TR&C

Pennsylvania Workers' Compensation Bulletin

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

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

AVERAGE WEEKLY WAGE: FACT OR FICTION?
(The Sequel)

Section 309 of the Pennsylvania Workers' Compensation Act provides the formula to be used to determine an injured workers' average weekly wage for purposes of computing the wage loss benefits that may be due and owing.

A few years ago, the following question was posed: "Average Weekly Wage – Fact or Fiction?" (TR&C Workers' Compensation Bulletin, Vol. VIII, No. 5) At that time, it was concluded that: "the claimant's *actual earnings* is the key to calculating the average weekly wage." Under certain circumstances, that is no longer true.

Earlier this year, the Pennsylvania Supreme Court decided two cases, each of which involved a claimant who had suffered two separate work injuries.[1] In each case, the claimant was disabled following the first injury for a period of time during which temporary disability benefits were paid. Thereafter, each claimant returned to work and suffered a second injury.

As a result of having been off due to the first injury, each claimant had depressed or no earnings during one or more of the four quarters of the 12-month period preceding the second work injury. As a result of the quarters with low or no earnings, each claimant's average weekly wage relative to the second injury, when calculated based upon their actual earnings, was significantly reduced in comparison with their average weekly wage relative to the first injury.

The Supreme Court held that under these particular circumstances, Section 309 of the Act is ambiguous and, as such, does not readily apply. Instead, in keeping with the humanitarian purpose of the Act, the claimant's average weekly wage used in the first injury is to be imputed to those quarters during which the claimant's earnings were depressed or non-existent.

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Relying upon its prior decision in Hannaberry HVAC v. WCAB (Snyder, Jr.), 575 Pa. 66, 834 A.2d 524 (2003), the Court stated:

> *"The work scenario here, like that at issue in Hannaberry, is not specifically addressed by Section 309: i.e., the Section is silent as to the proper approach where a previous work injury deflated the otherwise typical wages of an injured worker. Hannaberry highlights the humanitarian purpose of the Act and the clear legislative intention that injured workers entitled to benefits be paid a fair benefit based upon an accurate calculation of their actual history of earnings and earning capacity.... It is not an accurate measure of economic reality to treat periods where no*

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Commonwealth Court Case Reviews

U.S. Steel Mining Company, L.L.C. v. Workers' Compensation Appeal Board (Goretsky), No. 831 C.D. 2004, filed May 18, 2005.

(Credibility - Reasoned Decision - WCJ acts appropriately in choosing one doctor over another where both doctors provide a logical and persuasive opinion.)

Decedent worked as a coal miner for 48 years. In 1981, it was determined that he was totally disabled by coal workers' pneumoconiosis and he was awarded benefits. He died in 1996 at the age of 81.

Decedent's widow then filed a fatal claim petition, alleging decedent died as a result of exposure to coal and other hazardous dust while employed by employer. Employer denied the allegations of the petition. Hearings were then held before a Workers' Compensation Judge.

Claimant presented testimony from Cyril Wecht, M.D., a board certified pathologist who performed the autopsy on decedent. He testified that the immediate cause of death was an aneurysm. He also opined that there were two significant secondary causes of death - (1) hypertensive and arteriosclerotic cardiovascular disease, and (2) coal workers' pneumoconiosis. Dr. Wecht stated that while the aneurysm was not caused by the pneumoconiosis, the increased strain and pressure placed on the decedent's heart by his lung disease led to a faster progression of the aneurysm. Thus, Dr. Wecht opined that the coalworkers' pneumoconiosis hastened decedent's death. In his opinion, although the aneurysm would have burst eventually even absent the lung disease, the rupture would not have occurred when it did without the lung disease contributing to and aggravating decedent's overall cardiovascular system.

In response, employer presented testimony from Everett Oesterling, Jr., M.D., who is also a board certified pathologist. He opined that while decedent did have coal workers' pneumoconiosis, it was not the cause of his death. Rather, decedent had very significant arteriosclerosis and the aneurysm was purely a result of his vascular disease. The respiratory impairment played no role in decedent's demise. In Dr. Oesterling's opinion, decedent would have died at the same time and in the same manner even if he had not contracted coal workers' pneumoconiosis. On cross-examination, Dr. Oesterling did admit that coal workers' pneumoconiosis may cause respiratory distress and may be a contributing factor to death.

