



Pennsylvania Workers' Compensation Bulletin

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The Disappearing DPW Lien?

Tristani v. Richman has the potential to change the face of DPW reimbursements in personal injury actions. What effect will it have on workers' compensation claims?

The United States District Court for the Western District of Pennsylvania issued a decision in *Tristani v. Richman*, (___ F. Supp.2d ___, 2009 WL 799747) on March 25, 2009. The lengthy memorandum opinion addresses the presumed exception in federal law, first expounded upon in the 2006 United States Supreme Court decision of *Arkansas Health and Human Services v. Ahlborn*, permitting state medical assistance agencies to effectuate mandatory third-party liability recovery through the imposition of liens on a plaintiff/recipient's personal injury proceeds. *Ahlborn*, 547 U.S. 268 (2006).

Tristani is an extraordinarily dense case that, in its entirety, addresses the finer points and minute interpretations of due process, civil procedure, qualified immunity, the takings clause, and congressional intent. However, when you cut to the heart of *Tristani*, the Court held that the federal Anti-Lien and Anti-Recovery provisions found in 42 U.S.C. 1396p(a)(1) and 1396p(b)(1) preempt Pennsylvania statutory law found at 62 Pa. C.S. §1409 under the Supremacy Clause of the Constitution. In other words, the Court held that the application of 62 Pa. Stat. Ann §§ 1409(b)(7)(i) and 1409.1(b)(1), authorizing the Department of Public Welfare (DPW) to impose liens on the proceeds of a Medicaid plaintiff's judgment, award, or settlement in personal injury actions, is unconstitutional under the Supremacy Clause.

Tristani arose out of two separate personal injury actions wherein each plaintiff was a Medicaid recipient.

Each plaintiff's attorney received a letter from DPW indicating that the plaintiff was a recipient of Medicaid and that Pennsylvania law permitted DPW to recover the costs of medical care from liable third parties if there was a settlement, judgment or award in favor of the plaintiff/recipient. Both personal injury lawsuits settled out of court and DPW liens were willingly satisfied by plaintiff's counsel out of the settlement proceeds.

Each plaintiff then filed a lawsuit against DPW alleging that the lien placed on their personal injury recovery violated Title XIX of the Social Security Act, the Takings Clause of the 5th Amendment, the Due Process Clause of the 14th Amendment, and the Takings Clause of the Pennsylvania Constitution.

The Court held that DPW is no longer permitted to assert its reimbursement rights through liens. Instead, federal law now requires state Medicaid agencies to personally intervene in any lawsuit filed by a medical assistance recipient, so that the agency can commence a direct action for reimbursement against liable third parties.

Tristani also addressed two related issues: (1) although the Court held that the plaintiffs had no standing on this issue, the Court also explained in *dicta* that DPW can only collect managed care capitation payments prior to the enactment of Act 2005-42 (in other words, for managed care cases, DPW is only permitted to collect capitation payments made prior to July

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COMMONWEALTH COURT CASE REVIEWS

*Consol PA Coal Company—
Enlow Fork Mine v. Workers’
Compensation Appeal Board
(Whitfield), No. 971 C.D. 2008,
Filed January 8, 2009.*

(Suspension—In order to meet its burden of proof in a Suspension Petition, employer must still prove job availability even if claimant is released to any employment without conditions.)

Claimant suffered a fractured left arm while working on April 30, 2005. A Notice of Compensation Payable was subsequently issued.

As a result of his injury, claimant sought treatment from Dr. Schmidt, who performed surgery on claimant’s arm. On August 10, 2006, Dr. Schmidt released claimant, without restriction, to full-duty work.

Given Dr. Schmidt’s release, employer filed a Suspension Petition. Employer’s sole witness was Dr. Schmidt, who testified that he released claimant to “whatever he wanted to do, full duty.” Dr. Schmidt testified that he would “reconsider” and reevaluate claimant if claimant had problems working.

Claimant testified that, although he was aware of Dr. Schmidt’s release, he did not feel he was capable of returning to work. Additionally, claimant testified that his regular duty position was no longer available to him given employer’s policy of terminating employees who are away from their positions for more than one year.

Employer presented no evidence of work availability and did not dispute claimant’s testimony that his employment had been terminated.

The Workers’ Compensation

Judge found Dr. Schmidt to be credible and found claimant to be capable of returning to any type of work, without restrictions, as of August 10, 2006. Despite these findings, the WCJ denied employer’s petition because employer failed to show that a job was made available to claimant.

The Workers’ Compensation Appeal Board affirmed, stating that: “our research has revealed no cases which alleviated the defendant from demonstrating job availability through a mere showing of increased capacity, regardless of how great that capacity may be.”

Employer then sought review by the Commonwealth Court, arguing that an employer should not need to present evidence of work availability where the claimant no longer has a loss of earning power attributable to the work injury. The Court was not persuaded.

The Court noted that “disability” is defined as loss of earning power attributable to the work injury. Therefore, job availability is the standard by which an employer must establish that a claimant’s disability has ceased or decreased. Further, the Supreme Court has consistently required employers to prove job availability in order to justify suspension or modification of benefits, except under a few narrow exceptions where such evidence would be pointless, such as where the claimant is incarcerated, retired or is totally disabled due to a non-work related injury.

Accordingly, despite the medical evidence that claimant was able to perform not only his time of injury job but also any job, employer failed to carry its burden of establishing job availability.

The order of the WCAB was thus affirmed.

*Jacqueline Matthews v. Workers’
Compensation Appeal Board
(Elwyn Institute), No. 1413 C.D.
2008, Filed March 12, 2009.*

(Notice of Injury—Injuries sustained while en route to treatment for a work injury are compensable provided claimant has met the necessary burdens, including the burden of establishing notice to the employer of the injuries.)

