



To “Pre-Certify” or Not to “Pre-Certify?” That is the Question.

Section 306(f.1)(1)(i) of the Act mandates that an employer is obligated to pay all reasonable and necessary medical expenses arising from the claimant’s work injury. In 2002, the Commonwealth Court in McLaughlin v. WCAB (St. Francis Country House)¹ held that an employer violates its obligation under §306 (f.1)(1)(i) if it fails to “pre-certify” or “pre-authorize” medical treatment. The court instructed that if an employer questions the reasonableness or necessity of the treatment for which pre-certification is requested, it should seek an agreement, supersedeas, or a prospective utilization review; otherwise, the employer may be subject to penalties for unilaterally ceasing medical benefit payments.

In McLaughlin, the claimant sustained a lower back injury while in the course of his employment as a maintenance mechanic. Following treatment, it was recommended that the claimant undergo a lumbar laminectomy. He was referred to a doctor who scheduled the surgery but, on the eve of the procedure, the employer’s insurance carrier denied pre-approval. The claimant filed a request for prospective utilization

review, as well as a petition for penalties. The WCJ found that the claimant had not fully recovered from the work injury, and that the treatment was reasonable and necessary. The WCJ also assessed a penalty on employer for refusing to authorize the scheduled surgery without challenging its reasonableness or necessity on a properly filed UR request. The employer appealed, challenging only the WCJ’s assessment of penalties.

The WCAB reversed, finding that §306(f.1) (5) of the Act only requires the employer to make payment for the treatment within 30 days after receiving bills from the provider, and that the employer has no obligation to pre-certify or pre-approve a treatment or seek a UR determination to dispute the reasonableness of the treatment.

On appeal to the Commonwealth Court, the employer argued that, under §306(f.1)(2) and (5), its duty to pay did not commence until it received the requisite medical bills and records from the provider. The Court found this argument “disingenuous” and reasoned

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COMMONWEALTH COURT CASE REVIEWS

Craig McLaurin v. Workers' Compensation Appeal Board (SEPTA), NO. 40 C.D. 2009, Filed June 5, 2009, Reported August 26, 2009.

(Psychological Injury—Where employer establishes that life-threatening situations occur with some regularity, claimant must prove by objective evidence that his psychic injury was not merely a subjective reaction to normal work conditions.)

Claimant was employed by Southeastern Pennsylvania Transportation Authority (SEPTA) for 6 months as a bus driver in West Philadelphia. Several hooded young men entered his bus without paying fares. At the end of the route, one of the men approached claimant with a gun. Believing that he was about to be shot, claimant pleaded with the gunman, who eventually put the gun away and disembarked. Claimant immediately drove to the bus depot, reported the incident, and never returned to work.

Claimant filed a claim petition seeking benefits due to work-related post-traumatic stress disorder, anxiety, chest pains/angina and impotence as a result of the incident.

In defense of the petition, SEPTA presented testimony of the individual who oversees the training of new employees and who worked as a SEPTA bus driver for 10 years. He explained that new bus drivers are advised to expect dangerous

passengers and are given training on how to deal with potential situations. The drivers are given codes to be used when radioing for help and the buses are equipped with a silent alarm.

Additionally, SEPTA's workers' compensation coordinator testified that their records establish that assaults on operators are not abnormal. Between June 1, 2005 and June 25, 2007 there were 106 assaults on bus drivers.

The Workers' Compensation Judge found that claimant did suffer post-traumatic stress disorder relative to the incident, and that he was prevented from returning to his position as a bus driver. The WCJ, however, also found SEPTA's witnesses to be credible on this issue of whether the experience of being accosted with a gun was an abnormal work condition. As such, the claim was denied.

The Workers' Compensation Appeal Board affirmed, noting that the incident could not be considered abnormal given the credited testimony of SEPTA's witnesses.

Claimant sought review by the Commonwealth Court, arguing that claims for psychic injury are fact sensitive and that for work conditions to be considered abnormal, they must be evaluated in the context of the specific employment. Claimant argued that the training offered by SEPTA did not address a potential assault with a firearm.

The Court disagreed. The Court noted that the WCJ painstakingly reviewed and summarized SEPTA's incident reports and noted that life-threatening situations occurred

with sufficient frequency to lead the WCJ to conclude that they were not abnormal working conditions for bus drivers.

Claimant had the burden to prove by objective evidence that his injury was not a subjective reaction to normal work conditions. He offered no proof that the incident represented something that a SEPTA bus driver could not anticipate. The claimant failed to meet his burden of proof.

