TR&C

Pennsylvania Workers' Compensation Bulletin

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ACT 109

"There's a new law in the land!"

A new law impacting workers' compensation matters became effective September 5, 2006. Be careful when you pull that pen out of its holster to draw a check!!

Senate Bill 1205 of 2006, now known as Act 109, amends the Domestic Relations Code so as to require satisfaction of overdue child support from benefits paid by insurers or self-insured employers under the Workers' Compensation or Occupational Disease Act.

Senator Greenleaf, who introduced the bill, issued a press release explaining: *"...the Judiciary Committee moved forward Senate Bill 1205, which would require employers with more than 10 employees to remit garnished child support obligations electronically to the Department of Public Welfare's State Collection and Disbursement Unit. Currently, 30 percent of child support collections are made electronically, and the department wants to increase the number to save on paperwork and administrative errors. The Greenleaf proposal also would require insurers to make inquiries with the department before making any payment of $2,500 or more from a personal injury or workers compensation claim to determine whether the claimant owes overdue support. The legislation sets forth the procedure whereby outstanding support payments would be made from such payouts.*

...Senate Bill 1205 will enable the Department of Public Welfare to collect more overdue child support payments by allowing the department to intercept the child support money owed from lump sum insurance and workers' compensation payouts that may be made to the parent in arrears."

The final version of the Act, which increased the number of employees for purposes of requiring electronic funds transfer from 10 to 15, and which increased the amount of monetary payment subject to the Act from $2,500 to $5,000, may be found at 23 P.S. §§4308.1 and 4374(b). Simply stated, in relevant part, no order providing for payment of any monetary award under the Workers' Compensation Act or Occupational Disease Act may be issued unless the claimant provides the Workers' Compensation Judge with a verified statement setting forth his or her name, mailing address, social security number and date of birth. In addition, the claimant must provide the WCJ with written documentation regarding arrearages from the Pennsylvania Child Support Enforcement System web-

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Commonwealth Court Case Reviews

Martin Vandervort v. Workers' Compensation appeal Board (City of Philadelphia), No. 1143 C.D. 2005, Filed May 23, 2006.

(Statutory Employer - Where city hires a contractor to demolish a building and one of the contractor's employees sustains injury, there must be evidence of a "contract" between the city and the demolition company to render city a statutory employer; city must be more than owner of property where injury occurred if city is to be found statutory employer.)

Claimant worked as a laborer for East Coast Demolition. While assisting in a demolition project that East Coast was performing for the City of Philadelphia, claimant suffered numerous physical and psychological injuries.

Claimant filed a Joinder Petition against the City, arguing that, because of the relationship between the City and East Coast, the City was his statutory employer at the time of his injury. The contract between the City and East Coast was not offered into evidence; however, two amendments to the contract were made a part of the record.

The Workers' Compensation Judge held that 1) the City entered into a "subcontract" with East Coast under which East Coast agreed to perform demolition activities on a project in South Philadelphia; 2) the premises were either occupied or under the control of the City; 3) claimant was injured while employed by East Coast in its capacity as subcontractor for the City; and 4) East Coast did not maintain workers' compensation insurance coverage. Therefore, the WCJ granted claimant's Joinder Petition.

The City appealed to the Workers' Compensation Appeal Board, which agreed with the City that it was not claimant's statutory employer. The WCAB applied the five-prong test enunciated in McDonald v. Levinson Steel Co., 302 Pa. 287, 153 A. 424 (1930), to determine whether a party is a statutory employer:

1) the employer (general contractor) must be working under a contract with the premises owner;
2) the premises must be occupied or under the control of the employer (general contractor);
3) the employer (general contractor) has contracted with a subcontractor to do work;
4) part of the employer's regular work is entrusted to the subcontractor; and,
5) the injured person is the subcontractor's employee.

Claimant then filed a petition for review with the Commonwealth Court. Claimant argued that the WCAB erroneously relied upon the restrictive standards in McDonald and, instead, should have relied on the more relaxed standards outlined in McGrail v. Workmen's Compensation Appeal Board (County of Lackawanna), 604 A.2d 1109 (Pa.Cmwlth. 1992) to find that the City was his statutory employer.

In McGrail, the issue before the Court was whether an entity was a statutory employer for purposes of providing insurance to an injured employee whose direct employer had not provided workmen's compensation insurance. The McGrail court noted that: "§302(b) of the Act has a ... vital mission - to provide security for payment of benefits in workmen's compensation case. The McGrail court referred to the elements of the McDonald test as mere "guidelines" and applied a more relaxed standard. Thus, to insure payment to the injured employee, the employer next in line from the immediate employer, usually the general contractor, becomes liable to pay benefits.

Here, the Court agreed with claimant that the McGrail analysis should be applied to the case at hand. The Court further noted, however, that crucial to the Court's finding of statutory employer liability in McGrail was the fact that the event at which the claimant was injured was a part of the County's regular business. In contrast, here, there is no evidence as to why the City hired East Coast for the demolition or whether the demolition project was a regular occurrence. There is no evidence as to the City's involvement in the demolition process, and no evidence as to whether the City was the contractor or merely the owner of the buildings. As such, claimant failed to meet his burden of proof.

The decision of the WCAB was affirmed.

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Lamont Taylor v. Workers' Compensation Appeal Board (Greyhound, Inc.), No. 2182 C.D. 2005, Filed May 26, 2006.

(Course and Scope of Employment - When bus driver discharged his passengers, parked the bus and *then* witnessed 9-11 bombings, he was not in the course and scope of his employment.)

Claimant sought to establish that he suffered a work-related injury in the form of "post-traumatic stress disorder" after observing a plane crash into the World Trade Center on September 11, 2001.

On that date, the claimant drove a bus from Mount Laurel, New Jersey to New Your City. After discharging his passengers at 42nd and 8th Avenue, claimant drove to 40th and 11th Avenue, the designated location for leaving the bus. After his arrival, other bus drivers told him that a plane had hit one of the World Trade Center towers.

