TR&C

Pennsylvania Workers' Compensation Bulletin

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

HARRY W. ROSENSTEEL, Editor MARGARET M. HOCK, Associate Editor

DEPARTMENT ISSUES SIGNIFICANT AMENDMENTS TO BUREAU RULES AND REGULATIONS

Chapter 121 of the rules and regulations that govern the administration of matters under the Pennsylvania Workers' Compensation Act was amended, effective Saturday, August 4, 2007. Some of the changes made by the Department of Labor & Industry, Bureau of Workers' Compensation, are significant.

For instance, the Department added §121.3b, such that employers are now required to provide general workers' compensation information to every employee at the time of hire and at the time of injury (or as soon thereafter as possible depending upon the severity of the injury). This is in addition to the previous requirement that employees be provided with notice concerning the need to treat with a panel physician both at the time of hire and at the time of injury. The purpose of the provision is to provide employees with the opportunity to learn basic workers' compensation information that otherwise may be difficult to obtain. Part B of the regulation provides:

The information shall be entitled "Workers' Compensation Information" and include the following:

(1) The workers' compensation law provides wage loss and medical benefits to employees who cannot work, or who need medical care, because of a work-related injury.

(2) Benefits are required to be paid by your employer when self-insured, or through insurance provided by your employer. Your employer is required to post the name of the company responsible for paying workers' compensation benefits at its primary place of business and at its sites of employment in a prominent and easily accessible place, including, without limitation, areas used for the treatment of injured employees or for the administration of first aid.

(3) You should report immediately any injury or work-related illness to your employer.

(4) Your benefits could be delayed or denied if you do not notify your employer immediately.

(5) If your claim is denied by your employer, you have the right to request a hearing before a workers' compensation judge.

(6) The Bureau of Workers' Compensation cannot provide legal advice. However, you may contact the Bureau of Workers' Compensation for additional general information at: Bureau of workers' Compensation, 1171 South

(Continued on page 11)

Inside This Issue...

COMMONWEALTH COURT CASE REVIEWS

Mercer Lime and Stone Company and Old Republic Insurance Company v. Workers' Compensation Appeal Board (McGallis), No. 2008 C.D. 2006, Filed May 17, 2007.

(Penalties—Employer's obligation to pay benefits under an award is immediate; the Act does not provide for *any* grace period, 30-days or otherwise.)

By decision issued on October 14, 2004, the Workers' Compensation Judge approved a compromise and release agreement between the parties. The agreement provided for payment to claimant in the amount of $100,000, payment of claimant's counsel's fee of $25,000, and payment of litigation costs in the amount of $3,218. On November 5, 2004, employer sent a check to claimant for the required amount; however, the check lacked an authorized signature and, therefore, was not negotiable.

Thereafter, on November 18, 2004, claimant's penalty petition was mailed. Upon receiving his copy of the petition, employer's counsel directed the carrier to issue a replacement check. A check was issued and sent to claimant on November 22, 2004. Claimant cashed the check the following day.

The penalty petition was subsequently litigated. The claims adjuster characterized the lack of an authorized signature on the original check as an "honest oversight." The adjuster further testified that, following the issuance of the Workers' Compensation Judge's decision on the C&R agreement, the employer requested a copy of claimant's letter of resignation. The adjuster then spoke with employer's counsel, who indicated that a letter of resignation had not been signed, but that he would contact claimant's counsel about the matter. The adjuster testified that employer's counsel told him to hold onto the check in order to "speed up recovery of the resignation letter."

The WCJ found that employer and insurer applied economic pressure on claimant in order to procure a resignation letter and, thus, the delay in sending the check was due to more than an innocent oversight. The WCJ concluded that employer had 30 days to make payment under his order and, therefore, payment was due on November 17. Because claimant did not receive payment until November 23, the penalty petition was granted and a $5,000 penalty (5%) was imposed. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, employer argued that payment was timely because the first check was mailed within 18 days of the WCJ's decision. Employer further argued that, even if employer only had 30 days from the date of the order in which to pay claimant, the payment was only 6 days late, and 3 days of that delay could be attributed to the time it took claimant to return the original check. Accordingly, employer argued that the penalty was excessive.

The Court disagreed, stating: *"[P]ursuant to the Act, an employer's obligation to pay compensation benefits under an award is immediate. The Act and accompanying regulations do not provide for any grace period, 30-days or otherwise."*

Here, when employer was notified that the check had not been signed, it intentionally delayed payment in an attempt to obtain a letter of resignation. The delay in payment was not due to the pursuit of an appeal or any justifiable cause. Consequently, employer violated the Act and the WCJ was free to impose a penalty as a sanction. The penalty was well within the permitted range and was not excessive.

Accordingly, the order of the WCAB was affirmed.

****

Allegheny Ludlum Corporation v. Workers' Compensation Appeal Board (Michael Carney, deceased, Pamela Carney, widow), No. 2020 C.D. 2006, Filed May 31, 2007.