The order of the WCAB was affirmed.



Pittsburgh Mercy Health System v. Bureau of Workers' Compensation, Fee Review Hearing Office (U.S. Steel Corporation), No. 2104 C.D. 2008, Filed May 29, 2009, Reported August 25, 2009.

(Application for Fee Review—Where provider submits bill in accordance with the Act, and employer pays only a portion of that bill, provider must then file a timely Application for Fee Review in order to challenge the denied charges.)

On November 21, 2006, provider billed employer in the amount of \$734,393.38 for services rendered to employer's injured employee. In support of the bill, provider mailed employer the documents required by §306(f.1)(2) of the Act, a detailed billing statement and claimant's medical records.

Employer informed provider that its "reprinter," MCMC, was auditing the charges. Employer and MCMC did not request additional documentation from provider.

On December 27, 2006, provider received an "Audit Summary" and "Explanation of Re-

view” (EOR) from employer, in which employer advised provider that part of its claim was denied. The EOR explained that the audit revealed a lack of documentation in the records to support some of the charges, but indicated that employer would pay \$499,375.26 for the approved services.

Provider then collected additional documentation to support the disputed charges and, on January 8, 2007, contacted employer to see if it would reconsider the denied charges.

CHANGES MADE TO WORKERS' COMPENSATION JUDGES' RULES

On October 17, 2009, amendments to the WC Judges' Rules took effect, including the Rules relevant to mandatory mediation conferences. Both parties are now subject to the imposition of sanctions if they : 1) fail to appear without prior approval of the WCJ; 2) fail to attend by teleconference as may be required by the WCJ; or 3) fail to have authority to accept, modify or reject settlement proposals offered at the mediation.

Possible sanctions against employers and insurers include the imposition of penalties and interest, as well as dismissal of pending petitions, closing the evidentiary record without accepting employer's evidence, and/or the denial of previously awarded supersedeas.

The moral of the story is: Be present (or readily available by phone) and be prepared to negotiate!!

Employer's representative advised provider to send the additional documentation, and provider did so. Between January 15, 2007 and March 15, 2007, provider followed up with various representatives of employer and MCMC. On March 15, 2007, a representative of MCMC advised provider that MCMC was declining to reprocess the claim because it had already been reviewed in a line-by-line audit.

On March 30, 2007, provider filed an Application for Fee Review, disputing the amount paid by employer. The Bureau denied the application as untimely. Section 306(f.1) (5) of the Act requires that a fee review application be filed no more than 30 days following notification of a disputed treatment, or 90 days following the original billing date of treatment. Provider appealed, and a hearing on the timeliness of the application was held before a hearing officer.

Before the hearing officer, provider maintained that it first knew that the claim was disputed on March 15, 2007. The hearing officer found this to be inconsistent with provider's letter of January 8, 2007 to employer submitting the additional documents to support the "denied line items." Additionally, the hearing officer did not believe that employer's representations and statements lulled provider into delaying its fee review application. Consequently, provider's appeal was denied and the application dismissed as untimely.

Provider then sought review by the Commonwealth Court, arguing that its application was timely because it was submitted within 30 days of

March 15, 2007, the date it received *final* notification that employer was disputing a portion of its claim. The Court was not persuaded.

Employer's obligation to pay was triggered by the November 21, 2006 bill; in fact, employer paid provider the undisputed portion of that bill. Provider then had standing to challenge the amount of the payment using the fee review process, but instead chose to seek additional payment outside the fee review process.

Accordingly, the Bureau's dismissal of the application as untimely was affirmed.



Equitable Resources v. Workers' Compensation Appeal Board (Thomas), No. 80 C.D. 2009, Filed September 2, 2009.

(Orthopedic Appliance—Defective Modifications—Where employer is obligated to pay for modifications to claimant's home to accommodate his needs resulting from his paraplegia due to work injury, employer is also obligated to pay for the repairs necessitated by the substandard construction of those modifications.)

Claimant sustained a work-related injury to his back in October of 1991. As a result, claimant is confined to a wheelchair, is unable to use his legs and suffers from bladder and bowel dysfunction.

Following the injury, employer made modifications to the bathroom in claimant's home to accommodate his injuries. The modifications were poorly done by the contractor hired by employer. A water leak caused damage to the bathroom and mold to form in the

walls and under the floor. Employer provided for subsequent repair work to be performed by the same contractor, but the leakage was not resolved. Claimant requested that employer provide for further repairs and employer refused.