Shortly thereafter, claimant looked up and saw the second plane crash into the second tower. Claimant became upset and went numb.

At hearings before the Workers' Compensation Judge, the claimant presented testimony from Dr. Katherine Bertolet, a psychologist. She stated that claimant suffers from post traumatic stress disorder with psychotic features and concluded that this was caused by his witnessing the events at the World Trade Center. In response, employer presented testimony from Dr. Lauren Wylonis, a psychiatrist, who opined that claimant's PTSD is due to his experiences in Vietnam and that the real cause of his disability was his alcohol dependency.

The WCJ credited claimant's testimony as to the events of September 11th, but also credited the testimony of Dr. Wylonis. The WCJ also found that observing the plane hit the World Trade Center was not a working condition. Finally, the WCJ found that the events of September 11th were an act of war by a terrorist and thus rendered any resulting injury noncompensable under §301(a) of the Act. The Workers' Compensation Appeal Board affirmed the WCJ's decision. Claimant then appealed to the Commonwealth Court.

The Court stated that, in order to be eligible for benefits, a claimant must show that the injury occurred in the course of employment and that it was related thereto.

Here, claimant was not injured while actually engaged in the furtherance of employer's business inasmuch as he was not transporting passengers and had already parked the bus at the designated location. There is nothing about the condition of the employer's premises which caused the injury alleged by claimant. Because claimant was not in the course of employment at the time of his injury, the decision of the WCAB was affirmed.

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Kevin Kennelty v. Workers' Compensation Appeal Board (Schwan's Home Service, Inc.), No. 2357 C.D. 2005, Filed May 31, 2006.

(Psychological Injury - Abnormal Working Conditions - Robbery at gunpoint is an abnormal working condition for a food delivery person.)

(Medical Evidence - Causation - For a medical opinion to be incompetent due to inaccurate medical history, the history must be erroneous and the doctor must rely solely upon the flawed history in rendering his opinion.)

Claimant's job involved driving employer's vehicle to customers' homes and selling food products. He was robbed at gunpoint in the Garfield section of Pittsburgh on September 18, 2003 while delivering food in the course of his employment. Claimant escaped his assailant, but was subsequently hospitalized for anxiety, depression, panic attacks and nightmares. He then received extensive outpatient therapy. He never returned to work for employer, although he did obtain alternate employment a few months later as a welder.

Claimant filed a claim petition alleging that he sustained injuries in the form of depression, anxiety, post-traumatic stress disorder, and mental disability. In support of his petition, claimant offered reports from a psychiatrist, a psychologist and his primary care physician. According to the reports, the claimant had a history of one episode of depression after his mother's death, but that he had not required any psychiatric treatment since that time.

At hearings before the Workers' Compensation Judge, employer offered lay testimony establishing that employer had a policy instructing employees as to the frequency of robberies in low-income housing areas and how to react.

The WCJ found that claimant failed to establish that he was exposed to stress due to abnormal working conditions, noting employer's policy of advising employees of the risk of robbery on the job. Further, the WCJ found that claimant's medical experts were not credible because claimant admitted during his testimony that he had obtained prescriptions from his primary care physician for treatment of anxiety and depression off and on since July 2001. Since none of the claimant's experts mentioned that treatment in their reports, their diagnoses were based upon an inaccurate history.

The Workers' Compensation Appeal Board affirmed the decision of the WCJ, noting that no competent medical testimony existed to support claimant's allegations.

Claimant then appealed to the Commonwealth Court. The Court held that the WCAB erred in determining that claimant's medical evidence was insufficient as a matter of law. A medical expert's opinion is not rendered incompetent unless it is based *solely* on inaccurate or false information. Medical evidence is viewed as a whole. Inaccurate information will not defeat a medical opinion unless the opinion is dependent upon the inaccuracies.

The Court also noted that, while certain jobs such as a police officer are inherently stressful, society has not deteriorated to the point where a holdup at gunpoint does not constitute an "abnormal working condition" for a food delivery person.

The order of the WCAB was reversed and the case was remanded for an order affirming the decision and order of the WCJ.

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Verizon Pennsylvania, Inc. v. Workers' Compensation Appeal Board (Alston), No. 1804 C.D. 2005, Filed May 31, 2006.

(Course and Scope - "At home" employee injured while descending steps to go to her work computer is in the course and scope of her employment.)

Claimant had worked for employer for 32 years as a systems engineer. Her job duties included interfacing application programs

and computers, as well as troubleshooting computer problems. She worked three days per week at the employer's office and two days per week at home, in her basement office.

On January 7, 2002, while descending the steps to her basement office, she fell, hitting her head and injuring her neck. As a result, she was out of work from January 9, 2002 to January 9, 2003, during which time she received her full pay and medical benefits from employer.

On July 5, 2002, she underwent surgery on her neck. The scars resulting from that surgery formed the basis of her disfigurement benefits claim.

The Workers' Compensation Judge found that claimant's injury occurred while in the course and scope of her employment, and that claimant's injury resulted in disfigurement. As a result, the WCJ awarded claimant 85 weeks of benefits under §306(c)(22) of the Act. The Workers' Compensation Appeal Board affirmed.

Employer appealed to the Commonwealth Court, arguing that the injury did not occur in the course and scope of employment and that the award was excessive.

The Court noted that an analysis of whether a claimant is injured in the "course of employment" is dependent upon whether the employee is a traveling or stationary employee. A "traveling" employee may depart from the work routine while off the employer's premises for purposes such as lunch without interrupting the continuity of the employee's course of employment. A "stationary" employee, however, is not within the course of employment if he or she leaves the employer's premises for personal reasons unrelated to his or her job duties.

Here, claimant was not "traveling" but was working at her "home office." Claimant did not leave the premises where she was authorized to work. Claimant was clearly engaged in furthering the business of employer because, at the time of her injury, she was speaking with her supervisor on the phone and descending the stairs in order to address a work matter that her supervisor had called to discuss. Claimant had not "abandoned" her employment merely because she had gone upstairs to retrieve a drink from her kitchen.