(Pension Benefit Offset—Employer is <u>not</u> entitled to offset death benefits due to decedent's widow's receipt of employer funded pension benefits.)

Decedent died on August 24, 2004 in the course and scope of

Q. Can we re-designate an impairment rating evaluation physician because he/she is the treating or independent medical examination physician?

A. No.

(Additional "Workers' Compensation FAQs" published on the PA Labor & Industry Internet are reprinted on the following pages. For more information, please visit the Bureau's website: www.dli.state.pa.us. Of course, for specific legal advice, the reader should seek counsel from a qualified workers' compensation attorney.)

Q. As owner of a trucking operation, must I show proof of workers' compensation insurance if I use owner/operation drivers?

A. If an insured utilizes owner/operators and is part of a trucking operation, proof of workers' compensation may be required. For those drivers deemed to be employees, your insurer will need proof of workers' compensation insurance coverage. Otherwise, that part of the total remuneration that is wages will be included in the premium calculation. If payroll cannot be obtained, then 1/3 of the contract price will be considered payroll for premium calculation purposes.

his employment, leaving a widow and two children. Employer entered into an agreement of compensation for death with the widow for weekly compensation death benefits of $690 to be paid to her and the two children. The widow also began receiving pension benefits from employer of $1,881 per month as decedent's surviving spouse.

Employer filed a notice of workers' compensation benefit offset, notifying the widow that it was going to take an offset of $443 per week as pension benefits against the compensation death benefits. The widow filed a review petition, alleging that the offset was improper.

The Workers' Compensation Judge agreed with the widow, stating there is no basis in case law, the Act or the regulations for such an offset. Under §204(a) of the Act, an offset is allowed only when benefits are received by an employee. The widow was not an employee. Additionally, the regulations provided that an offset applies only to wage loss benefits, as opposed to medical, specific loss or survivor benefits. Death benefits are independent of and not derivative of a decedent's right to benefits. Thus, the WCJ held that employer was not entitled to an offset. The Workers' Compensation Appeal Board affirmed.

Employer appealed to the Commonwealth Court, arguing that by disallowing the offset, the widow now receives more per year than decedent would have had he survived. The Court was not persuaded by the argument. Section 204(a) of the Act, which allows an offset for pension benefits, is clear and unambiguous. The offset applies only to benefits received by the employee. There is no mention of death benefits received by a survivor under §204(a). Consequently, employer is not entitled to an offset.

The order of the WCAB was affirmed.

****

William Gregory v. Workers' Compensation Appeal Board (Narvon Builders), No. 2021 C.D. 2006, Filed June 8, 2007.

(Penalty—Where supersedeas is granted by WCAB from WCJ's order approving C&R, no penalty is due for employer's refusal to pay.)

The parties entered into a Compromise and Release Agreement which provided for a lump sum payment of $35,000 for a full and final settlement of claimant's claim. After a hearing, the Workers' Compensation Judge approved the C&R Agreement by an order circulated on December 22, 2003. Claimant was murdered 8 days later.

On January 9, 2004, employer filed an appeal claiming that claimant had not understood the full significance of the C&R Agreement. Employer also filed a petition for supersedeas alleging that claimant was under duress and entered into the C&R Agreement under coercion without full understanding of its legal significance. The Workers' Compensation Appeal Board granted supersedeas by order dated February 2, 2004.

In September of 2004, employer withdrew its appeal and issued a check for $35,000, plus interest. A penalty petition was then filed claiming that employer violated the Act by failing to timely pay benefits in accordance with the WCJ's order approving the C&R. The petition further alleged that employer filed a baseless and frivolous appeal after entering into the C&R Agreement, which amounts to an unreasonable contest.

The WCJ denied the penalty petition, noting that employer had no obligation to pay benefits after the WCAB granted it supersedeas. The WCAB agreed, noting the Supreme Court's decision in *Snizaski v. WCAB (Rox Coal Co.)*, 586 Pa. 146, 891 A.2d 1267 (2006). In that case, the Court explained that "[t]o hold that an employer is liable for penalties for not paying compensation when its request for supersedeas is pending is, in effect, to make an employer's right to seek a supersedeas in most instances a nullity."

The Commonwealth Court adopted the WCAB's reasoning. The Court also noted that the award of penalties is within the WCJ's discretion. Consequently, it was held that an employer is not subject to a penalty for failure to make payment after supersedeas is granted by the WCAB until disposition of the appeal.

****

Wayne Weismantle v. Workers' Compensation Appeal Board (Lucent Technologies), No. 1393 C.D. 2006, Filed June 18, 2007. **(Impairment Rating Evaluation—Employer's request for an IRE does not render moot the employer's pending termination.)**

In November of 2001, claimant began to receive total disability benefits for a work-related low back strain. On January 8, 2003, employer filed a termination petition based upon an affidavit of recovery issued by Michael W. Weiss, M.D.