Claimant, a counselor at a facility for mentally handicapped individuals, filed a claim petition alleging that she sustained a work injury to her left knee on January 16, 2003. She sought partial disability from February 22, 2003 through April 20, 2003, and full disability on and after April 21, 2003.

During claimant’s testimony, employer’s counsel questioned her about other injuries she sustained after she left work in April of 2003. Claimant responded that on September 9, 2003, while driving to her physical therapy appointment, she was involved in an auto accident.

Claimant’s medical expert, Dr. Gordon, testified that claimant suffered a contusion and strain to her left knee and injury to her back in the auto accident. He opined that claimant had fully recovered from the January 2003 work injury, but that she continued to suffer from the injuries sustained in the auto accident.

The Workers’ Compensation Judge granted claimant a closed period of disability, finding that claimant had sustained her burden of proving a work injury to her left knee from which she had fully recovered as of April 16, 2004.

Both parties appealed. The Workers’ Compensation Appeal Board vacated the WCJ’s decision, in part. The WCAB noted that if claimant’s accident had occurred while en route to treatment for the work injury, injuries sustained in that accident would be compensable provided claimant met her burden of proof. Because the injuries sustained in the auto accident were separate and apart from her work injury of January 16, 2003, claimant had the burden of

establishing each element of her claim for compensation for the injuries suffered in the auto accident. The WCAB remanded the case to the WCJ to make "all necessary findings."

On remand, the WCJ found that claimant's injury should be expanded to include the injuries resulting from the September 2003 auto accident.

Employer appealed arguing that, because claimant never notified employer that the injuries she suffered in the auto accident were work-related, adequate notice had not been given. The WCAB agreed, noting that the record was devoid of any evidence to establish that claimant had notified employer that she suffered an additional work injury during the 120-day period after the accident. The decision of the WCJ was reversed.

Claimant then sought review by the Commonwealth Court. Claimant argued that notice was not required. She maintained that because she had provided employer with notice of the January 2003 injury, no further notice was required.

The Court disagreed. "Aggravation of a pre-existing condition" is deemed to be a new injury for workers' compensation purposes. It is well established that the claimant bears the burden of proving each element to support an award of compensation. Notice under §311 of the Act is one such element. Where notice of a work injury is not given within 120 days of its occurrence, the claim for compensation must be denied.

Here, claimant based her entire case on the contention that she was not recovered from the January 2003 work injury. She did not present the evidence necessary to establish a second injury in September of 2003. Consequently, she did not meet her burden of proof and was not entitled to a finding of ongoing compensable disability.

The decision of the WCAB

was affirmed.

Robert Reyes v. Workers' Compensation Appeal Board (AMTEC), No. 643 C.D. 2008, Filed March 16, 2009.

(Litigation Costs—Where claimant does not prevail on any issue in dispute, litigation costs are properly denied.)

Claimant, a cable technician, was involved in a work-related motor vehicle accident on April 26, 2006. Shortly thereafter, he filed a claim petition alleging that he sustained injuries consisting of a T5 compression fracture, headaches, and pain in his low back, mid back, upper back and neck. Claimant alleged that he was totally disabled as a result of his injuries on and after April 26, 2006.

Employer issued a Notice of Denial acknowledging that claimant sustained a work injury but denying that he was disabled as a result. Employer also filed an answer to the claim petition denying all of the claimant's allegations.

At the outset of the first hearing, employer explained that it was not disputing that claimant sustained an injury in the accident, but was contesting the extent of his alleged disability, specifically the alleged compression fracture. Further, employer contested claimant's assertion that his loss of earning power was caused by the accident.

Claimant testified that when he called his supervisor to report the accident, he was fired over the phone because he was "too much of a liability." He also testified that he met with his supervisor the week after the accident, at which time he was told that the accident did not cause his discharge, but rather he was fired because he failed to disconnect cable service at three locations as he had reported.

Claimant presented testimony

from Dr. Stempler, who first saw claimant on June 2, 2006. He diagnosed claimant with a cervical, thoracic and lumbar sprain/strain, as well as a mild compression fracture, all caused by the work accident. Dr. Stempler testified that while claimant was unable to perform his time of injury job, he was able to perform light or sedentary duty work.

In response, employer presented testimony from Dr. Noble, who performed an IME on November 1, 2006. Dr. Noble opined that claimant may have sustained soft tissue injuries to the cervical, thoracic and lumbar areas, but he was fully recovered by the time of the IME and could then perform his regular duty job.

Employer also presented testimony from claimant's supervisor. He denied firing claimant on the day of the accident, but rather fired him for submitting false billing, which he learned of on April 29, 2006, three days after the accident.

The Workers' Compensation Judge granted claimant's claim petition for a closed period, but only with respect to medical benefits. The WCJ noted that the parties agreed that claimant had been in a work-related motor vehicle accident and that the only issue in controversy was in the nature of the injury and extent of disability. The WCJ accepted the testimony of employer's witnesses as credible. As such, the WCJ found that claimant's disability related to his termination for cause for falsifying work orders and billing for work that was not completed. Thus, the WCJ found that claimant's loss of earnings as of April 29, 2006 was caused by claimant's willful misconduct and not by his work injury. The WCJ denied costs because claimant failed to prevail on the issues in controversy, i.e., "the nature of claimant's injury and extent of disability."

Claimant appealed and the Workers' Compensation Appeal Board affirmed.