The WCJ accepted the opinion of Dr. Wecht stating: "The closely reasoned and logical and sequential opinions of Dr. Wecht as supported by the evidence and his reasoning are ascribed more credibility by this Workers' Compensation Judge than the conclusions of Dr. Oesterling which he himself called into question when he made the admissions above referred to during cross-examination."

Employer appealed the WCJ's decision to the Workers' Compensation Appeal Board, arguing that the WCJ's decision was not a "reasoned decision" as required by §422(a) of the Act. The WCAB affirmed the WCJ's decision, noting that while the WCJ provided no support for his position that Dr. Wecht's testimony was supported by the record, the WCJ nevertheless adequately explained the basis for his decision.

Employer then sought review by the Commonwealth Court, arguing that the WCAB erred in affirming the WCJ's decision when there were no *objective* reasons for crediting Dr. Wecht's opinion over the contrary opinion of Dr. Oesterling. As such, the WCAB ignored the requirement of a reasoned decision as set forth in §422(a) of the Act.

The Court cited the Supreme Court's decision in *Daniels v. WCAB (TriState Transport), 574 Pa. 61, 828 A.2d 1043 (2003),* noting that "a decision is 'reasoned' for purposes of §422(a) if it allows for adequate review by the WCAB without further elucidation and if it allows for adequate review by the appellate courts under applicable review standards." The Court further noted that "some actual objective basis for the credibility determination must be offered for the decision to be 'reasoned.'"

Here, the WCJ explained that he found Dr. Wecht's opinions "closely reasoned, logical and sequential." The WCJ also found that Dr. Oesterling's admissions during cross-examination called his conclusions into question. Because the WCJ articulated these actual, objective bases for his credibility determination, the Court concluded that the WCJ's decision was a "reasoned" one which facilitated effective appellate review.

The order of the WCAB affirming the decision of the WCJ was, therefore, affirmed.

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Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Consolidated Freightways, Inc.), No. 2465 C.D. 2004, filed May 25, 2005.

(Supersedeas Fund Reimbursement - Where employer loses in a Reinstatement Petition, but files a successful appeal under §430 and requests supersedeas, reimbursement from the Fund is appropriate.)

Claimant, a truck driver, sustained a work-related injury in

1992. He returned to work in February of 1993, at which time his benefits were suspended. Claimant worked until January 12, 1994, at which time he stopped working, allegedly because he was unable to drive safely due to pain medication he was required to take as a result of the work injury. Consequently, claimant filed a petition, seeking reinstatement of total disability benefits from January 12, 1994 through May 1, 1995.

The Workers' Compensation Judge denied claimant's petition. Claimant appealed to the Workers' Compensation Appeal Board, which ultimately reversed the WCJ's decision, and ordered reinstatement of total disability benefits plus interest.

Employer filed a petition for review with the Commonwealth Court, along with a request for supersedeas. The Court denied supersedeas, but then ruled in employer's favor by reversing the WCAB's order.

Employer then filed an Application for Supersedeas Fund Reimbursement with the Bureau, seeking recoupment of $55,435.44 plus interest that had been paid to claimant pursuant to the WCAB's order reinstating benefits. The WCJ granted employer's Application, and the WCAB affirmed. The Bureau then petitioned the Commonwealth Court for review.

The Bureau took the position that because the reinstated benefits were attributable to a period of disability that predated employer's request for supersedeas, reimbursement was not allowable.

In response, employer argued that it was entitled to reimbursement because it complied with §443(a) of the Act. Under that section, reimbursement is appropriate if: (1) Supersedeas has been requested; (2) The request for supersedeas was denied; (3) The request was made in a proceeding under §413 or §430 of the Act; (4) Payments were continued because of the order denying supersedeas; and (5) In the final outcome, it was determined that such compensation was not, in fact, payable.

The Court agreed with employer. Here, employer made its request for supersedeas in the context of a reinstatement petition, which is one of several types of petitions contemplated by §413 of the Act. Following denial of that request, employer continued to make payments to claimant. Thereafter, it was ultimately determined that claimant was not entitled to those benefits. Therefore, employer is eligible for reimbursement of those funds paid on or after November 21, 2001, the date employer filed its petition for supersedeas.

The order of the WCAB was, thus, affirmed.

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Monessen, Inc. v. Workers' Compensation Appeal Board (Fleming), No. 2204 C.D. 2004, filed May 27, 2005.

(Subrogation - Offset for third party settlement in excess of current lien is *absolute* and *immediate*. Therefore, the WCAB cannot unilaterally reduce the offset due to alleged hardship on claimant.)