The Court then noted that the award of disfigurement benefits is a matter of the WCJ's discretion. An award that is not outside the range that most WCJs would award cannot be disturbed on appeal. Here, the award was consistent with the permissible range of benefits for that type of injury.

Accordingly, the order of the WCAB was affirmed.

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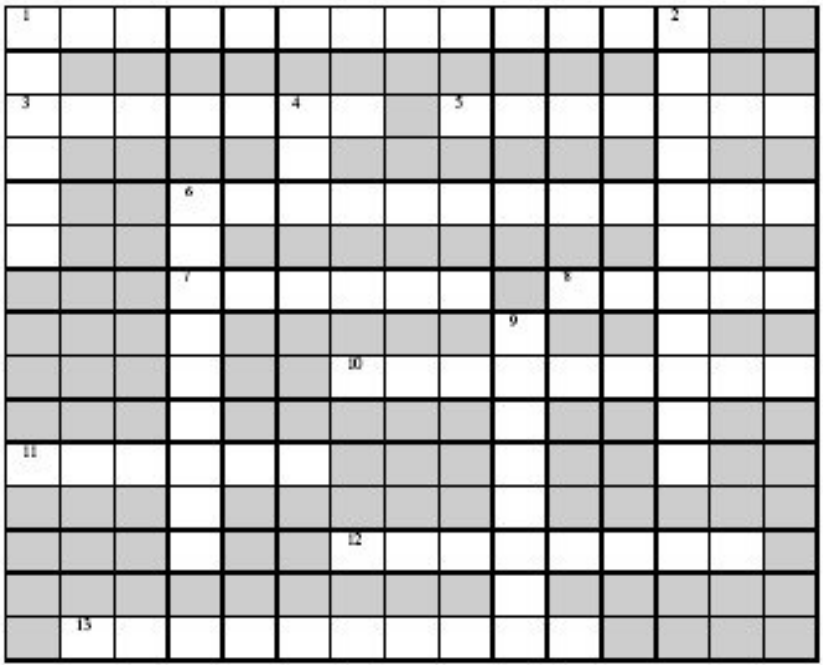
Inservco Insurance Services v. Workers' Compensation Appeal Board (Purefoey), No. 2163 C.D. 2005, Filed June 13, 2006.

(Termination - Even where a WCJ found condition to be "irreversible and permanent," a WCJ can later grant a termination where there is new medical testimony of recovery after the first award.)

Claimant, a general laborer, sustained injury to his left foot when it was caught in the wheel of a forklift. As a result, a claim petition was filed. The Workers' Compensation Judge found as fact: "Claimant sustained a post-traumatic tarsal tunnel syndrome and post-traumatic degeneration and instability of his Lisfranc's or tarsometatarsal joints....The instability in the tarsometatarsal joint is not going to reverse and is permanent."

Two years later, employer filed a petition to terminate, alleging that claimant had fully recovered from the work injury. The WCJ found that the opinion of employer's medical expert was more credible and convincing that the testimony of



DOWN

1. RECORD TESTIMONY OUTSIDE HEARING
2. CESSATION OF BENEFITS
4. TEMPORARY TOTAL DISABILITY
6. INFORMAL SETTLEMENT CONFERENCE
9. DOCUMENT FILED TO EFFECT CHANGE IN BENEFITS

ACROSS

1. SPECIFIC LOSS BENEFITS
3. ACT VIOLATION RESULT
5. COMPENSATION CARRIER
6. CHANGE IN WAGE LOSS BENEFITS
7. HEALTH CARE PROVIDER
8. APPELLATE BODY
10. WAGE LOSS BENEFITS
11. EMPLOYER AWARENESS OF INJURY
12. INJURED EMPLOYEE
13. COMPROMISE AND RELEASE

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claimant's treating physician. The termination petition was granted, and claimant appealed to the Workers' Compensation Appeal Board.

The WCAB reversed, noting that the testimony of employer's expert was "less than positive as to claimant's complete recovery from his judicially established work injuries. In addition, it fails to address the finding that claimant's instability in the tarsometatarsal joint [was] irreversible and permanent." Employer then sought review by the Commonwealth Court, arguing that the WCAB erred in concluding the testimony of its expert to be incompetent. Employer argued further that the second WCJ was not bound by the findings of the first that claimant's injuries were permanent in nature. The Court agreed.

The Court reviewed the testimony of employer's expert, and found that the expert did not disavow claimant's judicially established injuries. To the contrary, the testimony reflects that the expert accepted the underlying WCJ findings of work trauma and based his opinions as to claimant's present condition on those findings. He testified specifically: 1) that he found no evidence of an existing nerve injury, 2) that claimant was capable of returning to his pre-injury employment, without restrictions, 3) that claimant no longer exhibited any residual problems from his work-related injury, and 4) that claimant no longer required any medical care or treatment.

The Court rejected the WCAB's conclusion that the employer's expert was bound by the first WCJ's finding that the claimant's condition was permanent and irreversible. The duration and extent of an injury are always at issue in proceedings under the Workers' Compensation Act. Unless there is an impairment rating evaluation, specific loss claim or alleged occupational disease, a WCJ cannot definitively establish the duration of an injury.

The order of the WCAB was reversed and the decision of the WCJ terminating claimant's benefits was reinstated.

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Craftex Mill, Inc. of PA v. Workers' Compensation Appeal Board (Markowicz), No. 1758 C.D. 2005, Filed June 26, 2006.

(Causation - Occupational Disease - Where claimant is not entitled to presumption of causation in occupational disease claim and must prove injury, testimony from physician that he has ruled out all other possible sources of exposure and work is most likely source is competent evidence as to causation.)

Claimant's duties involved the cleaning of employer's air conditioning system. Sometime around the year 2000, claimant began to experience breathing problems, including shortness of breath that became increasingly worse. Claimant had a lung biopsy performed after leaving work on October 5, 2000 and subsequently alleged that he suffered an occupational disease on that day, his last day of work.