While the termination petition was pending, claimant reached the point of having collected total disability benefits for 104 weeks. As a result, employer requested claimant to undergo an Impairment Rating Evaluation, which was conducted by Ronald Glick, M.D., on November 11, 2003. Dr. Glick found claimant to have a 10% impairment rating. Employer then notified claimant that he was being placed on partial disability as of the date of Dr. Glick's evaluation.

The Workers' Compensation Judge subsequently denied employer's termination petition because employer acknowledged that claimant was impaired as of November 11, 2003 by placing him on partial disability.

The Workers' Compensation Appeal Board vacated the WCJ's decision and remanded the case to the WCJ for a decision on the merits of the termination petition. The WCAB explained that there is nothing in the Act or the case law prohibiting an employer from pursuing an IRE and a termination of benefits simultaneously.

On remand, the WCJ terminated claimant's benefits and found that he had made a full recovery as of August 26, 2002.

On appeal, claimant argued that once employer obtained an IRE indicating a 10% impairment and filed a notice of change of status with the Bureau, it was foreclosed from seeking termination of claimant's benefits as of a date prior to the date of the IRE. The Court disagreed.

The Court noted that the inquiry made in an IRE is not the same as an inquiry in a termination petition. An IRE is designed to determine impairment, not disability. An IRE is quite different in scope from an IME undertaken to determine if a claimant can perform his or her pre-injury job.

The Act gives an employer the right to pursue an IRE and a termination without regard for the other, because "IRE remedies ...are in addition to, not a replacement of, the remedies available to an employer who believes that an employee's loss of wages is not the result of a work-related injury."

Accordingly, the order of the WCAB was affirmed. President Judge Gardner Colins filed a dissenting opinion.

****

BUREAU FORMS REVISED

During the past year, the Bureau has made revisions to five forms, most of which are used by carriers and employers on a daily basis. In order to protect your interests, and to avoid unnecessary litigation, please make certain that you are using the current edition of each of the following forms:

LIBC-501—Notice of Temporary Compensation Payable. The form, which must be filed in duplicate, now includes a "Medical Only" check box. The form now includes a reminder that a Statement of Wages must accompany the form. Question #4, allowing for "additional remarks," now appears on the back of the form.

LIBC-496—Notice of Workers' Compensation Denial. The form now includes an area to enter "Alleged Injury Information" and a space to enter the date that the employer received notice or knew of the claimant's alleged injury or disability. Please note that the date *must* be completed.

LIBC-760—Employee Verification of Employment, Self-Employment or Change in Physical Condition. The instructions on this form have been changed, and questions #1 and #2 have been rephrased. The location of the block for the date of the notice has been moved, as has the claimant's signature line.

LIBC-380—Third Party Settlement Agreement. This form was revised in an effort to make the instructions easier to understand and to simplify the calculations. Overall, the idea was to make it more "user friendly."

LIBC-751—Notification of Suspension or Modification. The form now includes a field for entering the claimant's time of injury wages if benefits are being suspended.

Linda Davis v. Workers' Compensation Appeal Board (Woolworth Corporation), No. 1873 C.D. 2006, Filed July 5, 2007.

(Independent Medical Evaluation—The mere passage of time, in and of itself, is a reasonable basis to support an order compelling a physical examination.)

Claimant sustained a work-related wrist injury in November of 1990. In 1997, claimant submitted to an independent medical evaluation (IME). Two years later, the parties entered into a compromise and release agreement which resolved claimant's wage loss claims but which left open employer's responsibility for her reasonable and necessary medical expenses.

In November of 2003, claimant filed a request for utilization review. A decision was issued in February of 2004 which found claimant's prescription expenses to be reasonable and necessary. Employer then filed a petition to compel a physical examination, contending that claimant's last physical exam was in 1997. Claimant opposed the petition, contending that there was no reasonable basis for an IME since her prescriptions had just been found to be reasonable and necessary.

The Workers' Compensation Judge denied employer's petition, concluding that the recent UR determination "encompassed the issue of the unchanged, ongoing nature of the claimant's work-related injury for medical purposes…"

On appeal, the Workers' Compensation Appeal Board held that the WCJ erred by misconstruing the purpose of the UR, which does not address questions concerning a claimant's disability. The WCAB also noted that, contrary to the WCJ's reasoning, it is irrelevant whether employer alleged a change in claimant's condition. The matter was then remanded to the WCJ.

Q. Is a subcontractor required to carry workers' compensation insurance if he/she is a sole proprietor?

A. Sole proprietors with no employees are not required to carry workers' compensation insurance. However, detailed information must be provided to your insurer to prove that the individual is a true independent contractor. If your insurer determines that the sole proprietor is your employee, you will be charged for his/her payroll as per the appropriate classes on your policy. It is your responsibility to provide your insurer with all appropriate documentation to resolve the subcontractor's employment status.