Before the Commonwealth

Court, claimant argued that he was entitled to reimbursement for litigation costs because he was successful, in part, before the WCJ.

The Court noted that, under §440(a) of the Act, a claimant must prevail on the contested issue in order to be awarded litigation costs. The Court rejected claimant's argument that he prevailed on a contested issue because the claim petition was granted. The WCJ specifically found that the contested issues in the case were the nature of injury and extent of disability. The employer acknowledged the occurrence of the accident. The employer did not dispute that claimant sustained the injuries as found by Dr. Noble, i.e., a soft tissue strain/sprain to his neck, mid back and low back. These were the injuries found to have been sustained by the WCJ. The WCJ rejected claimant's allegation that he suffered headaches or a compression fracture as a result of the injury. Claimant also failed to prevail on the issue of disability because the evidence showed his loss of earnings was due to his misconduct and was not the work injury.

Because claimant did not prevail on any issue in dispute, the WCJ properly denied claimant's request for litigation costs. The order of the WCAB was affirmed.

Denise M. Liveringhouse v. Workers' Compensation Appeal Board (ADECCO), No. 1639 C.D. 2008, Filed March 19, 2009.

(Medical Determinations—A WCJ is not competent to make independent medical determinations, but rather must base his decision upon proffered medical evidence of record.)

(Repetitive Injury—Carpal tunnel syndrome is a condition that arises as a classic cumulative trauma or repetitive stress injury that may result from use of the hands in a variety of job settings, and is not limited to cases

involving use of significant vibratory tools over long periods.)

Claimant suffered a work injury on October 4, 2005, which was acknowledged as "right shoulder pain."

Claimant was examined by Dr. Kozakiewicz on February 23, 2006. Based upon his opinion, employer filed a termination petition on March 22, 2006. Employer also filed a suspension petition on March 31, 2006, alleging that a specific job was offered to claimant as of March 27, 2006.

During the litigation of employer's petitions, claimant filed a review petition seeking to expand the description of her injury to include cervical and shoulder strains, as well as carpal tunnel syndrome. Employer stipulated that the injury should be amended to include cervical and shoulder strains, but contested the carpal tunnel syndrome as work-related.

Claimant testified before the Workers' Compensation Judge that she worked full time as a window sash cleaner. As such, she worked with frames or sashes that did not have glass, but which had leftover welds in the inside corners. She would clip the inside corners with spring-loaded pliers. She did 700 to 800 units per day.

Claimant also presented testimony from Dr. Molter, who had ordered an EMG and nerve conduction studies. Dr. Molter testified that the diagnostic tests revealed severe bilateral median nerve compression and mild to moderate ulnar neuropathy at the level of the right wrist. Dr. Molter stated that he did not believe claimant's carpal tunnel syndrome was related to her employment, but did feel that her shoulder and cervical strain were related. Finally, Dr. Molter stated that the claimant was capable of returning to work without restrictions effective February 16, 2006.

Dr. Kozakiewicz also testified that claimant's bilateral carpal tunnel syndrome as diagnosed by the EMG was not work-related

because the motions that she performed at the time of her injury would not cause carpal tunnel syndrome. Dr. Kozakiewicz would not offer an opinion as to whether claimant's continuous job duties caused claimant's carpal tunnel syndrome. Dr. Kozakiewicz noted that his findings on exam were normal and he opined that claimant had fully recovered as of the date of his examination.

Claimant then presented testimony from Dr. Evans. He diagnosed claimant with cervical strain, thoracic strain, degenerative disc disease and carpal tunnel syndrome. He testified that claimant's repetitive use of pliers caused her to develop carpal tunnel syndrome.

The WCJ accepted Dr. Kozakiewicz' opinion that claimant had fully recovered and Dr. Molter's opinion that she could resume work without restriction as of February 16, 2006. The WCJ did not credit Dr. Evans' opinion because he relied upon claimant's subjective complaints and her statements concerning her use of pliers that involved twisting. The termination petition was granted in lieu of a suspension, and claimant's review petition was dismissed.

The Workers' Compensation Appeal Board affirmed, concluding that the WCJ's findings were supported by substantial competent evidence.

On appeal to the Commonwealth Court, claimant argued the medical evidence supporting her allegation of work-related carpal tunnel syndrome was ignored. The Court agreed. Contrary to the opinions of all three doctors, the WCJ derived his own medical opinion of "no clinical corroboration for the EMG findings," and hence no proof of claimant's symptoms. The Court stated this was error, noting that it is well established that a WCJ is not competent to make independent medical determinations.

Dr. Kozakiewicz clearly stated that he was limiting his opinion as

to the claimant's development of carpal tunnel syndrome to the work injury of October 4, 2005 and would not render an opinion as to whether or not claimant's repetitive work duties could have caused carpal tunnel syndrome.

Dr. Molter testified that, in his opinion, carpal tunnel syndrome is only caused by the use of significant vibratory tools over long periods. The Court noted that this is contrary to Pennsylvania law. Thus, Dr. Molter's opinion may not be used as a basis to deny claimant's review petition.

Finally, Dr. Evan's testimony unequivocally indicates that claimant's carpal tunnel syndrome was caused by her job duties. The WCJ found Dr. Evan's opinion to be equivocal. Although he stated that her job duties would "likely" cause carpal tunnel syndrome, a doctor's testimony must be viewed as a whole and a determination of whether it is unequivocal should not rest on a few words taken out of context.

Given the multiple errors committed by the WCJ and the WCAB, the Court remanded the case for a re-determination based upon a proper application of the law.

James Fox, Jr. v. Workers' Compensation Appeal Board (Peco Energy Company), No. 1774 C.D. 2008, Filed March 23, 2009.