In support of his claim, claimant offered testimony from Dr. Mengel, who opined that claimant suffered from hypersensitivity pneumonitis and asthmatic bronchitis as a result of his exposure to thermophilic actinomyces in the air conditioning unit. Dr. Mengel testified that claimant's condition was permanent, that his pulmonary function is impaired as a result, and that he was not able to return to his pre-injury job. Dr. Mengel testified that he did not know what caused claimant's condition until he reviewed the lung biopsy and sensitivity test. Only at that point, and after speaking with the claimant as to his work history, was Dr. Mengel able to eliminate all other possible causes of the claimant's condition.

The Workers' Compensation Judge found Dr. Mengel to be credible, but concluded claimant did not carry his burden of proof to establish that he had an occupational disease. The WCJ noted that the claimant's condition is not one of the identified diseases under §108 of the Act. Thus, in order to establish an occupational disease, the claimant had to establish that: (1) he was exposed to lung disease by virtue of his employment; (2) there was a causal relationship between the disease and his employment; and, (3) the incidence of lung disease is substantially greater in his occupation than in the general population. Claimant failed to establish the third element. Nevertheless, the WCJ concluded claimant suffered a work-related injury under §301(c)(1) of the Act and awarded benefits.

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

Employer then sought further review by the Commonwealth Court. Employer argued that, by accepting Dr. Mengel's testimony as competent the WCJ and WCAB essentially eased claimant's burden of proof by providing claimant with a presumption similar to the presumption claimants enjoy under §301(e). That section provides that, if the claimant is employed in any occupation or industry in which the occupational disease is a hazard, then it is presumed that the employee's occupational disease is causally related to his employment. Otherwise, a claimant must provide evidence showing the illness and showing that the hazard existed in the workplace before the disability occurred.

Here, Dr. Mengel's testimony was competent to support the factual determination that claimant was exposed at work to the spores that resulted in his condition. This was found to be true despite the fact that there was no evidence of the presence at the workplace of the illness-causing spores. Dr. Mengel did testify, however, that such spores are frequently found in air

conditioning units, as well as mushroom houses, tree de-barking facilities and areas in which pigeons roost. After questioning claimant about potential sites of exposure, Dr. Mengel concluded that the only environment to which claimant was exposed that was likely to contain spores was the air conditioning unit claimant cleaned bi-annually.

Accordingly, the order of the WCAB was affirmed.

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Penn Beverage Distributing Company and Cincinnati Insurance Company v. Workers' Compensation Appeal Board (Rebich), No. 1698 C.D. 2004, Filed June 27, 2006.

(Statute of Limitation - Section 413(a) of the Act applies where claimant has a scar that arises from injuries acknowledged in Notice of Compensation Payable.)

Employer issued a Notice of Compensation Payable acknowledging that claimant sustained work-related injuries due to a motor vehicle accident that occurred on August 19, 1985. As a result of his injuries, claimant underwent brain surgery on October 28, 1985 and cervical surgery on January 26, 1993. Theses surgeries left claimant with scarring on his head and neck. After his injury, claimant also suffered from seizures that caused damage to his teeth.

On December 6, 1999, claimant filed a claim petition for facial disfigurement. Employer denied the petition, asserting claimant did not suffer disfigurement of an unsightly nature as a result of his work injury and that the petition was barred by the statute of limitations. The WCJ found that, had the claim not been time barred, claimant would have received 40 weeks for the indentation in his skull and 10 weeks for his cervical scar.

The Workers' Compensation Judge found the claim to be time barred under §315 of the Act. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed in part. The WCAB reversed the WCJ's decision that the claim was time barred. The WCAB concluded that the statute of limitations contained in §413(a) applied and had not started to run when claimant filed his petition. Claimant was thus awarded 50 weeks of disfigurement benefits.

Employer then filed a petition for review with the Commonwealth Court, arguing that the claimant petition was time barred by either section of the Act. The Court noted the "critical distinction" between the statute of repose in §315, which acts to bar the filing of a new claim, and the statute of limitations in §413(a), which acts to bar amendments or additions to previously filed claims. Section 315 requires a petition to be filed within 3 years of the date of injury. Section 413(a) requires a petition to be filed within 3 years after the date of the most recent payment of compensation made prior to the filing of the petition.

Here, at the time claimant filed his petition, he was still receiving benefits for the injury underlying his original NCP. Claimant was merely attempting to add an injury (the scars) that arose as a direct result of the injury for which employer had assumed liability. Consequently, the claim petition was timely filed under §413(a) of the Act.

The order of the WCAB was affirmed.

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Akers National Roll Co. v. Workers' Compensation Appeal Board (Whaley), No. 2344 C.D. 2055, Filed June 27, 2006.

(Average Weekly Wage - Concurrent Employment - Claimant is entitled to total disability benefits based on wage loss from *both* his time of injury job and concurrent Union job, even though not physically disabled from Union job, where Union job requires claimant to work on employer's premises.)

Claimant suffered a work-related injury on May 6, 2002. As a result, claimant was paid weekly compensation of $417.16 based upon an average weekly wage of $625.74.

On August 27, 2003, claimant filed a review petition and a penalty petition alleging that employer incorrectly calculated his benefits. According to claimant, his wages earned as a unit griever with his union at the time of injury should have been included in his average weekly wage.

The parties stipulated that if claimant's union wages were included, he would have an average weekly wage of $692.63, with a corresponding compensation rate of $461.78.

Claimant testified that, after his work-related accident, he continued to do union work, which involved filing grievances, settling disputes with the company and negotiating contracts. Because claimant performed his union work at home, however, he was not paid for his services. The union only paid him when he lost time from work. Because claimant was no longer losing time from work to conduct union business due to his work-related injury, he in effect did not lose any time from work and therefore did not receive reimbursement from the union.