Claimant then filed a Petition for Penalties. The Workers' Compensation Judge characterized the modified bathroom as an "orthopedic appliance" which employer is obligated to provide under §306(f.1)(1)(ii) of the Act, and to repair or replace. The WCJ held employer responsible for the repairs.

Employer appealed to the Workers' Compensation Appeal Board, arguing that it was only obligated to make a one-time payment to modify claimant's home to accommodate his confinement to a wheelchair. The WCAB disagreed and affirmed the WCJ's decision.

Before the Commonwealth Court, employer advanced the same argument which it had presented to the WCAB. Like the WCAB, the Court was not persuaded.

The Court agreed that the term "orthopedic appliance" in §306(f.1) includes modifications to a claimant's home to accommodate his use of a wheelchair. While the employer is only required to make a one-time expenditure to modify a claimant's home, employer is also liable for repairs to those modifications due to wear and tear, or due to inadequate workmanship.

Here, employer made modifications to claimant's bathroom to accommodate his work injuries. The modifications were negligently performed by the contractor. Claimant is not

seeking additional modifications, but is merely seeking to have employer repair the defects in the original modifications made by the contractor employer selected. The Court noted: "It would be unconscionable to hold that an employer could discharge its obligations under §306(f.1) by providing defective, negligently-made orthopedic appliances."

The order of the WCAB was affirmed.



Noreen Thompson v. Workers' Compensation Appeal Board (Cinema Center), No. 621 C.D. 2009, Filed September 24, 2009.

(Course and Scope of Employment—Where employer does not own parking lot but pays landlord a fee for maintenance of lot and the non-exclusive right to use the lot, employee injured in lot is injured in the course and scope of employment.)

An injury is compensable under the Workers' Compensation Act only if it is sustained in the course and scope of employment. Pursuant to §301(c) of the Act, in order for an injury to occur in the course and scope of employment, it must be sustained upon the employer's premises or while furthering the employer's business.

Here, employer is a movie theatre located in a strip mall. Employer owns the building that houses the theatre, but does not own the sidewalk or parking lot. Instead, the owner of the strip mall (landlord) owns that property. Employer pays landlord a fee for use and maintenance of "common areas" including the sidewalk

and parking lot. There are no assigned parking spaces. Employees and customers may park anywhere in the lot without charge.

Claimant, a ticket taker and usher, parked in the lot when she reported for work on February 12, 2007. After completing her shift, she left by the door closest to her car and walked out onto a concrete sidewalk that leads to the asphalt parking lot. An uneven area existed where the concrete met the asphalt. Claimant lost her footing at the uneven area, and fell onto her left side, suffering a severe injury to her left shoulder.

Claimant filed a claim petition. Employer denied that claimant sustained a work-related injury. Employer did not believe that the incident occurred on employer's premises and that, therefore, claimant was not injured in the course and scope of her employment.

The Workers' Compensation Judge found that the injury did occur on employer's "premises," a term which encompasses more than just the property owned by employer. The WCJ reasoned that claimant's presence on the sidewalk and parking lot was required by the nature of her employment and her injury was caused by a condition of the premises. The WCJ also concluded that employer had reasonably contested claimant's petition inasmuch as: "...the case law provides that certain specific factual findings are necessary to determine whether claimant's injury occurred while she was within the course and scope of employment." As such, the WCJ denied claimant's request for the imposition of unreasonable

contest counsel fees.

Claimant appealed the WCJ's conclusion that employer's contest was reasonable. The Workers' Compensation Appeal Board affirmed the WCJ's determination. Claimant then sought review by the Commonwealth Court.

The Court noted that the reasonableness of an employer's contest depends on whether the contest was prompted to resolve a genuinely disputed issue, which can be a legal or factual issue, or both. The sole issue before the WCJ was whether the area where claimant fell was, in fact, employer's "premises." Employer's evidence showed that its use of the common areas was not exclusive and that employer had no control over where its employees parked. These facts could support a reasonable conclusions that the incident did not occur on employer's premises.

The mere fact that employer leases or even owns a parking lot or garage where an employee is injured is not dispositive of the question of whether a parking area is part of the employer's "premises." Such a determination requires an examination of many other facts.

Here, although employer did not prevail, the record shows that there was a genuinely disputed issue as to whether the area where claimant fell was employer's "premises" under the Act. Thus, the WCJ and the WCAB did not err in concluding employer's contest was reasonable.

The order of the WCAB was affirmed.