(Subrogation—The right to subrogation is absolute, even where the third-party tortfeasor is a governmental entity.)

Claimant suffered a right ankle injury on April 1, 2003. A Notice of Compensation Payable was issued and employer ultimately paid \$47,813.79 in workers' compensation indemnity and medical benefits.

Claimant brought a civil action against the City, claiming that his injury was due to the City's negligence. Eventually, claimant and the City entered into a settlement

agreement which paid claimant \$150,000 in damages. Additionally, the City agreed to indemnify claimant for any subrogation he might have to pay to employer. Finally, the City agreed to represent claimant with regard to any subrogation claim brought by employer.

Employer subsequently filed a review petition, maintaining that it was entitled to recover its subrogation lien under §319 of the Act. Before the Workers' Compensation Judge, claimant argued that employer could not recover its lien given §23 of Act 44, which provides:

"The Commonwealth, its political subdivisions, their officials and employees acting within the scope of their duties shall enjoy and benefit from sovereign and official immunity from claims of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits."

The WCJ found that under §319 of the Act, employer had a right to subrogation because employer was not attempting to file an action directly against the City and, thus, immunity did not apply. The Workers' Compensation Appeal Board affirmed, noting that §23 of Act 44 did not excuse a claimant for his obligation under §319 to reimburse an employer for workers' compensation paid when a claimant received compensation from a governmental tortfeasor.

Claimant then sought review by the Commonwealth Court, which noted that an employer has an absolute right to subrogation. The rationale underlying the right to subrogation is to prevent: 1) a claimant from receiving a double recovery for the same injury; 2) an employer from making payments for injuries that were the result of a third-party's negligence; and 3) the third-party from escaping liability.

Section 23 of Act 44 does not

make a governmental employer immune from subrogation. All that §23 of Act 44 does is provide governmental agencies with immunity from claims that failed in order to protect an employer's subrogation claim. Because the employer here was seeking subrogation from claimant for the \$150,000 he received from the City, not from the City itself, §23 does not foreclose employer from enforcing its §319 reimbursement rights.

The WCJ properly found that claimant was required to reimburse his employer for the workers' compensation benefits it paid. The reimbursement was properly ordered from the tort recovery claimant received from the City.

The order of the WCAB was affirmed.

Calex, Inc. and Inservco v. Workers' Compensation Appeal Board (Vantaggi), No. 1788 C.D. 2008, Filed March 26, 2009.

(Health Insurance Premiums—An employer's obligation for medical compensation does not include payment of premiums for a health insurance policy that covers any and all illnesses and injuries.)

In January of 2006, claimant was involved in an accident in California when the tractor trailer he was operating collided with a guard rail. Claimant reported the accident and returned to employer's terminal in Pennsylvania about one week later. Because he reported low back pain to his supervisor, claimant was referred to a panel physician, Dr. Stankowski, who took claimant off work for several days. Claimant then returned to work and continued making runs from Pennsylvania to California until late April 2006, when he was discharged for not reporting his whereabouts.

Claimant then filed a claim petition alleging an injury of January 14, 2006. He stated that he

did not have trouble working until late March 2006 when he began to experience severe headaches which caused hallucinations. He claimed that, by April 2006, he was no longer capable of working.

Claimant sought treatment in California, New Jersey and Pennsylvania for headaches, low back problems, neck problems, numbness and psychosis resulting from a head injury.

He testified that part of his medical costs were paid by New Jersey Medicaid and part by the health insurance coverage provided through employer's group plan. After he stopped working, he continued his coverage through the employer sponsored plan. His COBRA premium for 10 months of coverage was \$3,986.18.

Both parties presented medical testimony to the Workers' Compensation Judge, who found claimant's evidence to be more credible and convincing. The WCJ thus granted claimant's claim petition and directed employer to reimburse claimant for his COBRA insurance premium payments in the amount of \$3,986.18.

Employer appealed and the Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal before the Commonwealth Court, employer argued that the WCJ erred by awarding claimant reimbursement of his premium payments for comprehensive health insurance coverage. The Court agreed.

The Workers' Compensation Act does not require an employer to reimburse an injured employee for health insurance premiums that a claimant utilizes to pay for work-related medical expenses while the claim is contested. Here, claimant's health insurance coverage covered all sickness and injury claims, which far exceeds the medical treatments provided to an injured employee under the Workers' Compensation Act. Employer is liable for the cost of medical treatments related to claimant's

work injury, and these costs may include claimant's co-payments and deductibles. The cost of insurance premiums, however, is not the employer's responsibility.

The decision of the WCAB was reversed.

Jesse Ostrawski v. Workers' Compensation Appeal Board (UPMC Braddock Hospital), No. 497 C.D. 2008, Filed March 26, 2009.

(Average Weekly Wage—Where claimant resigns his position with his time of injury concurrent employer to accept a higher paying second job, claimant is not entitled to have his potential wages from that higher paying job included in the calculation of his AWW.)

On April 8, 2004, claimant suffered a right foot fracture while working as a security guard for UPMC. At the time of his injury, he also worked full-time for Am Gard.

In June 2004, claimant anticipated that he would be starting a new second, higher paying job with Leonard Security on July 25, 2004. As such, he tendered his resignation with Am Gard to be effective July 24, 2004. Due to a contracting issue that Leonard had with a third party, claimant did not start work with Leonard as expected.

Claimant continued working through September 14, 2004, at which time he underwent surgery relative to the work injury. Leonard then requested that claimant begin working on October 13, 2004. Claimant was unable to comply with that request because he had not yet been released to return to work following surgery.