The WCJ again found that employer offered no reasonable basis for the requested examination other than the mere passage of time. Accordingly, the WCJ again denied employer's petition.

Employer appealed to the WCAB, which again reversed the WCJ's decision. The WCAB observed that custom and practice have established six months as a reasonable period of time for a new examination where a claimant continues to receive benefits.

Claimant appealed to the Commonwealth Court and argued that the grant or denial of a physical examination is within the sound discretion of the WCJ. The Court agreed, but further found that, in this case, the WCJ abused that discretion. The mere passage of time does constitute grounds to compel a claimant to submit to a physical examination or vocational interview. Here, seven years elapsed since the last IME. Such a lengthy period of time patently satisfies the "mere passage of time" basis for granting a petition compelling an examination.

The decision of the WCAB was accordingly affirmed.

****

Tara Bartholetti v. Workers' Compensation Appeal Board (School District of Philadelphia), No. 2058 C.D. 2006, Filed July 10, 2007

(Physical/Mental Injury—Where credited psychological opinion establishes a work-related psychiatric injury, but does not address disability, claimant is still entitled to benefits based upon her own testimony that she could not work.)

Claimant, an elementary school teacher, was punched in the shoulder and bitten in the arm when she attempted to stop a fight between two fourth grade students. As a result, she filed a claim petition alleging she suffered "severe anxiety and depression from abnormal working conditions."

Claimant testified before the Workers' Compensation Judge that she returned to work the day after the altercation and "felt like I was crazy...I felt inadequate… [t]hat I couldn't do my job." She worked one-half day, and then took sick leave. She also sought psychological counseling from Patricia Mikols, Ph.D.

In support of her petition, claimant offered a report from Dr. Mikols, who diagnosed claimant with "major depression, single episode, acute." Dr. Mikols did not, however, render an opinion that claimant's psychic condition was disabling.

The WCJ awarded both wage loss and medical benefits, find-

ing the claimant's testimony and evidence to be uncontroverted and credible.

The Workers' Compensation Appeal Board reversed the award of wage loss benefits, noting that claimant failed to prove the disabling nature of her work injuries.

On appeal to the Commonwealth Court, claimant argued that the WCAB erred in rejecting the WCJ's acceptance of claimant's testimony and Dr. Mikols' report concerning causation. The Court agreed.

The Court noted that, to substantiate a physical/mental claim, the psychological injury must be the result of a triggering physical event and the injury must arise in the course of employment. If the causal relationship between the claimant's work and the injury is not clear, then the claimant must provide unequivocal medical testimony to establish the causal relationship.

Here, Dr. Mikols' report clearly stated that claimant was injured at work and suffered from depression as a result. The WCJ found the claimant's testimony and her medical evidence credible. The WCJ is the sole fact-finder, and if the facts found by the WCJ rest on competent evidence, they may not be disturbed.

The decision of the WCAB was reversed and the decision of the WCJ reinstated.

****

Ruth Hough v. Workers' Compensation Appeal Board (AC&T Companies), No. 2198 C.D. 2006, Filed July 17, 2007.

(Fee Review—A workers' compensation judge has jurisdiction over matters of timeliness of payments to medical providers absent a fee review request by provider.)

Claimant suffered a work-related partial amputation of her finger. She subsequently developed reflex sympathetic dystrophy (RSD), which was acknowledged by employer as compensable.

As a result of her RSD symptoms, claimant takes several prescription medications, which she obtains through Innoviant Pharmacy/Workers' Comp Rx. All bills, health insurance claim forms and medical reports were submitted to employer; however, employer repeatedly failed to reimburse the provider, Innoviant Pharmacy/Workers' Comp Rx. As a result, claimant filed a penalty petition.

The Workers' Compensation Judge awarded a 50% penalty on the outstanding bills. The WCJ also awarded a quantum meruit attorney's fee to claimant's counsel for unreasonable contest. The WCJ noted that, if employer had wanted to challenge the bills, employer could have applied for a fee review.

Employer appealed. Employer took the position that the provider had a duty to file a fee review under §306(f.1)(5) of the Act before any penalties could be assessed. The Workers' Compensation Appeal Board agreed, noting that claimant received all of her prescriptions despite employer's failure to pay the provider. The WCAB reasoned that it was then up to the provider, not claimant, to file a fee review challenging the untimeliness of payment. Thus, the WCJ lacked jurisdiction to determine the payment dispute because the provider's remedy lies in fee review.

Claimant then appealed to the Commonwealth Court, arguing that it is employer's duty to either pay her medical bills within 30 days of receipt or challenge the reasonableness and necessity of the bills under either the utilization or fee review provisions. By doing neither, employer violated the Act. The Court agreed, in part.