Patricia Reutzel v. Workers' Compensation Appeal Board (Allegheny General Hospital), No. 448 C.D. 2009, Filed October 20, 2009.

(Partial Disability—500 Week Limitation—Claimant is not entitled to two consecutive 500-week periods of partial disability benefits due to two separate work injuries.)

While working as a registered nurse, claimant sustained a work-related shoulder injury on February 24, 1996. She subsequently returned to work at a loss of earnings due to restrictions on her activities. As such, she received partial disability benefits based on her reduced earnings.

On May 30, 1997, she sustained another injury to her low back, but continued to work under the same restrictions imposed upon her as a result of the 1996 injury.

In 2003, she underwent surgery for her back due to the 1997 injury and received total disability benefits of \$527 per week. Although her average weekly wage for the 1997 injury was the same as her average weekly wage at the time of the 1996 injury, her 1997 AWW yielded a higher weekly compensation rate. Three months after surgery, she returned to work with the same work restrictions and continued to receive partial disability benefits.

As of June 1, 2006, claimant received 500 weeks of partial disability benefits. Employer then stopped paying her benefits claiming that she was not entitled to further benefits under §306(b)(1) of the Act.

Claimant filed a petition seeking reinstatement of her benefits. Claimant maintained

that she received 500 weeks of partial disability benefits only for the 1996 injury and that she was entitled to another 500 weeks of partial disability benefits for the 1997 injury. In essence, claimant argued that her 500-week partial disability benefits were suspended until she exhausted 500 weeks of partial disability benefits for the 1996 injury.

The Workers' Compensation Judge was not persuaded. The WCJ determined that claimant's entitlement to partial disability benefits expired when she received 500 weeks of partial disability benefits after the 1997 work injury, not including the total disability benefits received after the 2003 low back surgery.

The Workers' Compensation Appeal Board affirmed the WCJ's decision stating: "The Act clearly indicates that the 500 week period starts with the commencement of partial disability. Therefore, claimant has two periods of partial disability, and the result is not cumulative, but concurrent."

Claimant then sought review by the Commonwealth Court, arguing that the partial disability benefits for the 1996 and 1997 injuries should not run concurrently.

The Court disagreed. There is no statutory basis for suspending claimant's partial disability benefits for the 1997 injury while she was receiving partial disability benefits for the 1996 injury. Further, the case law relied upon by the claimant in support of her position does not support her argument.

For example, in the case of Westmoreland Regional Hospital v. WCAB (Stopa), 789 A.2d

413 (Pa.Cmwlt. 2001), the Court determined that the claimant could not collect two simultaneous total disability awards because “short of death, a claimant can never be more than totally disabled.” The Court in Stopa clarified its previous decision in Reliable Foods, Inc. v. WCAB (Horrocks), 660 A.2d 162 (Pa.Cmwlt. 1995). In that case, the claimant was entitled to receive simultaneous benefits for both partial and total disability due to separate work injuries up to the maximum compensation rate because, had it not been for the first injury, the claimant would have been receiving a higher wage when the claimant was totally disabled. The Court in Stopa held that the prior case law merely stood for the proposition that the Act does not proscribe simultaneous compensation so long as the total compensation, based on the claimant’s pre-injury average weekly wage, does not exceed the statutory maximum allowable benefit.

Here, the issue does not involve the simultaneous payment of *total* disability benefits for separate injuries. Claimant was already partially disabled in 1997. She thereafter maintained the same ability to earn wages and suffered no additional wage loss due to the 1997 injury.

Because the Court concluded that neither the Act nor the case law supported claimant’s argument that she was entitled to two consecutive 500-week partial disability periods for the two work injuries, the order of the WCAB was affirmed.



Jennifer Harvey v. Workers’ Compensation Appeal Board (Monongahela Valley Hospital), No. 333 C.D. 2009, Filed October 21, 2009.

(Suspension—Where employer learns of claimant’s misconduct after the work injury and swiftly addresses it by terminating claimant’s employment, employer is then not required to prove work availability to suspend claimant’s benefits.)

Claimant worked as a registered nurse and suffered a work injury when she was involved in a motor vehicle accident in employer’s parking lot on July 4, 2001. As she left the lot, claimant failed to make a left-hand turn through the gate, drove over a 4-inch curb, went over an embankment and came to a stop in a wooded area. As a result, claimant fractured her neck.