Claimant subsequently filed a petition to review his compensation benefits alleging that employer failed to include earnings from his concurrent employment when calculating his average weekly wage. Claimant also filed a penalty petition asserting em-

ployer knew he had concurrent employment and violated the Act by failing to include his wages from that employment in its average weekly wage calculation. Finally, claimant filed a modification petition asserting he had an increase in loss of earning power as of October 14, 2004 because he could not perform the work which had then become available at Leonard.

The Workers' Compensation Judge granted claimant's review and modification petitions and imposed a twenty (20%) percent penalty based upon the conclusion that employer violated the Act by not including claimant's concurrent wages in making its calculations. The WCJ denied claimant's request for unreasonable contest counsel fees.

Claimant appealed to the Workers' Compensation Appeal Board, which reversed the WCJ's grant of claimant's review and modification petitions, but affirmed the WCJ's conclusion that employer had violated the Act by not including claimant's concurrent wages in the AWW calculation. However, since the WCJ's penalty was calculated based on the WCJ's grant of the review and modification petitions, the case was remanded to the WCJ to reconsider the award of penalties.

On remand, the case was assigned to a different WCJ. Despite finding employer committed a technical violation of the Act, the second WCJ concluded that no penalties were warranted. The WCAB affirmed.

Claimant appealed to the Commonwealth Court, arguing that the WCAB erred in failing to consider the higher paying wages he would have earned at Leonard as wages from concurrent employment. The Court was not persuaded.

When claimant resigned his position with Am Gard, that position no longer provided him with concurrent wages. The employment Leonard offered, which was the reason claimant terminated his

employment with Am Gard, did not occur before or at the time of injury. Hence, Leonard may not be considered a concurrent employer. The WCAB did not err with regard to its conclusion that the position claimant had with Leonard did not constitute a basis to include potential wages from that employment in calculating claimant's AWW.

The order of the WCAB was affirmed.

City of Philadelphia v. Workers' Compensation Appeal Board (Grevy), No. 924 C.D. 2008, Filed March 27, 2009.

(Disability Pension Offset—Where pension benefits are paid in lieu of workers' compensation, employer is only entitled to offset to the extent it funded the pension benefits, not for the entire amount of the pension benefits paid to claimant.)

While employed as a correctional officer, claimant sustained various stab wounds on August 2, 1999. He was unable to return to work.

Employer continued paying claimant his regular wages in lieu of workers' compensation until February 19, 2001, when claimant was separated from his employment due to his injuries. Thereafter, employer began paying claimant total disability workers' compensation benefits at the rate of \$506.07 per week.

Claimant then applied for service-connected disability pension benefits. As a part of the process, claimant agreed that employer would be entitled to an offset or credit against any award of workers' compensation benefits for pension benefits paid.

Claimant's pension application was granted. His pension benefits were made retroactive to the date of his separation. He then began receiving \$496.86 per week in pension benefits, which was less than he received in workers' com-

pensation benefits. After claimant was awarded pension benefits, employer ceased paying workers' compensation benefits to claimant.

Claimant filed numerous petitions seeking reinstatement of his workers' compensation benefits and penalties. Employer also filed a modification petition seeking an offset against claimant's workers' compensation benefits for the service-connected disability pension benefits that were paid.

The Workers' Compensation Judge concluded that employer's payment of service-connected disability pension benefits was in lieu of workers' compensation and that employer was thus entitled to a dollar for dollar offset against workers' compensation for the pension benefits paid. The WCJ also concluded that employer violated the Act by ceasing payment of claimant's benefits without a supplemental agreement, final receipt, notice or order from the Bureau. Penalties and unreasonable contest counsel fees were awarded, as was the employer's modification petition.

Claimant appealed to the Workers' Compensation Appeal Board arguing that the WCJ erred in granting employer a dollar for dollar offset when Section 204(a) of the Act only permits an employer an offset to the extent that employer funded such benefits. The WCAB agreed, and remanded the case to the WCJ to determine the amount of the offset to which the employer was entitled.

On remand, employer presented testimony of an actuary who stated that he had calculated employer's contribution rate to claimant's pension plan as 73.149%. The WCJ found the actuary to be credible and concluded that employer was entitled to a 73.149% offset.

Claimant appealed, arguing that the WCJ erred in relying upon the actuary's testimony because the actuary failed to consider the effect of contributions made to the pension plan by the Common-

wealth under Act 205. Employer appealed contending that the WCJ erred in failing to award a dollar for dollar offset. The WCAB found the actuary's testimony to be sufficient and affirmed the WCJ's decision.

Employer then appealed to the Commonwealth Court, arguing that the WCJ correctly found that employer was entitled to a dollar for dollar offset for the pension benefits paid, inasmuch as those benefits were essentially paid in lieu of workers' compensation.

The Court disagreed. Section 204(a) was intended to prohibit employers from utilizing an employee's own pension fund contributions to satisfy its workers' compensation obligations.

Here, employer was entitled to an offset for the service-connected disability pension benefits that it paid to claimant, but only to the extent it funded those benefits. Because this case involved a defined benefit plan, credited actuarial testimony is legally sufficient to establish the extent of the employer's funding for offset purposes.

The WCAB did not err in affirming the WCJ's decision granting employer an offset of 73.149% of the pension benefits paid to claimant.

Ford Motor/Visteon Systems v. Workers' Compensation Appeal Board (Gerlach), No. 1944 C.D. 2008, Filed April 1, 2009.

(Impairment Rating Evaluation—When employer pursues a modification to partial disability through the traditional administrative process, the effective date of the modification is the date of the IRE, not the date of the WCJ's decision nor 60 days thereafter.)