In October of 2003, claimant was told by the union that he could no longer perform grievance duties because he was not physically working on employer's premises.

The Workers' Compensation Judge found that the duties of a griever are sedentary and the claimant was physically capable of performing those duties. The WCJ concluded that claimant met his burden of showing that he was concurrently employed by both employer and the union at the time of his injury and that his disability caused his loss of wages from his concurrent employment. As such, the WCJ granted claimant's petition

for review, but denied his request for penalties. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, employer argued that it was error to grant claimant's petition because claimant was not physically disabled from performing his union job as a result of his work injury.

The Court noted that where a claimant holds more than one job at the time of a work-related injury, the average weekly wage must be calculated based on the wages from all of his or her other jobs, whether the claimant is disabled from the other jobs or not. Where the claimant is not disabled from his or her other employment, it is then proper to place the claimant on partial disability.

Here, although claimant's work-related injury did not cause him to be physically disabled from performing his concurrent job with the union, claimant's loss of earning power from his union job was directly caused by his work injury.

As a result, the decision of the WCAB was affirmed.

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Select Security, Inc. v. Workers' Compensation Appeal Board (Korbin), No. 1600 C.D. 2005, Filed June 30, 2006.

(Modification - The assessment of a workers' compensation claimant's earning power is a question of fact to be determined by the Workers' Compensation Judge.)

Claimant held concurrent employment with employer as an outside security systems salesperson and with Wee Bee Audio as an audio equipment salesperson. On January 11, 1999, claimant suffered a work-related left ankle sprain. Employer issued a Notice of Compensation Payable and claimant received the maximum compensation payable, $588, based upon his average weekly wage of $1714.24. On March 15, 1999, claimant returned to his employment with Wee Bee, but continued to receive $588 per week as partial disability benefits.

On October 2, 2003, employer filed a modification petition seeking to reduce claimant's benefits because work was generally available to claimant as of January 8, 2003. Claimant replied that he was restricted to modified duty work, i.e., 5-6 hours per day, 5 days per week.

In support of its petition, employer presented testimony from Dr. Ellenberger, who saw no problem with claimant working 60 hours per week. Employer's vocational expert testified that, based upon Dr. Ellenberger's release, claimant had an earning capacity of $50,000 to $60,000 per year, and likely more.

Claimant testified that he continued to have ongoing pain. He also presented testimony from Dr. Perevous, who opined that the jobs identified by employer's vocational expert were inappropriate for claimant on a full-time basis. Dr. Perevous testified that claimant was restricted to working 5-6 hours per day, 5 days per week, with no overtime.

The Workers' Compensation Judge found Dr. Perevous' diagnosis credible, but rejected Dr. Perevous' testimony restricting claimant to 5-6 hours per day. The WCJ further found Dr. Ellenberger's testimony that claimant could work 60 hours per week as cavalier and unpersuasive. Finally, the WCJ rejected the vocational experts testimony as to claimant's earning capacity, and found as fact that claimant had an earning capacity of $39,000 per year. This was the average of the low-end salary for each of the 4 jobs upon which the expert had relied in calculating claimant's earning capacity. The WCJ also concluded that, despite the medical testimony presented, claimant was capable of working 40 hours per week.

Overall, the WCJ found that employer established that claimant had an earning capacity of $750 per week. Even with that earning capacity, however, claimant was still entitled to the maximum benefit rate of $588. Initially, the WCJ denied employer's petition and ordered employer to pay claimant's litigation costs. Thereafter, the WCJ amended the order, granting employer's petition so as to reflect claimant's earning capacity of $750 per week. The Workers' Compensation Appeal Board affirmed that decision.

Employer appealed, arguing that the WCJ erred in granting the petition without modifying claimant's compensation rate. Employer maintained that the WCJ erred in failing to credit the vocational expert's testimony that claimant had an earning capacity of $50,000 to $60,000. Upon reviewing the record, however, the Court noted that the WCJ's determination of claimant's earning capacity was supported by substantial evidence. The WCJ relied upon the same data relied upon by the expert, but simply arrived at a different calculation. This was not a capricious disregard of evidence by the WCJ inasmuch as the WCJ is free to reject even uncontradicted testimony.

Employer further argued that the WCJ erred in awarding litigation costs when employer was successful in establishing an increase in claimant's earning capacity. The WCJ awarded claimant his litigation costs because claimant successfully defended the modification petition in part when his benefits were not reduced. The Court noted that it will not interfere with a

ANSWER TO PUZZLE ON PAGE 4

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WCJ's discretionary award of litigation costs when they are found to be reasonable. Because the WCJ did not make findings as to the reasonableness of the claimant's litigation costs, the matter was remanded to the WCJ for further findings.

The remainder of the WCJ's decision as affirmed by the WCAB was, thus, affirmed.

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Wayne Huddy v. Workers' Compensation Appeal Board (U.S. Air), No. 1031 C.D. 2005, Filed August 1, 2006.

(Review Petition - Claimant seeking to amend an NCP has the burden to prove that his disability has increased and that the original work-related injury caused the amending disability.)

Claimant worked as a baggage handler until March 8, 1993, when he suffered a work-related cervical strain. On August 2, 2001, claimant filed a review petition, seeking to amend the Notice of Compensation Payable to include depression and anxiety.

Before the Workers' Compensation Judge, claimant testified that he had constant pain, depression and suicidal thoughts. Claimant also presented testimony from his treating psychiatrist, Dr. Richardson, who opined that claimant developed a major depressive disorder of the recurrent type due to chronic pain syndrome resulting from the work injury. Dr. Richardson believed that without psychiatric care, claimant would have committed suicide.

Employer presented testimony from Dr. Burstein, who agreed that claimant's depression was related to the work injury, but also felt that the claimant had made a complete recovery from his work-related mental injury by January of 1996. Dr. Burstein opined that the claimant's current psychological profile was due to other non-work related developments.