While investigating the accident, the local police found two empty morphine vials in claimant’s vehicle. Employer’s subsequent investigation into claimant’s handling of narcotic medications revealed that claimant had violated em-

ployer’s policy on 4 occasions in a 10-month period by checking out narcotics, but not indicating in patient records that the narcotics had been administered. Employer then discharged claimant on July 16, 2001 based on her violation of its policy.

Claimant filed a claim petition for workers’ compensation benefits, which was granted. The Workers’ Compensation Judge determined that claimant’s injuries were caused by the condition of employer’s premises, i.e., the lack of a barrier around the parking lot. The WCJ also found that claimant was discharged for reasons unrelated to her work injury. The Workers’ Compensation Appeal Board affirmed the WCJ’s decision.

Employer then sought review by the Commonwealth Court arguing that there was no substantial evidence to support the WCJ’s finding that the physical condition of the lot caused claimant to drive over the embankment. Claimant cross-appealed, arguing that her discharge was pretextual and designed to relieve em-

IMPAIRED REINDEER EVALUATION



Impaired Reindeer

ployer from having to provide disability benefits. The Court affirmed the WCAB's order.

Several years later, employer filed a modification petition in which it sought to modify claimant's benefits on the basis that work would be available with employer within claimant's restrictions had claimant not been terminated for conduct unrelated to her work injury.

Employer presented testimony establishing that it had three jobs available for a registered nurse within claimant's physical capabilities. Employer also presented testimony to establish that the positions would not be made available to claimant because she did not hold a current license as a registered nurse. Further, the positions were not available because of claimant's termination.

The WCJ granted the modification petition, noting that claimant's license suspension was due to non-injury related incidents. The WCJ also determined that employer was not required to actually offer the jobs to claimant because she was no longer licensed to perform them. The WCAB affirmed, stating that the employer is not required to perform a vain act.

Claimant then took her case to the Commonwealth Court arguing that the WCJ erred in concluding that employer was not required to refer or offer claimant a position that was actually open simply because she no longer held an active license due to her non-work related problems. Claimant maintained that because she was terminated after her injury for conduct that occurred prior to her injury, her pre-injury

conduct was irrelevant and should not have been considered by the WCJ, The Court disagreed.

The Court noted that, as a general rule, where an employer waits until after a work injury to terminate an employee for conduct that the employer was aware of prior to the injury, the employer is not excused from showing job availability before benefits may be modified.

Where, however, the employer immediately terminates an employee for pre-accident conduct once the employer learns of the misconduct, proof of job availability is not required. Although the employer is then required to identify actual available positions within the claimant's medical restrictions, the employer is not required to offer those positions to the claimant given the claimant's prior termination.

Because claimant's loss of earnings was not due to her work injury but rather was due to her termination for misconduct, the employer was not required to show availability of an alternate position for claimant. Such would have been a futile act and would promote form over substance. Because the identified positions would have been referred to claimant had she not lost her job for professional misconduct, employer is not required to establish earning power outside employment with employer (via expert opinion) in order to meet its burden of proof. The order of the WCAB was affirmed.



Presby Homes and Services v. Worker's Compensation Appeal Board (Quiah), No. 978

C.D. 2009, Filed November 5, 2009.

(Modification—Job Availability—Job offer is not rendered invalid because the job is “at will” and employer reserves right to amend job duties at a future date.)

Claimant, a certified nursing assistant, was bathing a non-ambulatory patient who fell onto claimant's left arm. Employer issued a notice of temporary compensation payable, describing the injury as a lumbar sprain/strain. Claimant then filed a claim petition alleging that she suffered a low back injury and a left wrist injury and was totally disabled as a result. Employer then issued a notice stopping temporary compensation and a medical only NCP, noting that claimant benefits were suspended because she failed to return to modified duty work which had been offered to her.

Before the Workers' Compensation Judge, claimant acknowledged that employer offered her a modified duty position, but maintained that she did not accept it because of ongoing pain in her back and right leg. Claimant also presented testimony from her treating physician, who opined that claimant was incapable of returning to work in any capacity.

In response, employer's medical expert testified that claimant was capable of returning to sedentary duty work. Employer presented testimony from its Staff Development Coordinator, who prepared a modified duty job description to accommodate the claimant's restrictions as determined by employer's medical expert. The job description was then for-

warded to claimant along with a letter asking claimant to return to work as of August 29, 2007 at her pre-injury salary. Claimant did not respond.

The job description included the following provisions: "I acknowledge and understand that...receipt of the job description does not imply nor create a promise of employment, nor an employment contract of any kind, and that my employment is at will....[J]ob duties, tasks, work hours and work requirements may be changed at any time."