Claimant suffered a work-related injury on February 28, 2001. On December 14, 2006, employer filed a Modification Petition seeking to convert claim-

ant's benefits status from total disability to partial disability based on a 19% impairment rating calculated by Dr. Naftulin, who examined claimant on August 24, 2006.

The Workers' Compensation Judge granted employer's petition and changed claimant's disability status from total to partial disability effective August 24, 2006.

The Workers' Compensation Appeal Board affirmed, but found that claimant was not adjudicated to have an impairment rating of less than 50% until the date of the WCJ's decision, October 31, 2007. Thus, the WCAB found that claimant's benefits should be modified as of December 30, 2007, sixty days from the date of the WCJ's decision.

Employer sought review by the Commonwealth Court, arguing that the WCJ was correct in finding that the claimant's benefit status should be modified as of the date of the impairment rating evaluation (IRE).

The Court noted that subsections (1) and (2) of §306(a.2) of the Act provide for a self-executing, automatic modification of benefits when the employer requests an IRE within sixty days after the claimant receives 104 weeks of total disability.

The Court further noted that an employer who does not comply with the 60-day time frame is not forever barred from requesting that a claimant submit to an IRE at a later time. Subsections (5) and (6) of §306(a.2) of the Act permit an employer to request that a claimant submit to an IRE although the results are not self-executing. Rather, the employer must proceed through the traditional administrative process by filing a Modification Petition.

While §306(a.2)(2) provides that a claimant's benefits shall not be reduced to partial until a claimant is given 60-days notice of the modification, that subsection applies only where the employer seeks to obtain self-executing relief by requesting a claimant to

submit to an IRE within the applicable time frame after claimant receives 104 weeks of total disability benefits.

Further, while Section 123.105 (d)(2) of the Regulations require that a claimant be given 60 days notice prior to his benefits being modified, the Regulation is applicable only where the employer is seeking automatic relief. Thus, it is not applicable in cases brought under subsections (5) and (6) of §306(a.2) of the Act.

Consequently, when an employer pursues a modification to partial disability through the traditional administrative process, the effective date of the modification is the date of the IRE physician's examination, not the date of the WCJ's decision or 60 days thereafter.

The decision of the WCAB was reversed and the WCJ's determination that claimant's benefits were modified as of August 24, 2006 was reinstated.

Rogele, Inc. v. Workers' Compensation Appeal Board (Mattson), No. 1206 C.D. 2008, Filed April 2, 2009.

(Incarceration—The Act does not permit the unilateral discontinuance of benefits for periods of incarceration prior to conviction.)

Claimant, who had worked as a laborer when he sustained a fractured wrist in 2003, was receiving partial disability benefits in 2005.

On October 13, 2005, claimant was incarcerated without bail in the Cumberland County Jail on charges that he solicited the murder of his wife. Employer stopped paying benefits to claimant on and after September 30, 2005.

On October 20, 2005, employer petitioned to suspend benefits on the basis that claimant voluntarily withdrew from the workforce. In a letter to the Workers' Compensation Judge, employer enclosed an order from the Court

of Common Pleas of Cumberland County whereby claimant pled guilty to criminal solicitation. Employer requested that the WCJ hold the record open so that employer could submit the sentencing order which was due on August 1, 2006. On August 15, 2006, claimant was sentenced to 4 to 8 years of imprisonment.

The WCJ ordered employer to pay partial disability benefits from September 30, 2005 until claimant's conviction, ordered employer to pay unreasonable contest counsel fees, and ordered employer to pay a 50% penalty. The WCJ reasoned that §306(a.1) of the Act provides that disability compensation is not required following a conviction; however, the Act does not authorize the cessation of benefits because a claimant is incarcerated pending a trial.

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

Employer then sought review by the Commonwealth Court, arguing that §306(a.1) does not preclude a suspension of benefits during incarceration prior to conviction where the injured worker voluntarily removes himself from the workforce. The Court disagreed with the employer's interpretation of the Act.

Section 306(a.1) clearly states: "Nothing in this Act shall require payment of compensation under clause (a) or (b) for any period during which the employe is incarcerated after a conviction..." The Act makes no reference to a termination or suspension of benefits during periods of incarceration prior to conviction. Because the Legislature clearly intended the discontinuance of benefits for an incarcerated recipient only after conviction, the Court will not attempt to re-write the statute to support a suspension of benefits prior to conviction.

The Court also rejected employer's argument that claimant voluntarily removed himself from the workforce by soliciting the

murder of his wife. The Court noted that an accused is presumed innocent until proven guilty. Thus, it does not necessarily mean that pretrial incarceration is the equivalent to “voluntarily” removing oneself from the workforce. If that were true, an injured employee’s entitlement to benefits prior to conviction would turn on the ability to post bail.

The order of the WCAB was affirmed.

Henkels & McCoy, Inc. and Liberty Mutual Insurance Company v. Workers’ Compensation Appeal Board (Barner), No. 1396 C.D. 2008, Filed April 15, 2009.

(Supersedeas Fund Reimbursement—Retroactive payments made after an improper cessation of benefits, whether made voluntarily or pursuant to an Order, are not reimbursable from the Fund.)

Claimant suffered a work injury on February 19, 2001. A Notice of Compensation Payable was issued, and employer’s insurer commenced payment of benefits.

On September 11, 2001, claimant returned to work without a loss of wages. Insurer suspended benefits as of that date, believing claimant signed a supplemental agreement.

On March 8, 2005, claimant filed a penalty petition alleging that his benefits were illegally suspended and that he had been laid off by employer.

