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### Recent Cases in Pennsylvania *by John W. Zatkos, Jr., Esq.*

#### **Review Petition Is Not Always Needed When Reviewing a Description of the Injury**

In *Cinram Mfg., Inc. & PMA Group v. WCAB (Hill)*, the Commonwealth Court rejected the Employer's argument on appeal that the injured worker's expert's opinion was incomplete because a review petition was not filed.

In this case, the worker had a herniated lumbar disc in 2000 and sustained a lumbar strain on the job in 2004. The Employer later filed a termination petition, claiming the lumbar strain had resolved. The injured worker's medical expert testified that the work injury resulted in a significant change to the symptoms but did not file a review petition. The Workers' Compensation Judge (WCJ) accepted the testimony, concluding the work injury had caused or materially aggravated the herniated lumbar disc, keeping the benefits intact. The Employer appealed the decision, claiming that the medical expert's opinion was incomplete without the review petition. However, the Court agreed with the WCJ that the injured worker had met his burden of proof without the review petition.

**What does this mean?** It falls to the claimant to prove that the nature of his or her injury is beyond the insurer's description. While in this case, a review petition was not needed to meet this burden of proof, we feel it is a better practice to always file the appropriate review petitions. A review petition documents diagnosis for medical experts to comment upon, ensures due process, and provides a guide for the WCJ when analyzing the description of the injury.

#### **Employers Must Comply with the Workers' Compensation Act's codes to Receive Offsets or Recoupments**

In *Maxim Crane Works v. WCAB (Solano)*, the Workers Compensation Appeals Board (WCAB) and the Commonwealth Court affirmed the WCJ's decision to deny the Employer's recoupment of credit accrued.

Mr. Solano was injured in October 2000 and terminated that December. Although the law

says that the Employer must notify the employee of his or her reporting rights and the insurer must provide the required forms to the employee, the Employer did not send anything to Mr. Solano until June 6, 2005, when they sent him Form LIBC-756. When Mr. Solano reported his social security old age benefits, the Employer issued a Notice of Benefit Offset, looking for a future credit and a recoupment of benefits paid over the past 14 months.

The WCJ denied the recoupment of any benefits prior to June 5, 2005 since the Employer did not send the forms to the injured worker until then. The Court agreed, stating that the Employer had no right to an offset until it complied with the law.

**What does this mean?** Unless the Employer can prove the injured worker provided inaccurate information, the Employer cannot claim recoupment until the proper papers are received, (in this case Form LIBC-756). Taking an offset or recoupment of an accrued offset if Form LICA-756 has not been received could result in penalties for the Employer.

#### **Wage Loss Benefits Reinstated for Depression Resulting from a Work Injury**

In *Bartholetti v. WCAB*, the Commonwealth Court affirmed the WCJ's decision that the injured worker was entitled to wage-loss benefits for a period of depression that resulted from an injury at work.

Ms. Bartholetti, an elementary school teacher, was punched and bitten at work while trying to break up a fight between two students. She filed for Workers' Compensation benefits for her injury and for wages lost due to the severe anxiety and depression she suffered as a result of the incident. A psychologist testified that Ms. Bartholetti showed signs of post-traumatic stress syndrome as a result of the incident and the WCJ found the testimony sufficient to grant lost wages. However, on appeal the WCAB modified the award, entitling Ms. Bartholetti only to medical benefits but not lost wages, claiming "the disabling nature of [Bartholetti's] psychological injury was not obvious." Ultimately, the Commonwealth

Court reversed back to the original decision noting that “The WCJ is the sole fact-finder, and if the facts found by the WCJ rest on competent evidence, they may not be disturbed.”

**What does this mean?** When evidence is competent, the WCJ’s decision should stand as final. Only if there are serious questions as to the competence of the evidence should the WCAB reverse a decision. On an aside, the Bartholetti case demonstrates an increase in assaults on teachers in school and the devastating effects that can result for the worker.

## The Family and Medical Leave Act: Overview of the FMLA’s Basic Protections

By Alan C. Blanco, Esquire

The Family and Medical Leave Act (“FMLA”) is a federal law which became effective in 1993 and which provides, for eligible employees of covered employers, up to twelve weeks of unpaid job protected leave in four situations designed to permit employees to balance their work and family lives. The four FMLA qualifying reasons for leave are: (1) for an employee’s serious health condition that renders him or her unable to do the job; (2) to care for a seriously ill child, spouse, or parent; (3) for child birth or to care for a newborn child up to the age of one; or (4) for the placement of a child for adoption or foster care with the employee.

