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Pennsylvania Weekly Case Law Summary

When suspending wage loss based on retirement the WCJ must look at the totality of circumstances:

The issue of voluntary removal from the work force based on retirement was again the subject of a decision from the Commonwealth Court in Turner v WCAB (City of Pittsburgh), No. 347 C.D. 2013, Filed October 16, 2013.

In Turner, claimant returned to a modified job after she was injured while working as a police officer. When the city eliminated its light duty program, the claimant was out of work and accepted a disability pension. The claimant did not look for work between 2003, when she retired, and 2007 when a Notice of Ability was sent containing medical restrictions based on an IME. The claimant then signed up for two programs to enhance her ability to obtain new employment. The WCJ suspended based on the presumption that claimant had retired when she took her disability pension, but the Commonwealth Court remanded back to the WCJ to comply with The Pennsylvania Supreme Court's holding that there is no presumption of retirement when a claimant takes a disability pension but rather that the issue of retirement depends on the "totality of circumstances."

Comment: The case reaffirms the important lesson that success in a petition for suspension based on voluntary removal from the workforce requires two things: (1) a Notice of Ability and (2) evidence that based on the totality of circumstances that claimant has retired from the workforce.

In cumulative trauma cases when must Notice be provided and how is Liability determined between multiple employers?

A & J Builders, Inc. and State Workers Insurance Fund, v. WCAB (Verdi), No. 479 C.D. 2013, Filed October 16, 2013.

The claimant worked as a carpenter for over 33 years. The claimant suffered right knee pain from an injury in 2004 and underwent surgery. Once the claimant started working for A & J Builders, his right knee pain returned. He worked for A&J between 2004 and 2007. The claimant then worked for Miller for three days in 2008 and stated that during that time his right knee filled with fluid and was "hard as a rock." The claimant filed claim petitions against both A&J and Miller asserting that either or both were responsible for his loss of wages.

A&J and Miller both argued that the claimant did not provide timely notice of his injury, and that he knew or should have known that his problem was work related before he was advised by his treating doctor in March, 2009. Miller also argued that the claimant's three days of employment did not materially contribute to the disability.

The Commonwealth Court agreed with the WCJ that the claim petitions were filed within 120 days of when the claimant was told in March 2009 of the relationship between his right knee problems and his work duties, and hence timely notice was given. The Commonwealth Court explained that in cases where the relationship between an injury and employment is not known, that the time to give notice begins to run when the employee knows, or by the exercise of reasonable diligence should know, of the existence of a relationship with employment. This knowledge must be more than a mere suspicion or belief that a relationship may exist. The Court also affirmed the WCJ determination that claimant's three days of work with Miller did not aggravate his knee problem and hence A&J was solely responsible.

Comment: Cumulative trauma cases have their own rules as to when the notice period begins to run and it is not unusual for the magic date to occur when a physician tells a claimant of the relationship between a condition and employment. In addition, when multiple employers are involved liability will hinge on medical evidence as to whether certain periods of employment materially contributed to the disability. Many think that the last employer in a cumulative trauma case is always responsible. In this case, the last employer was not found liable based on the credible medical evidence that three days of work did not materially contribute to claimant's disability.

Massage Therapy can be a covered Medical Expense.

The Commonwealth Court has previously determined that an unlicensed massage therapist was not a health care provider under the Act and the employer was not liable to pay for massage therapy administered to a claimant, even though under a doctor's orders.

In Moran V WCAB (McCarthy Flowers and Donegal Mutual Insurance), No. 830 C.D. 2013, Filed October 16, 2013, the issue was whether an employer was liable for massage therapy performed by an LPN under a doctor's orders and direction. The employer/carrier filed a UR Request which concluded that the LPN was not licensed to perform massage therapy. It further concluded that the LPN was not certified by a national massage therapy organization. The claimant filed a petition to review the UR determination. The Judge and the Commonwealth Court both disagreed with the UR Reviewer and found the employer liable to pay for the massage therapy. The Court determined that an LPN is a health care provider under the Act and is licensed by the Commonwealth of Pennsylvania. In this instance the LPN had received over 900 hours of training in massage therapy and held a national certification as a massage therapist.

Comment: A determination must be made of the credentials of the person providing the treatments before deciding to dispute payment. In this case, since an LPN is recognized as a health care provider under the Act, a doctor's order to provide massage therapy was allowed.