The WCJ credited the testimony of each medical expert, in part. As such, the WCJ concluded that claimant satisfied his burden in part by proving that his depression and anxiety were due partially to his work injury and that employer established that the work injury was not the sole factor contributing to claimant's condition. Hence, the WCJ granted claimant's petition, in part, amending the NCP to reflect claimant's depression and anxiety, but making employer liable for only 50% of the psychiatric treatment.

Both parties appealed to the Workers' Compensation Appeal Board, which reversed, concluding that claimant failed to sustain his burden of proof that the 1993 work injury was a substantial contributing factor in his current mental injury. Neither Dr. Richardson nor Dr. Burstein testified that such was the case.

Claimant argued to the Court that the record, as a whole, contained substantial evidence to support the WCJ's decision to amend the NCP. The Court agreed. The Court noted that both experts testified that prior to the work injury, claimant had no history of depression. Moreover, both experts agreed that claimant's depression was due to the chronic pain resulting from his work injury. This was found to be substantial evidence in support of the WCJ's decision to amend the NCP to include depression and anxiety.

Further, the Court found that the WCJ erred in holding employer liable for only 50% of the claimant's medical bills. The Act does not contemplate or support apportionment of medical bills. Absent that authority, the WCJ committed error.

The WCAB's decision was reversed and the WCJ's decision reinstated, as modified.

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Edward Hayduk v. Workers' Compensation Appeal Board (Bemis Co., Inc.), No. 230 C.D. 2006, Filed August 11, 2006.

(Hearing Loss - Where employer fails to establish that audiogram complies with OSHA standards, employer fails to establish a reasonable contest.)

Claimant worked for 27 years as a maintenance mechanic at a plant that manufactured plastic wrappers for bakery products. Throughout that time, the plant had a number of different owners. Bemis acquired the plant on February 5, 1993.

In the latter part of 2001, claimant became aware that he suffered from a hearing loss that was work-related. He filed a petition for benefits on January 24, 2002.

Claimant relied upon the opinion of Dr. Akbar, who calculated a permanent hearing impairment of 15.0% in claimant's right ear and 18.8% in his left, or a 15.6%b binaural hearing impairment. Dr. Akbar opined that claimant's hearing loss was work-related.

In addition, claimant presented testimony from a union shop steward, who stated that when Bemis acquired the plant, employees were told that they would retain their jobs and seniority status.

In response, Bemis presented a report from Dr. Miller, who opined claimant suffered from a hearing loss of $11.25% in the right ear, 16.87% in the left ear, and binaural loss of 12.18%. Dr. Miller also opined that the majority of the loss sustained occurred prior to claimant's employment by Bemis and that less than 10% of the hearing loss was suffered while in the employ of Bemis.

Bemis also presented testimony from its vice president of human resources. He said that when Bemis purchased the plant, it only purchased the assets of the prior owner, and did not assume liability relating to workers' compensation claims arising before February 5, 1993.

The Workers' Compensation Judge found Bemis' contest of the petition to be reasonable, but granted claimant's petition for benefits.

Bemis appealed to the Workers' Compensation Appeal Board, contending that the WCJ's findings were not supported by substantial evidence and that the WCJ erred when he determined that Bemis was the successor-in-interest of the prior owner and thus responsible for claimant's hearing loss. Claimant appealed the WCJ's determination that Bemis' contest was reasonable.

The WCAB reversed as to the award of benefits and affirmed as to the contest.

Claimant then filed a petition for review with the Commonwealth Court, asserting that the WCAB erred as a matter of law when it reversed the WCJ's decision that Bemis was a successor-in-interest. Claimant also argued the WCAB erred in determining that claimant's hearing loss was not caused by employer where no legally competent baseline audiograms established that claimant's hearing loss predated his employment with Bemis.

The Court noted that the WCJ found the testimony of Bemis' witness credible with regard to Bemis' purchase of the assets of the plant, not the liabilities. The asset purchase agreement specifically excluded liabilities which were incurred on or prior to the closing date. Therefore, Bemis was not a successor-in-interest to the previous owner.

Further, the Court noted that the WCJ credited Dr. Miller's testimony that claimant's hearing loss attributable to his employment with Bemis to be only 5.93%,which was below the 10% threshold set forth in the Act. Hence, assuming there was no problem with the audiograms, Bemis could not be liable for claimant's hearing loss because it was not a successor-in-interest to the prior plant owner.

Section 306(c)(8)(iv) of the Act provides that hearing impairment may be established solely by audiogram and that the audiometric testing must conform to OSHA standards. Here, there was no evidence in the record to establish that the audiogram relied upon by Bemis complied with OSHA standards. Therefore, Bemis failed to establish that any portion of claimant's hearing loss was attributable to a prior employer. Because Bemis' contest was not based on an OSHA approved audiogram as required by the Act, Bemis contest of the petition was not reasonable.

Accordingly, the Court affirmed in part and reversed in part. The determination that Bemis was not a successor-in-interest was affirmed. The determination that claimant had a hearing loss that pre-dated Bemis' assumption of the plant's assets was reversed, as was the determination that employer's contest of the petition was reasonable.

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Marilyn Knechtel v. Workers' Compensation Appeal Board (Marriott Corporation), No. 140 C.D. 2006, Filed August 24, 2006.

(Independent Medical Examination - Under §314(b), claimant is

The Weis Myth Lives On!

In Richard Pries v. Workers' Compensation Appeal Board (Verizon Pennsylvania), No. 1870 C.D. 2005, filed July 25, 2006, the Commonwealth Court was asked to overturn its decision in County of Allegheny (Department of Public Works) v. Workers' Compensation Appeal Board (Weis), 872 A.2d 263 (Pa.Cmwlth. 2005). The Court refused to do so.

Mr. Preis sustained work-related injuries on September 4, 1989. On August 30, 2001, claimant returned to work for one day so that he could retire and receive a $60,000 retirement package employer offered to him. As a part of the deal, he submitted a letter voluntarily withdrawing from employment.