Section 306(f.1)(6) of the Act governs utilization review and limits jurisdiction to the reasonableness and necessity of the medical treatment at issue. That provision is inapplicable here. There was no dispute that claimant's medications were reasonable and necessary.

Rather, §306(f.1)(5), governing fee review, controls. Unlike the utilization review process, the fee review provision does not mention employees or claimants at all. There is no language in the fee review provision which affects rights of employees provided elsewhere in the Act. Moreover, there is no language which limits an employee's right to pursue a penalty petition under §435 of the Act as a result of a late payment of medical bills.

Additionally, while reasonableness and necessity of treatment must be resolved through the utilization review process, which would deprive the WCJ of original subject matter jurisdiction, employer here failed to challenge the reasonableness and necessity of claimant's treatment.

For these reasons, the Court held that §306(f.1)(5) of the Act doe not require a provider to seek a fee review before claimant may

Q. Do family members and minors have to be covered by workers' compensation insurance?

A. Pennsylvania state law does require you to cover any employee, regardless of the number of hours worked per week or whether the person is your spouse or child.

Q. Do members of limited liability companies (LLC) have an obligation to ensure workers' compensation liability on their members?

A. Section 301(a) of the Act only requires employers to maintain workers' compensation coverage of their employees. To the extent LLCs have no employees, i.e., its only workers are partners, it has no employees and, thus, no workers' compensation liability. However, should a partner withdraw from the partnership and become an employee or the business adds a part-time or a full-time employee, it would then be required to insure its workers' compensation liability.

proceed on a penalty petition alleging untimely payment of medical bills.

The Court also found that claimant is entitled to unreasonable contest attorney's fees. Employer did not challenge claimant's medications in either a utilization review or fee review proceeding. As a result, claimant's counsel proceeded with the penalty petition. If employer had complied with the Act, claimant would not have incurred attorney's fees. Accordingly, claimant is entitled to fees under §440 of the Act.

The order of the WCAB was reversed and the WCJ's order granting penalties and fees was reinstated.

****

Graphic Packaging, Inc. v. Workers' Compensation Appeal Board (Zink), No. 1066 C.D. 2006, Filed July 24, 2007.

(Penalties—An award of penalties is not contingent upon an award for a specific compensation amount.)

After several rounds of litigation, in a remand decision issued on August 10, 2005, the Workers' Compensation Judge found: (1) claimant was temporarily totally disabled as result of a work-related aggravation of pre-existing post-traumatic stress disorder as of July 24, 1996; (2) employer's witness credibly testified that employer had work available for the claimant as of August 20, 1996 on the third shift; and (3) claimant's medical expert credibly testified that, as of December 24, 1996, claimant was able to return to work on a permanent third shift assignment. The WCJ thus awarded claimant temporary total disability from July 24, 1996 through December 24, 1996, with benefits suspended thereafter.

The WCJ also found that the Commonwealth Court had previously found claimant was entitled to benefits from July 24, 1996 through at least January 1997. The Court's decision was issued on July 10, 2003. Employer did not pay benefits to claimant, however, until December 2004. The WCJ concluded that employer failed to pay benefits for seventeen months and directed employer to pay a penalty of 40%.

Both parties appealed to the Workers' Compensation Appeal Board, which affirmed. Both parties then appealed to the Commonwealth Court.

Employer argued that the WCJ erred in finding that it violated the Act because the Commonwealth Court's prior order did not expressly direct employer to pay an amount certain to claimant, but rather remanded the matter to a WCJ for an appropriate award. Employer took the position that the Court's prior order imposed no obligation upon employer to pay benefits to claimant of any kind under the Act.

The Court disagreed. Claimant was awarded benefits under the Court's decision of July 10, 2003, thereby triggering employer's obligation to make prompt payment. Only a grant of supersedeas would have obviated employer's obligation to pay compensation. Absent that, employer carried the burden of paying workers' compensation benefits during the litigation period.

Here, employer did not request supersedeas and yet made no payments for seventeen months after its obligation to do so was settled by the Commonwealth Courts' original order. The WCJ did no err in finding employer violated the Act.

Claimant argued on appeal that the WCJ erred in suspending his benefits as of December 24, 1996.

The Court agreed. The only finding of job availability was that employer had an appropriate position available in August of 1996. Because claimant was totally disabled and unable to work in August of 1996, the job was not available to claimant as a matter of law. Employer presented no evidence to show that it made work available to claimant within his capabilities once he was released to return to work. In fact, the job offer letter sent to claimant indicated that the offer expired on August 26, 1996. Thus, having failed to establish a basis to suspend claimant's benefits, employer is liable for, and obligated to pay, claimant benefits from July 24, 1996 and ongoing.

****

Shop Vac Corporation v. Workers' Compensation Appeal board

(Thomas), No. 217 C.D. 2007, Filed July 25, 2007.