Unable to locate a signed supplemental agreement, insurer voluntarily resumed weekly benefits on April 12, 2005. Thereafter, insurer learned that claimant had been fired on September 13, 2001 for failing a mandatory drug test.

On June 30, 2005, employer filed a petition to suspend benefits as of September 11, 2001 and requested supersedeas based: 1) on claimant’s return to work at no loss of earnings and 2) on his discharge for cause.

The Workers’ Compensation Judge granted the penalty petition and imposed a 50% penalty along with counsel fees for unreasonable contest. Additionally, the WCJ granted the suspension petition.

Employer then sought reimbursement from the Fund in the amount of \$95,453.64, representing all disability payments made to claimant from the date of the request for supersedeas on June 30, 2005 through the granting of the suspension petition on August 18, 2006. This sum included the retroactive payments made on August 23, 2005 to cover the period of benefits due from September 13, 2001 through April 12, 2005. In response, the Bureau offered reimbursement of \$26,248.59, which included benefits paid from the date of its request until suspension was granted but excluding the retroactive payment.

The matter was brought before WCJ Bloom who found that employer had stopped paying benefits to claimant without filing a supplemental agreement or pursuant to a WCJ’s order. As such, the WCJ concluded that under Robb, Leonard & Mulvihill v. Workers’ Compensation Appeal Board (Hooper), 746 A.2d 1175 (Pa.Cmwlth. 2000), the retroactive payments made after the violation of the Act were not reimbursable from the Supersedeas Reimbursement Fund. The WCAB affirmed the WCJ’s decision, noting that insurer’s lump sum payment to claimant was not attributable to a denial of supersedeas, but rather to the wrongful cessation of benefits prior to litigation.

Before the Commonwealth Court, employer and insurer argued that Hooper did not apply inasmuch as, in Hooper, the employer made retroactive payment only after being ordered to do so by the WCJ and, further, the employer in Hooper admitted that penalties had been properly assessed against it. Here, insurer made payment of its own volition

prior to the decision on the penalty petition. Further, employer and insurer never admitted that penalties were properly assessed. Insurer ceased payments due to its good faith belief that a supplemental agreement was signed when claimant returned to work. Also, claimant wrongfully obtained benefits from a blameless carrier.

The Court was not persuaded, noting that Hooper is directly on point. Reimbursement is appropriately denied for a lump sum payment attributable to a time period during which benefits were halted in violation of the Act. The Act does not give the employer the right of self-help, i.e., the right to ignore the requirements of the Act.

The proper course of action upon claimant’s return to work would have been to file a suspension or termination petition along with a request for supersedeas. Employer and insurer did not follow that course of action and instead halted benefits without an agreement or order in place. The lump sum payment was not made in response to a denial of supersedeas, but rather was made as a result of insurer’s wrongful withholding of benefits.

The decision of the WCAB was affirmed.

Timothy Diehl v. Workers’ Compensation Appeal Board (IA Construction and Liberty Mutual Insurance), No. 1507 C.D. 2007, Filed April 22, 2009.

(Impairment Rating Evaluation—Modification—An employer need not prove both earning power and level of impairment to effect a change in the claimant’s disability status; an employer is free to prove one or the other.)

Claimant suffered a work injury on May 24, 1999. By May 24, 2001, claimant had collected total disability benefits for 104 weeks; however, employer did not request the Bureau of Workers’

Compensation to designate a physician to perform an IRE until April 4, 2002, long after the 60-day window had passed.

Ultimately, Dr. Wolk did the IRE on November 8, 2002 and concluded that claimant had an impairment rating of 28 percent.

At the time, the law was still uncertain and employer tried to effect a unilateral change in claimant's benefit status from total to partial based on Dr. Wolk's report. Claimant challenged employer's action and, given the Supreme Court's decision in Gardner v. WCAB (Genesis Health Ventures), 585 Pa. 366, 888 A.2d 758 (2005), employer abandoned its efforts. In Gardner, the Supreme Court clarified that an employer cannot effect a unilateral change in a claimant's disability status if it requests an IRE outside the 60-day window.

Employer then filed a modification petition for the purpose of effecting a change in claimant's benefit status from total to partial disability, but not for effecting a reduction in claimant's compensation benefits.

The Workers' Compensation Judge concluded that employer proved that claimant was impaired

to the level of 28% given Dr. Wolk's IRE report. The WCJ, however, believed that employer was also required to prove the availability of suitable work for claimant, either by labor market survey or by actual job referrals.

The Workers' Compensation Appeal Board reversed, noting that employer sought a change in disability status, not a change in compensation amount. Thus, the WCAB reasoned that employer did not have to present evidence of job availability.

Claimant then sought review by the Commonwealth Court asserting that, where the employer makes an IRE request more than 60 days after the claimant's collection of 104 weeks of total disability, the employer must present evidence of job availability. Originally, the Commonwealth Court agreed with claimant. Soon thereafter, the Court granted reargument and vacated its original order.

After reconsidering the arguments, the Court has now held that, under the Workers' Compensation Act, an employer seeking to change a claimant's benefit status using results of an IRE requested

outside the 60-day window must obtain an agreement from the claimant or an adjudication that the claimant's condition improved to an impairment rating of less than 50 percent. Proof of job availability is not required.

Section 306(a.2)(2) of the Act instructs that if a claimant is found to have an impairment equal to or greater than 50%, then he or she is presumed to be totally disabled. If the impairment rating is less than 50%, then the claimant's *status* changes to one of partial disability. Despite the change in status, the claimant continues to receive benefits at the total disability rate. The claimant is then, however, limited to 500 weeks of compensation, as is the case for all persons with a partial disability status, regardless of the reason therefore.