The WCJ credited the testimony of employer's medical expert, but rejected the testimony offered by employer to establish that a modified duty job had been made available to claimant. The WCJ held employer failed to show that the offered modified duty job actually existed and further failed to show that it was a bona fide job offer. As such, claimant's claim petition was granted.

Employer appealed to the Workers' Compensation Appeal Board, and the WCAB affirmed. Employer then petitioned the Commonwealth Court for review.

Employer argued that the WCJ erred in finding that the modified duty job was not available due to the qualifying language in the job description. Employer contended that the boilerplate provisions merely memorialized the at-will nature of every employment relationship in Pennsylvania and in no way limited the availability of the position. The Court agreed.

Here, the language in the job description did two things: 1) confirmed the at-will nature of the employment, and 2) advised claimant that her job du-

ties, tasks, work hours and work requirements may be changed at anytime.

The Court noted that the effect of these provisions had nothing to do with the credibility of employer's witness. The effect of these provisions on the validity of the job offer was purely a question of law. The Court found that the provisions in the job description did not render employer's job offer either illusory or invalid.

The "at will" proviso was of no moment since Pennsylvania is an at will employment state. As such, either party may terminate an employment relationship for any or no reason. Employer's inclusion of such language in the job description does not constitute bad faith.

Similarly, the proviso reserving employer's right to change claimant's job duties, tasks and work requirements did not negate the availability of the job. If, in the future, employer imposes duties on claimant which exceed her limitations, claimant is not without recourse. She can then file a petition to reinstate total disability benefits.

Employer created a modified duty job tailored to claimant's physical restrictions. The WCJ rejected claimant's testimony that the job exceeded her limitations. Employer made a good faith effort to return claimant to productive employment. The WCJ erroneously presumed employer acted in bad faith by including the boilerplate language in the job description. That presumption was not supported by the evidence.

As such, the WCJ's decision was amended so as to pro-

vide for a suspension of claimant's benefits effective August 29, 2007 due to her failure to accept the modified duty job.



Giant Eagle, Inc. v. Workers' Compensation Appeal Board (Givner), No. 813 C.D. 2009, Filed November 18, 2009.

(Suspension—Under §314(a) of the Act, suspending both medical and wage loss benefits is a matter that falls within the sound discretion of the WCJ.)

Claimant suffered a work injury on June 4, 1998. A Notice of Compensation Payable was issued acknowledging the injury as compensable.

On December 4, 2007, the Workers' Compensation Judge ordered claimant to appear for an independent medical evaluation scheduled for December 12, 2007. Claimant failed to appear, and employer then filed a suspension petition. The WCJ granted employer's petition and suspended claimant's wage loss benefits effective December 12, 2007 and continuing until she attended an IME.

Employer appealed to the Workers' Compensation Appeal Board seeking to suspend claimant's medical benefits as well. The WCAB affirmed the WCJ's order and employer appealed to the Commonwealth Court. Employer argued that §314(a) of the Act mandates that claimant be deprived of all compensation, both medical and wage loss benefits. Section 314(a) provides, in pertinent part:

The refusal or neglect, without reasonable cause or excuse, of the employe to submit to such examina-

tion...ordered by the workers' compensation judge...shall deprive him of the right to compensation, under this article, during the continuance of such refusal or neglect, and the period of such neglect or refusal shall be deducted from the period during which compensation would otherwise be payable.

The Court noted that, in the case of O'Brien v. WCAB (Montefiore Hosp.), 690 A.2d 1262 (Pa.Cmwlth. 1997), the definition of the term "compensation" is to be made on a "section by section" basis. In that case, it was held that "compensation" under §413 of the Act does not include medical benefits. The Court in that case stated that medical expenses and compensation are to be considered separate where the employer's liability has already been determined.

Here, inasmuch as employer's liability had already been established, the Court held that "compensation" under §314(a) could refer only to wage loss benefits. Consequently, the decision of the WCAB was affirmed.

The Court went on, however, to state that:

"[W]e hold that under §314 (a), suspending both medical and wage loss benefits is a matter that falls within the sound discretion of the WCJ, subject to review for an abuse of such discretion. Noting the humanitarian purposes of the Act, we hold that where a WCJ would suspend both wage loss benefits and medical benefits, the WCJ must expressly state that medical benefits are suspended in addition to wage loss benefits."