(Reinstatement—Absenteeism that WCJ finds is credibly related to injury is not "bad faith" that will justify claimant's firing, thereby relieving employer from the need to reinstate benefits.)

Employer issued a Notice of Temporary Compensation Payable which described claimant's injury as a cervical strain. Claimant subsequently returned to work, but was laid off six months later for a period of three months. She again returned to work at full duty, but was terminated shortly thereafter due to excessive absenteeism.

After being fired, claimant filed a Reinstatement Petition alleging that the injury again caused a decrease in her earning power and that the description of her injury was incorrect and should be modified to reflect a herniated disc.

Employer agreed that the injury was inaccurately described, so the Workers' Compensation Judge entered a decision amending the injury description. The WCJ concluded that claimant's firing was not a result of bad faith conduct on her part. Consequently, he granted claimant's Reinstatement Petition. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer filed an appeal to the Commonwealth Court challenging the WCJ's order reinstating claimant's benefits.

The Court noted that, before the WCJ, claimant testified that the major causes of her absenteeism were headache and neck pain. She explained that she would receive injections that would cause her to then be off work for a few days. The WCJ credited claimant's testimony and found that claimant was not fired for bad faith conduct on her part.

Employer argued that it maintained a written attendance policy that required a medical excuse for an absence to be considered an excused absence. Claimant failed to provide written documentation following her absences. Hence, employer argued that, regardless of the reasons for her absence, claimant failed to comply with the attendance policy and, therefore, acted in bad faith.

The Court disagreed. A showing of a lack of good faith, or bad faith, on the part of the claimant is not the same as the willful misconduct standard sufficient to deny unemployment compensation. When an employer terminates a claimant for a violation of a company policy, it must present conclusive evidence that the claimant violated that policy in order to rebut the presumption that the claimant's loss of earnings is through no fault of his or her own. While excessive absenteeism in and of itself may be considered willful misconduct, illness is a good cause defense to a charge of willful misconduct.

Here, at least some of the unexcused absences that led to claimant's termination were the result of her calling off without any sick days remaining as opposed to her failure to turn in medical excuses following her absences. The WCJ credited claimant's testimony that she called off work due to difficulties arising from her work injury. Just as an "illness" can be a good cause defense to a charge of willful misconduct due to excessive absenteeism, debilitating pain from a work injury serves as good cause as well.

The order of the WCAB was affirmed.

****

CRST v. Workers' Compensation Appeal Board (Boyles), No. 1954 C.D. 2006, Filed July 30, 2007.

(Earning Power Evaluation—Where claimant finds and accepts employment on his own, the employer may still use an earning power assessment to adjust his compensation through a modification petition.)

Claimant, a truck driver, sustained a work-related wrist injury in 1988. He was released to return to work with restrictions in 2000, but employer did not have any suitable positions. Thus, beginning in February of 2000, claimant began to apply for jobs on his own initiative. By August of 2000, he had obtained a full-

Q. What are the requirements to be self-insured?

A. To be authorized by the Department of Labor & Industry's Bureau of Workers' Compensation to self-insure, an employer must first demonstrate that it has the financial ability to guaranty the payment of all benefits it may incur under the Act while it is approved as a self-insurer and that it has an adequate accident and illness prevention program. Additionally, an approved self-insurer must post security, such as a bond or letter of credit, covering its liability; must purchase excess insurance to protect it and its workers from losses resulting from a large claim or catastrophic situation; and, must arrange for the proper adjusting and administration of its potential claims, either through in-house resources or the retention of an authorized claims services company.

time position as a security guard, which paid $7.50 per hour. He subsequently obtained a part-time job with the Sheriff's Department, so he cut back his work as a security guard to part-time so as to accept the County position, which paid $9.05 per hour and included the possibility of overtime. Claimant anticipated that the County would make him a full-time employee.

In the meantime, in May of 2000, claimant had a vocational interview with a certified rehabilitation counselor. After conducting a labor market survey, the counselor issued a report indicating that claimant had an earning power of $10-13/per hour.

The Workers' Compensation Judge, who found both the claimant and the vocational counselor to be credible, concluded that employer was not entitled to modify claimant's benefits on the basis of the labor market survey because claimant found suitable employment on his own within his restrictions pursuant to the Notice of Ability to Return to Work. The Workers' Compensation Appeal Board affirmed, and the Commonwealth Court remanded the case to the WCJ for findings of fact as to claimant's actual earnings and earning power.

After conducting additional hearings, the WCJ concluded that claimant's earning power should be $11.39, based on one of the positions identified by the vocational counselor in the labor market survey. The WCJ also concluded that claimant's actual earnings were not greater than his earning power. The WCJ again, however, denied employer's modification petition, concluding that claimant fulfilled the mandate of §306(b) of the Act by seeking and securing employment on his own. The WCAB again agreed with the WCJ.