The timing of the IRE request affects *how* the claimant's change in disability status will be effected. If the IRE is requested within the 60-day window, an employer may take advantage of the "self-executing" provisions in §306(a.2) (2) and unilaterally change the claimant's disability status. On the other hand, if the request is made after the 60-day window, the employer must obtain approval of a WCJ to effect a change in the claimant's benefit status. In Gardner, the Supreme Court established that, to obtain this approval, the employer must establish an impairment rating "*via the traditional administrative process.*"

Here, the Court defined the traditional administrative process as more than the mere filing of a modification petition. Instead, the parties must litigate the merits of an IRE modification petition before the WCJ as they would any other petition. Evidence of earning power, however, is not required. To require proof of both a claimant's level of impairment and a claimant's earning power would render the IRE provisions meaningless.

The decision of the WCAB was affirmed.

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(Continued from page 1)

7, 2005); and, (2) the traditional “50% of the net” rule for settlements was validated and, therefore, in the absence of a court order specifically allocating the plaintiff’s proceeds, the DPW is entitled to up to 50% of the net proceeds of any settlement to satisfy reimbursement.

Upon analyzing the *Tristani* opinion in great detail, the important question becomes: What effect will *Tristani* have on personal injury litigation going forward? Despite its sweeping and controversial holding, *Tristani* most likely will not alter the way personal injury cases are handled. First, the *Tristani* court merely issued an interlocutory opinion, which did not include an injunction, declaratory judgment or order invalidating the lien statute. Therefore the provision of Pennsylvania state law permitting liens (62 P.S. §1409) is still enforceable. Second, the *Tristani* case was disposed of on “dueling” summary judgment motions filed by the plaintiffs and defendants which have been appealed. Accordingly, it could take years to finally resolve the litigation in the Third Circuit. In the interim, with the Pennsylvania lien statute still in full force and effect, DPW will cautiously ignore the *Tristani* holding and continue to assert and collect on its liens as usual.

In fact, DPW has already issued a public statement regarding its interpretation of *Tristani*, and how it plans to move forward in light of the opinion. DPW has written a letter to plaintiffs’ attorneys advising them of their clients’ rights. The letter acknowledges the *Tristani* opinion but notes that DPW does not consider the *Tristani* opinion to be binding in any respect. In the meantime, until the Third Circuit Court of Appeals resolves the issue, DPW, in light of *Tristani*, will give plaintiffs in per-

sonal injury actions the following options:

(1) A plaintiff may voluntarily agree to protect DPW’s interest in any recovery, award, settlement or judgment; (2) if a plaintiff refuses to voluntarily protect the DPW’s interest, the plaintiff must strictly comply with the notice requirements of 62 P.S. §1409(b) voicing their objection [DPW will then evaluate the case and determine if it wants to personally intervene in the litigation, thereby allowing DPW to contract with outside counsel to address the matter further. If DPW acknowledges the objection and chooses not to intervene, the claim is labeled “disputed” (all claims are disputed unless plaintiff’s attorney specifically followed the procedures for excluding medical expenses paid by Medicare from the plaintiff’s case) and upon resolution of the case through judgment, award or verdict, the plaintiff must deposit the gross amount to DPW’s monetary claim into an interest bearing escrow account pending resolution of *Tristani*. DPW should receive periodic statements from this escrow account, and the lawyer is not permitted to deposit the disputed amount into his usual IOLTA account.]; (3) if a plaintiff’s case has already settled, the plaintiff’s lawyer can negotiate a voluntary resolution of DPW’s monetary claim despite the *Tristani* holding; or (4) if the case has already settled, the plaintiff’s lawyer, may assert whatever rights he or she believes his or her client has under *Tristani*, as long as the notice requirements of 62 P.S. §1409(b) are obeyed. [At that point, DPW will evaluate the case and determine whether it will file a post-settlement intervention motion as authorized by *Jordan v. Western Pennsylvania Hospital*, 961 A.2d 220 (Pa. Cmwlth 2008).]

Tristani also presents a burden to defendants and their insurers:

unless plaintiffs voluntarily resolve the claim with DPW, tort defendants and their insurers remain exposed to liability to DPW. Nor will insurers be protected from liability to DPW if they allow claimants’ counsel to escrow the amount of DPW’s claim. Under 55 Pa. Code §259.4(d), plaintiffs have no authority to release claims for medical expenses paid by Medicaid without DPW’s consent. DPW has a seven-year statute of limitations to sue, which is generously extended if notices required by law are not given. Furthermore, DPW has chosen not follow *Tristani*’s holding on the capitation fee issue. The *Tristani* court held that the plaintiffs lacked standing to pursue the capitation fee issues, so the discussion of that issue in the opinion is merely dicta, i.e., non-precedential and ultimately not binding. DPW will await an adverse precedential decision from the Third Circuit before changing its claim computation practices.

The implication that *Tristani* will have on workers compensation cases is unknown but it is something to be concerned about. Ironically, *Tristani* specifically dealt with personal injury lawsuits and many commentators are perplexed as to what effect *Tristani* will have even in that regard. However, it is clear that workers’ compensation claims, while statutorily regulated, are civil claims in the nature of personal injury. The opinion will be appealed to the Third Circuit, which means many more years of litigation will occur before the issue is finally resolved. Until then, the Pennsylvania statute permitting DPW liens is still in full force and effect. With that said, it is important for both claimants and employers/insurers to carefully weigh their options when it comes to voluntarily satisfying or disputing a DPW lien, at least until the ultimate effect of *Tristani* has been confirmed.

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