SUPERIOR COURT CASE REVIEWS

Antonio Ranalli v. Rohm and Haas Company, No. 871 E.D.A. 2008, Filed September 8, 2009.

(Exclusivity—Even where an employee is unable to recover under the Workers' Compensation Act, he or she may still be prevented from filing a civil action against the employer due to the exclusivity provisions of the Workers' Compensation Act.)

Plaintiff filed a wrongful death action against defendant for damages resulting from the death of his wife. Plaintiff claimed that his wife's death was due to her exposure to vinyl chloride while working for defendant between 1974 and 1980.

Defendant filed preliminary objections claiming that the suit was barred under the exclusivity provisions of the Workers' Compensation Act.

In response, plaintiff argued that the Act does not bar a common law action against an employer for an injury which is not compensable under the Act. (The Act expressly excludes from its definition of "injury" an occupational disease which does not manifest until more than 300 weeks after the last date of workplace exposure.) Further, plaintiff argued that defendant was fraudulent in that it failed to reveal studies showing the dangers of vinyl chloride.

The trial court denied defendant's preliminary objections, and defendant appealed. Before the Superior Court, defen-

dant argued that the Act provides the exclusive remedy, and that the 300 week time limitation is merely a trade off for granting liability without fault on behalf of the employer. Further, defendant argued that plaintiff failed to allege a cause of action for fraudulent concealment. The Court agreed.

The Court noted that the Workers' Compensation Act was a compromise to provide workers recovery without any fault on the part of the employers while relieving employers of some of the damages in a traditional common law action. The major trade-off for granting liability without fault on the part of the employer was the elimination of recovery for pain and suffering. Also critical were time limitations such as the 300 week period here. The Legislature intended the time limitations in the Act to protect employers from strict liability for stale claims, and to prevent speculation over whether a disease is work-related years after an exposure occurred.

Thus, the Courts have long held that even if a plaintiff cannot recover under the Workers' Compensation Act, a common law action is still not available to him. This is permissible because the Act grants claimants some benefits which would otherwise be unavailable and, as a "trade-off," denies other benefits.

Simply because the injury here is not compensable under the Act by virtue of a time limitation, the workers' compensation bar may not be overlooked. The exclusivity provisions of the Act bar the instant action.

Plaintiff argued, however,

that the claim of fraud is outside the scope of the workers' compensation bar. The Court disagreed. Even claims of fraud are barred by the exclusivity provisions of the Act, unless the fraud committed by the employer causes an aggravation of a work-related injury. For example, in the case of *Martin v. Lancaster*, 530 Pa. 11, 606 A.2d 444 (1992), the employer intentionally withheld and altered the employee's blood test results which aggravated the employee's injury. Certain actions by employer amounting to flagrant misconduct do not fall within the protections of the Act.

That is not, however, what occurred here. The law is clear that the plaintiff is not entitled to a recovery. As such, the order denying the defendant's preliminary objections was reversed.

SUPREME COURT CASE REVIEWS

Harry Riddle v. Workers' Compensation Appeal Board (Allegheny City Electric, Inc.), No. 54 W.A.P. 2008, Decided October 22, 2009.

(Modification—When developing an earning power for an employee who has relocated following the injury, the employer must focus its job availability analysis on the area where the injury occurred, not where the claimant subsequently resides.)

Claimant suffered a work-related injury to his right shoulder in August of 2000. At the time, the claimant was working in Pittsburgh, Pennsylvania.

The claimant was subsequently released to light duty work by his treating physician. Given that release, employer filed a petition seeking a modification of claimant's benefits. Employer alleged that, given claimant's age, skills, education, experience and work availability, claimant had a residual earning capacity requiring a decrease in his benefits.

Employer presented testimony from a vocational expert who had performed a labor market survey for the Wheeling area in West Virginia, where the claimant then resided. Several available positions were identified, 5 of which were in Wheeling, WV, 2 of which were in Washington, PA, and several others in the nearby State of Ohio. None of the identified positions were in Pittsburgh, PA where the claimant was working at the time of his injury.

Claimant argued that employer's petition must be dismissed because employer had not complied with the geographical area requirement of §306(b)(2) of the Act which provides: "If the employee does not live in this Commonwealth, then the usual employment area where the injury occurred shall apply."

The Workers' Compensation Judge disagreed. The employer's expert's testimony was accepted as credible and an order was entered modifying the claimant's benefits.