Q. How do you measure compliance with the 21-day filing requirements of the Workers' Compensation Act?

A. The disability date or employer-notified date, whichever is later, is deducted from the file date to determine whether a particular filing is timely. The file date is the date the Bureau of Workers' compensation receives the form unless there is a legible, United States postal mark present on the envelope. In the case of a United States postal mark, the file date is the date of the postal mark.

Employer then appealed to the Commonwealth Court, arguing that the WCAB erred in concluding that an employer is precluded from establishing earning power when a claimant secures a position on his own. Employer asserted that, in enacting §306(b), the legislature created an entirely new job development concept, i.e., "earning power," which is separate and distinct from the former Kachinski standards involving specific job offers.

The Court agreed. The Kachinski standards do not apply where an employer seeks to modify a claimant's benefits based on earning power. Act 57 has no time limits by which employers must utilize earning power assessments for claimants with restored working capabilities. Accordingly, employer here was not precluded from offering an expert report to establish claimant's earning power, which the WCJ accepted as credible. The WCJ ultimately accepted the expert's evaluation by choosing one of the representative positions as indicative of what claimant could be earning. This finding was supported by the evidence of record and, as such, requires a modification of claimant's benefits to reflect that earning power.

The matter was remanded once again for an adjustment of claimant's benefits based upon his earning power, not the lesser, actual wages that claimant earns.

****

Mark Vaneman v. Worker's Compensation Appeal Board (Apollo Moving and Vanliner Insurance Company), No. 1711 C.D. 2006, Filed April 4, 2007.

(Expert Interview—Where injured employee returns to light duty work with employer at a loss of wages, employer is still entitled to an expert interview to assess the injured workers' earning power.)

On April 8, 2004, employer filed a Petition to Compel Expert/ Vocational Interview. An order was entered on May 27, 2004, directing claimant to attend a vocational interview. On June 1, 2004, however, claimant returned to work with employer at a reduced wage and concurrently received partial disability benefits.

Claimant then filed a motion to dismiss employer's petition. The Workers' Compensation Judge denied claimant's motion because he concluded that, under §314(a) of the Act, an employer may request a claimant to submit to a physical examination or expert interview at any time after an injury regardless of whether the claimant has returned to work or whether the employer has filed a subsequent petition.

The Workers' Compensation Appeal Board affirmed the WCJ's decision. Claimant then filed an appeal with the Commonwealth Court, arguing that use of a vocational interview to

determine earning power where the claimant has retuned to modified duty work is not reasonable. The core of claimant's argument was that a vocational interview should not be allowed unless it is incidental to a petition modifying benefits.

The Court disagreed. Section 314(a) of the Act provides that an employer may request that its employee attend a physical exam or expert interview "at any time after an injury." There is no express language directing that a request occur only upon the employer's filing a petition modifying benefits. "Disability" is defined uniquely in workers' compensation proceedings as "loss of earning power," which is defined in §306(b)(2) of the Act.

Reading §§314(a) and 306(b)(2) of the Act together, the Court stated that a vocational interview can be used to assess a claimant's earning power and earning power can be reviewed on a periodic basis. Since the interview is an assessment tool, there is no reason to require that it occur only upon the filing of a petition to modify benefits. Rather, an employer may use this tool as a means to determine whehter it is appropriate to file a petition to modify benefits.

The WCJ properly concluded that employer had authority to direct claimant to submit to a vocational interview. The order of the WCAB was, thus, affirmed.

****

Dollar Tree Stores, Inc. v. Workers' Compensation Appeal Board (Reichert), No. 797 C.D. 2007, Filed August 13, 2007.

(Recoupment of Overpayment—A claimant can only be ordered to reimburse an employer for an overpayment under §413(a) of the Act if there exists an "incorrect agreement to modify"; the doctrine of unjust enrichment is not available.)

Claimant sustained a work injury on April 2, 2001. Employer began paying benefits to claimant without issuing a Notice of Compensation Payable (NCP).

On August 3, 2005, Employer filed a review petition seeking to reduce the weekly compensation amount and seeking a credit against future compensation for the amount it overpaid, which totaled $27,164.99.

The WCJ granted employer's petition and allowed employer a $112 per week future credit against claimant's benefits until employer had recouped the overpayment.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that recoupment is authorized by only one provision of the Act, §413(a), and is then only available to correct an agreement. The WCAB agreed and reversed the WCJ's decision. The WCAB noted that recoupment may only be ordered due to an error in an agreement, and no agreement was issued in this case.

Employer then sought review by the Commonwealth Court. Employer contended that, even though it did not pay claimant compensation under an agreement or an NCP, recoupment may also be ordered based on the doctrine of unjust enrichment. The Court was not persuaded by the argument.