On December 31, 2001, employer filed a petition seeking to suspend Mr. Preis' benefits, alleging that claimant voluntarily withdrew from the workforce. Mr. Preis testified, however, that he was "pressured" into accepting the retirement package, that he physically could not do his job, and that, since retiring, he had not looked for work. He stated that he returned to work for one hour prior to retiring simply because the retirement package was conditioned upon his return to work, not because he was actually capable of working.

The Workers' Compensation Judge credited Mr. Preis' testimony and found that he had been forced into retirement and that he had not voluntarily removed himself from the workforce As such, employer's suspension petition was denied. The Workers' Compensation Appeal Board reversed based upon the Weis decision. The WCAB noted that, under Weis, the claimant must establish not only that he was forced out of his pre-injury job because of his work injury, but that he was forced out of the entire labor market as well.

Claimant then appealed to the Commonwealth Court, requesting that Weis be overturned. The Court conducted an extensive analysis of the Weis decision, and found it to be completely consistent with existing precedent, such as Shannopin Mining Company v. Workers' Compensation Appeal Board (Turner), 714 A.2d 1153 (Pa.Cmwlth. 1998). The case law has long held that a claimant must voluntarily withdraw from the entire labor market before his or her benefits will be suspended. Thus, under the rule of stare decisis, the Court refused to overturn its decision in Weis.

As reported in the TR&C Pennsylvania Workers' Compensation Bulletin, Vol. X, No. 2, Summer 2006, the Weis decision does not provide employers with a new tool to suspend benefits. The means to do so have been in existence for years and the requirements have not changed. In order to defeat such a petition, a claimant need only credibly testify that he or she has continued to look for work within his or her physical capabilities. Such testimony will defeat a suspension petition filed under Weis.

entitled to have his or her treating health care provider participate in the IME; however, his or her " participation" is limited to attendance and observation.)

Section 314(b) of the Act provides: *"In the case of a physical examination, the employe shall be entitled to have a health care provider of his own selection, to be paid by him, participate in such examination requested by his employer or ordered by the workers' compensation judge."*

Employer requested claimant to submit to two examinations, one with an orthopedic surgeon and one with a psychiatrist. Claimant expressed concern about the psychiatrist selected by employer, and requested that someone be allowed to accompany claimant and make an audio recording of the psychiatric evaluation. Employer refused this request and filed a petition to compel claimant to submit to the psychiatric evaluation. Thereafter, claimant indicated her willingness to attend the exam, if a health care provider of her choice participated in the examination.

The Workers' Compensation Judge granted employer's petition to compel as well as claimant's request to have her health care provider participate in the examination. However, the WCJ rejected claimant's argument that "participation" under §314(b) of the Act includes allowing the health care provider to tape record the evaluation, question the evaluator, make comments or otherwise assist claimant during the procedure. The WCJ specifically ordered that claimant's health care provider would be permitted to take notes and request brief recesses during the course of the evaluation to confer with claimant, but he or she would not be permitted to ask question of employer's psychiatrist or comment on the psychiatrist's questions.

Claimant appealed to the Workers' Compensation Appeal Board. The WCAB noted that in the case of Wolfe v. Workmen's Compensation Appeal Board (Edgewater Steel Company), 636 A.2d 1293 (Pa.Cmwlth.), appeal denied, 537 Pa. 669, 644 A.2d 1205 (1994), the court rejected the notion that the claimant has a right to have an attorney present during a physical examination by employer's doctor. The rationale for doing so was to prevent the medical examination from becoming an adversarial procedure. The WCAB concluded here that allowing claimant's health care provider to take an active role in the examination as suggested by claimant would effectively "turn the examination into an adversarial procedure with claimant's health care provider acting as proxy for claimant's counsel, thereby resulting in an atmosphere in which a fair and reasonable medical examination could not take place." Accordingly, the WCAB affirmed the WCJ's decision.

Claimant then sought review by the Commonwealth Court. The Court essentially adopted the WCAB's opinion, noting that the Legislature could not have intended the Act to be construed so as to allow the claimant's health care provider to disrupt a physical examination by questioning and disagreement. An examination disrupted in that manner would not yield the information regarding the employee's disability that an IME is intended to provide. The Court noted that this would be particularly true of a psychiatric exam.

The Court thus concluded that "participation" by a claimant's health care provider in an IME is limited to attendance and observation. The decision of the WCAB was affirmed.

(*Editorial Comment:* Judge Friedman filed a dissenting opinion. In her opinion, a claimant's health care provider must be permitted to take an active part in the examination, despite the fact that interference by the claimant's health care provider would interfere with the exercise of an employer's rights under §314(a) of the Act. She noted that, if such interference occurs, an employer may file a modification petition asserting that the health care provider's conduct vitiated the claimant's submission to the examination. The Judge fails to recognize, however, that this would result in unnecessary and protracted litigation. Further, given the humanitarian purposes of the Act, most WCJs are not likely to penalize a claimant due to acts of a third party, even if that third party is the claimant's physician. Consequently, Judge Friedman's "remedy" for employers is no remedy at all.)

SUPREME COURT CASE REVIEWS

Gloria Romaine v. Workers' Compensation Appeal Board (Bryn Mawr Chateau Nursing Home), No. 62 EAP 2004, Decided June 22, 2006.

(Statute of Limitations - For purposes of determining when the statute of limitations begins to run under §413 of the Act, the date claimant receives the check is the "date of last payment.")

Claimant suffered a work-related lumbar strain on July 5, 1990. On December 16, 1994, a decision was issued which terminated her benefits effective August 6, 1991. That decision was affirmed on appeal.

On December 16, 1997, claimant mailed a Petition to Reinstate Compensation Benefits to the Bureau. The Bureau received her petition on December 18, 1997. Employer denied the allegations of the petition.

The Workers' Compensation

Judge concluded that employer made the most recent payment of compensation on December 14, 1994, which indicated that it covered payment of benefits for the period from December 6, 1994 through December 19, 1994. Claimant presented no testimony as to when she received or cashed the check. The WCJ assumed that claimant cashed or deposited the check no sooner than December 19, 1994, the date stamped on the back of the check.