To benefit from the FMLA, an employee must work for a covered employer and be an eligible employee. Covered employers under the FMLA are: (1) all private employers with fifty or more employees who work twenty or more calendar weeks in the current or preceding calendar year, and (2) all public employers. An eligible employee must: (a) have worked for the employer for at least twelve months (the period need not be consecutive); (b) have worked at least 1,250 hours over the twelve month period preceding the leave; and (c) work at a location where fifty or more employees are employed within a seventy-five mile radius.

The FMLA offers up to twelve work weeks of leave within a twelve-month period. Employers are permitted to choose from one of four options in selecting the leave year. The four options are: (1) the calendar year, (2) any fixed twelve month period such as a fiscal year or a year starting on the employee’s anniversary date, (3) the twelve month period measured forward from the date any employee’s first FMLA leave begins, or (4) a “rolling” twelve month period measured back from the date an employee uses any FMLA leave. The choice of leave year can be a subject of negotiations in collective bargaining.

An employee’s “serious health condition” entitling him or her to leave is an illness, impairment, or physical or mental condition that involves either inpatient care, or continuing treatment by a health care provider. The term “continuing treatment by a health care provider” includes a number of other situations designed to capture significant health conditions and to eliminate ordinary colds, etc. as reasons for FMLA leave. Any period of incapacity due to pregnancy, and any period of incapacity due to a chronic serious health condition (such as asthma, diabetes, epilepsy, stroke, terminal diseases, etc.), is covered. In addition, other illnesses are covered so long as two elements are met: (1) a period of incapacity of more than three consecutive calendar days (and any subsequent period of incapacity relating to the same condition), and (2) treatment two or more times by a health care provider or treatment on at least one occasion by

a health care provider which results in a regimen of continuing treatment under the supervision of a health care provider.

An employee may take his or her annual FMLA twelve-week leave entitlement all at once for one qualifying reason or at different times for different qualifying reasons. FMLA leave can also be taken intermittently or on a reduced leave schedule under certain circumstances, such as when medically necessary for a serious health condition of the employee or of a seriously ill family member. In such a case, the employer may transfer the employee to an available open position which better accommodates the need for recurring leave, but the position must have equivalent pay and benefits. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces the employee’s usual number of working hours per workweek or workday.

The employer is permitted to charge as FMLA leave only the time actually taken while on intermittent or reduced leave. Employees may not be required to take more leave than necessary when on intermittent or reduced leave.

FMLA leave is normally unpaid, but the employee may elect to use accrued paid leave during an FMLA absence. The employer is also permitted to require the employee to use available paid leave in an FMLA qualifying situation, but the Regulations do not mandate employers to do this and the requirement can be subject to collective bargaining. The kind of paid leave to be used depends on the reason for taking FMLA leave.

At the conclusion of the leave, an eligible employee must be restored to the position held prior to the leave, or to a substantially equivalent position. An equivalent position is virtually identical in terms of pay, benefits, and working conditions, perquisites, status, duties, and responsibilities.

Employees are supposed to provide employers with at least thirty days advance notice before FMLA leave is to begin if the need for the leave is foreseeable. If the need for the leave is not foreseeable, the employee should provide at least verbal notification of the leave as soon as practicable, which is ordinarily within two business days.

When giving notice of the need for the leave, the employee does not have the legal responsibility to mention the FMLA or to specifically say that they want family and medical leave. To trigger the employer’s duties, however, the employee must identify the reason for the leave with enough specificity so that the employer can understand that the leave is for an FMLA qualifying purpose.

Once the employee provides notice of the need for FMLA leave, the employer is required to notify the employee that the leave will be counted against the employee’s twelve week annual FMLA entitlement. This is to be done in writing, and should normally be done within one or two business days after receiving the employee’s notice of need for the leave. If required by the employer, the employee must verify the need for FMLA leave from his or her health care provider.

The FMLA can be enforced through the union grievance procedure if the FMLA has been written into the collective bargaining agreement. The FMLA is also enforced administratively by the United States Department of Labor, through the local offices of the Wage and Hour Division or through the headquarters office of the Wage and Hour Division, in Washington D.C. The FMLA can finally be enforced by a lawsuit filed by the individual employee. Lawsuits must be commenced within two years of the violation for non-willful violations, and within three years for willful violations.