Claimant appealed to the Workers' Compensation Appeal Board and the Commonwealth Court, both of which affirmed the reduction in benefits. The Commonwealth Court held that employer was not restricted to the Pittsburgh, Penn-

sylvania area to conduct the earning power assessment.

The Supreme Court granted claimant's Petition for Allowance of Appeal, in which claimant argued that the plain language of §306(b) required employer to focus on the Pittsburgh area only in proving claimant's earning power.

The Court agreed. The Act provides that earning power is a function of the work the employer is "capable of performing" and job availability "in the usual employment area." With respect to employees who do not live in Pennsylvania, "the usual employment area where the injury occurred shall apply."

Here, the injury occurred in Pittsburgh, Pennsylvania, so an appropriate earning power assessment should have focused on Pittsburgh. The employer has no discretion to enlarge its search and focus on multiple or other areas that it decides could yield a "true" assessment of an injured employee's earning power.

The language of the General Assembly as set forth in the Act is explicit. The General Assembly's clear expression of policy may not be altered under the guise of pursuing the spirit of the Act by locating jobs within a reasonable commuting distance for the employee in an attempt to reintegrate injured workers into the work force.

Because the earning power assessment submitted by employer did not focus on jobs available in Pittsburgh where the injury occurred, the earning power assessment was insufficient to justify a modification of benefits under §306(b).

The decision of the Commonwealth Court was reversed.

(Continued from page 1)

that those sections only applied where claimant had actually received treatment in the first place. The Court was also sympathetic to the employee's argument that, in non-emergency situations, most hospitals will refuse to perform surgical procedures without preauthorization. Ultimately, the Court upheld the WCJ's decision, which did not order the employer to pre-approve the treatment, but merely assessed a twenty percent penalty on the compensation awarded against the employer.

Since the treatment was found to be related to the work injury in McLaughlin, that Court's decision did not resolve the issue of whether pre-certification is required when the underlying cause of an injury is disputed. The Commonwealth Court decision in Pryor v. WCAB (Colin Services Systems)² appears to shed some light on this issue. The claimant in that case had sustained a lower back strain while in the course of her employment. Initially, the employer issued a notice of compensation payable and accepted the work injury. Later, the employer filed a termination petition contending that the claimant had recovered. The claimant countered by filing several petitions, including a petition for penalties alleging that the employer refused to pre-approve her physician recommended treatment at a pain clinic. After considering all of the evidence and testimony, the WCJ granted the employer's termination petition and dismissed the claimant's petitions. The WCAB affirmed, and the employee appealed.

The Commonwealth Court evaluated the employee's reliance on McLaughlin for the proposition that the employer was obligated to pre-authorize the claimant's medical treatment. The Court found McLaughlin distinguishable because the WCJ in that case had rejected the employer's evidence of the claimant's recovery from his work-related injury. The Court determined that, in the case at hand, the WCJ had *accepted* the employer's evidence limiting the claimant's recovery to a back sprain, and did not expand the NCP to include additional injuries. *Id.* Based on this finding, the Court concluded that the employer had no responsibility to pre-approve medical treatment for a condition unrelated to the work injury.

The Court cautioned, however, that if an employer unilaterally chooses not to pre-certify medical treatment, it assumes the risk of penalties contingent upon a WCJ's ruling that the medical expenses are causally related to the work injury. The Court concluded that, because the employer had successfully challenged the causal relationship between the treatment sought and the work injury, it did not violate the Act.

The Courts' statutory interpretation and rationale evidences that employers should be cautious when unilaterally choosing not to pre-certify medical treatment for a questionable work-related injury. Note that an employer is absolutely subject to penalties for refusing to pay medical expenses it believes are unreasonable or unnecessary, but which are causally related to the work injury. In that case, an agreement, a supersedeas or any other order of the WCJ authorizing such action is required. However, when it comes to pre-certification or pre-authorization, an employer is only subject to penalties if the WCJ agrees that the treatment was causally related to the work injury. Since this determination can be subjective, an employer should be certain that the treatment for which the pre-certification is sought is not causally related to the work injury before denying the pre-certification. It appears that an employer in these circumstances may be forced to take a gamble on how the WCJ will decide, and if the WCJ will assess penalties based on its decision. Therefore, if the cause of the injury is truly vague, it is advisable to play it safe and to request a prospective utilization review to avoid the possibility of penalties.

¹ 808 A.2d 285 (Pa. Cmwlth. 2002), *appeal denied*, 828 A.2d 351 (Pa. 2003).

² 923 A.2d 1197 (Pa. Cmwlth. 2006).



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