Section 413 of the Act requires that a reinstatement petition filed after a termination of benefits must be filed within 3 years of the "most recent payment of compensation." Relying upon the case of Urick Foundry Co. v. WCAB (Aarnio), 496 A.2d 883 (Pa.Cmwlth. 1995), the WCJ concluded that claimant mailed her petition to reinstate more than 3 years after the date on the last check, exactly 3 years from the date of the WCJ's earlier decision, and less than 3 years after claimant cashed or deposited the check. He determined that the date of the "most recent payment of compensation" was the date on the employer's check, December 14, 1994. As such, the claimant's petition was not timely filed and was dismissed. The WCAB affirmed his decision, as did the Commonwealth Court. Claimant then sought review by the Supreme Court.

In Urick Foundry, the Commonwealth Court observed that when compensation payments are made by check, absent any fraud or intentional delay in transmittal, the 3-year statute of limitations period begins to run as of the date of the check. The Supreme Court elected to hear the case to decide the deceptively simple question as to what event is used to determine the date that payment is made when benefits are paid by check.

In order to answer the question, the Supreme Court conducted an extensive and exhaustive review of cases dating back to 1798 involving negotiable instruments. The Court then concluded that the date of payment for purposes of the running of a statute of limitations is the date that the check was delivered to the payee and not the date that the check was cashed or deposited or the date that the funds were transferred by the bank from which it was drawn. The Court reasoned that payment by check constitutes a conditional payment of the obligation once it is received - the condition being its collectibility from the bank on which it was drawn. When the check is paid on presentment, the condition to which the payment was subject is performed and, what had been a conditional payment at the time of delivery of the check, becomes an absolute payment. Such payment then relates back to the date the check was delivered.

Here, claimant presented no evidence as to when she actually received the check. The Court had no choice but to find that she did not meet her burden of proving that her petition was filed within the statutory limitations period.

Accordingly, the order of the Commonwealth Court was affirmed.

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EMPLOYER'S CORNER

"The hardest thing in the world to understand is income tax."
- Albert Einstein

If you have ever been involved in tax issues related to settling an employment discrimination claim, you probably agree with Mr. Einstein's statement.

The law in this area is ever-changing, as evidenced by the fact that recently, there have been new federal statutes (e.g., Jobs Creation Act of 2004), many important federal court decisions, including a United States Supreme Court case (Commissioner v. Banks, 1255 Ct. 826, 2005) and as recently as August 22, 2006 a Federal Appeals case (Murphy v. IRS, 2006 WL 2411372 D.C. Cir.) that attempts to reverse over a decade of law in the area. Additionally, numerous IRS guidelines and private rulings have been issued.

If an employer makes a mistake in this area, the consequences may involve an audit and resulting tax liability, interest, and penalty payments.

Although it is tempting to overlook the details pertaining to the tax ramifications of a discrimination settlement, doing so is fraught with risk. "An ounce of prevention is worth a pound of cure." The following is a list of preventative steps to avoid problems in this area:

- Have the plaintiff identify, in writing, the amount that he/she wants allocated as reimbursement for lost wages (back pay and front pay).
- Decide how much of the settlement, if any, the employer will be required to process through payroll. That amount will be subject to the customary withholdings, such as federal, state, and possibly local income taxes, FICA (Medicare and Social Security) and FUTUA.
- For payroll payments, if you do not have a current IRS W-4 Form from the plaintiff, be sure to acquire one.
- For payroll payments, confirm whether the employer or employee will be responsible for paying the employer's share of the FICA taxes. Some employers reduce the settlement amount by the amount it must pay for FICA.
- If some or all of the settlement is not processed through payroll, address whether an IRS Form 1099 will be issued and if so, which 1099 form it will be, whether there will be withholdings, and how the income will be identified on the form.
- Identify whether a separate check will be requested for attorney's fees and costs and if so, confirm that the attorney will receive an IRS Form 1099 with respect to same.
- Endeavor to put language in the release to protect the employer. For example: a tax indemnification clause; wage and non-wage allocation statement; disclaimer of having provided tax advice; and language confirming agreements regarding tax withholdings, payment dates, and any other term or condition relevant to the tax issues.
- If you have a doubt, check it out -- consult with your CPA and/or attorney.

(For information about this and other matters pertaining to income tax, contact Jerry Hogenmiller, Esquire at 412-316-8689 .)

(Continued from page 1)

site.

Although the information is readily available from the website, the Act allows attorneys or insurers to use the services of a private judgment search company approved by the department to obtain the documentation. The Act provides that the fee incurred for the judgment search may be deducted from the payment to the claimant. Claimants should, thus, be motivated to produce the necessary documentation so as to avoid the mere possibility of incurring a fee.

Any amount in arrears that is in dispute is to be placed in escrow with the State Disbursement Unit by the claimant's attorney and the escrowed funds are not to be released until the dispute is resolved.

When payments are made based upon the claimant's statement and the website documentation as to arrearages, or based upon the report of an approved private judgment search company, the employer or insurer is immune from any civil or criminal penalties for making an erroneous distribution.

Although somewhat absurd, the Act does state that, monetary awards due to a claimant under 12 years of age are exempt from these provisions relating to child support obligations. Finally, the Act places additional requirements regarding electronic funds transfer on employers who are required to withhold child support and make payments to the state disbursement unit. If an employer is ordered to withhold income from more than one employee and employs 15 or more persons, electronic payment methods are required. Additionally, if an employer has a history of two or more checks returned for non-sufficient funds, payments are required through electronic funds transfer. If an employer fails to comply with the electronic funds transfer payment provisions of the Act, civil penalties of up to $1,000 per violation may be imposed.

Some provisions of the Act are subject to various interpretations. So, look forward to case law or future legislation on this subject. In other works, more is yet to come!!

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

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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