The Court held that, under §413(a) of the Act, the WCJ only has the power to order recoupment for an overpayment paid under an agreement or an NCP. The doctrine of unjust enrichment is an equitable doctrine, and the WCJ and the WCAB are precluded from employing certain equitable principles in light of the Workers' Compensation Act. Here, §413(a) of the Act applies, and it states that reimbursement may be ordered if there exists an "incorrect agreement to modify."

The order of the WCAB was affirmed.

****

Maxim Crane Works v. Workers' Compensation Appeal Board (Solano), No. 2224 C.D. 2006, Filed August 14, 2007.

(Offset—Employer is obligated to notify claimant of reporting requirements under the Act in order to secure an offset; right to a retrospective offset is not absolute.)

Claimant suffered a work injury in October of 2000. In January 2003, claimant applied for old age Social Security benefits. On April 3, 2003, claimant and employer entered into an agreement for compensation benefits, which was later modified by a supplemental agreement dated September 12, 2003.

On June 5, 2005, claimant received an LIBC-756 form, "Employee's Report of Benefits for Offsets," on which he con-

Q. Why can't I print a copy of the form I submitted over the Internet?

A. The form may be printed after it has been submitted using the print button provided on the screen. If you would like to print the form from the summary screen prior to submission, do a right click on your mouse to show the print command and left click on the print command to print. Note: The summary screen should only be used to review your data as you have filed your form at this point.

firmed his receipt of old age Social Security benefits. On August 3, 2005, claimant received an LIBC-761 form, "Notice of Workers' Compensation Benefit Offset," notifying him that employer was taking a credit that would offset his weekly workers' compensation benefits, and that a credit from 14 months of prior old age Social Security benefits would also be recouped, reducing his benefits to zero for a period of 25.75 weeks.

Claimant filed a Review Petition, alleging that the offset was calculated in error. At the hearing before the Workers' Compensation Judge, claimant testified that he never received a form with which to report his old age Social Security benefits prior to June 6, 2005. The WCJ determined that employer was only entitled to an offset starting on June 6, 2005. The WCJ granted claimant's petition ruling that employer was not entitled to recoup offsetable benefits claimant received prior to June 6, 2005.

Employer appealed to the Workers' Compensation Appeal board, which affirmed the WCJ's decision. Employer then sought review by the Commonwealth Court.

The Court noted that, under §204(a) of the Act, 50% of old age Social Security benefits are to be credited against the amount of workers' compensation payments provided that the Social Security benefits were received after the work injury. The Court also noted that the employee is required to report the receipt of old age Social Security benefits on form LIBC-756. Finally, the Court noted that the insurer is required to notify employees of their reporting requirements under §204 of the Act.

The Court then looked to the regulations, which provide that when an employee has received old age Social Security benefits, "the insurer ***may*** be entitled to an offset."

The Court found no support in the Act or regulations that would support an employer's absolute right to a retrospective offset. While claimant does owe a duty to report receipt of old age Social Security benefits, it is employer's or its insurer's duty to notify claimant of the reporting requirements and to provide claimant with the proper forms.

Here, employer waited 5 years to notify claimant of his reporting requirements under the Act in order to secure an offset. As such, employer failed to act with due diligence. The doctrine of laches was found to apply, thereby depriving employer of the offset.

The decision of the WCJ, as affirmed by the WCAB, was affirmed by the Court.

****

Q. How long does it take to get results to a request for records from the Bureau?

A. Processing usually takes about 7 to 10 days—depending upon the availability of records.

(Continued from page 1)

Cameron Street, Room 103, Harrisburg, Pennsylvania 17104-2501; telephone number within Pennsylvania (800) 482-2383; telephone number outside of this Commonwealth (717) 772-4447: TTY (800) 362-4228 (for hearing and speech impaired only); www.state.pa.us, PA Keyword: workers comp.

The Regulations further state that the specified information must be printed on paper no smaller than 8½ by 11 inches and in font no smaller than 11 point.

Does the failure of the employer to provide this notice to the claimant, either at the time of hire or at the time of injury, constitute a basis for the imposition of penalties? Possibly. For that reason, we strongly recommend that employers have their employees sign an acknowledgement of the notice at the time of hire, as well as at the time of injury.

Additional changes to the Regulations relate to a) reporting injuries to the Bureau, b) the requirement for filing a Notice of Temporary Compensation, 3) when a Statement of Wages is or is not required, 4) when and how an amended agreement or Notice of Compensation may be filed, 5) the forms required to update claims status, 6) when a claimant's compensation checks may be mailed to his or her attorney, etc. The list of changes is extensive. A copy of the amended Regulations is available on the Bureau's website: www.pa.state.us, PA Keyword: *workers comp*. In fact, the changes are so far reaching, the Bureau is offering free, two hour informational seminars, in four regions of the Commonwealth. A registration form for the seminar is available on the Bureau's website, or by contacting the Bureau at (717) 783-5421.

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

TR&C

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

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

Prior issues are available on our web site at http://www.trc-law.com or upon request. Please direct inquiries to Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400.