In October of 1995, James Fleming filed a claim petition against employer and its carrier alleging he had developed lung cancer and asbestosis as a result of exposure to asbestos and coke gas while working for employer. One year later, his widow, claimant, filed a fatal claim petition alleging her husband died as a result of lung cancer related to his employment.

The Workers' Compensation Judge granted both petitions. Following appeals, the case was remanded to the WCJ to consider whether employer was entitled to a credit for any third-party settlements received by claimant. After additional hearings, the WCJ found that claimant recovered a net total of $65,656.02 from third-party settlements with several defendants. The WCJ further found that employer had paid claimant $120,190.00 in compensation benefits. As a result, the WCJ concluded employer was entitled to suspend benefits during a grace period of 241.38 weeks in order to recover the $65,656.02. Claimant then appealed to the Workers' Compensation Appeal Board.

The WCAB found that a complete suspension of benefits created a financial hardship for claimant. As such, the WCAB ordered that only $80.00 per week was to be deducted from claimant's benefits, thereby extending the repayment period to 494.30 weeks.

Employer then sought review by the Commonwealth Court, arguing that the WCAB exceeded its authority in reducing the rate by which it may recover its subrogation lien. Employer argued that, under §319 of the Act, employer has an absolute right to immediate payment of the past due lien through a total suspension of benefits until the lien is satisfied.

The Court agreed. This is one instance where the Act's humanitarian purpose does not come into play. The clear language of the statute confers on an employer an absolute right to immediate payment under these circumstances.

Consequently, although the Court acknowledged the WCAB's compassion in prolonging the period of recovery so as to allow weekly benefits to be paid to claimant, the Court was forced to acknowledge that the WCAB exceeded its authority in doing so. The order of the WCAB was, therefore, reversed.

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County of Allegheny (John J. Kane Center-Ross) and UPMC- Work Partners v. Workers' Compensation Appeal Board (Geisler), No. 1886 C.D. 2004, filed June 6, 2005.

(Utilization Review - Where the URO renders a decision without review due to provider's failure to provide records, a Petition to

Review Utilization Review Determination will be dismissed for lack of jurisdiction.)

On January 22, 2002, employer filed a request for utilization review of three of claimant's office visits with Dr. Behm and the medication he prescribed. Because Dr. Behm failed to provide medical records to the Utilization Review Organization (URO), the URO issued a determination that Dr. Behm's treatments were neither reasonable nor necessary.

Claimant then filed a petition, seeking review of the URO determination by a Workers' Compensation Judge. Employer moved for dismissal of the petition, asserting that where a provider fails to provide medical records to a URO, the WCJ lacks jurisdiction to consider the merits of the URO's determination. Employer's motion was denied.

The WCJ then concluded that Dr. Behm's treatment was reasonable based upon Dr. Behm's testimony, which he found to be credible. Employer appealed to the Workers' Compensation Appeal Board, and it affirmed. Employer then sought review by the Commonwealth Court.

On appeal, employer argued that where a URO determines that treatment was neither reasonable nor necessary because the provider did not provide his medical records to the URO, a WCJ cannot review the merits of the URO's determination. A WCJ's review of a URO determination must include the reviewer's report. Here, no report was issued because the necessary records were not provided. In the absence of a report, there was nothing for the WCJ to review on appeal and claimant's petition should have been dismissed.

The Court agreed. The purpose of utilization review is to afford providers the opportunity to defend their treatment of a claimant. The regulations dictate that, if a provider fails to forward his or her records to the URO within 30 days of the date of the request of the records, the URO shall render a determination that the treatment under review is neither reasonable nor necessary. The URO is not to assign the request to a reviewer for a report.

It is clear error for a WCJ to conduct a hearing on a URO determination without a reviewer's report. Although a WCJ is not bound by a reviewer's report, there must be a report in the record in order for the *de novo* hearing to take place before the WCJ. In such cases, the determination of the URO is final, binding and non-reviewable.

Utilization review is a mandatory first step in determining whether a provider's treatment is reasonable and necessary. A WCJ lacks subject matter jurisdiction to determine the reasonableness and necessity of medical treatment if the matter has not first gone to utilization review. If a report by a peer physician is not prepared because the provider has failed to produce medical records to the reviewer, the WCJ lacks jurisdiction to determine the reasonableness and necessity of the treatment at issue. To hold otherwise would allow a provider to indirectly confer jurisdiction on the WCJ without following the mandatory utilization review process.

The order of the WCAB was reversed.

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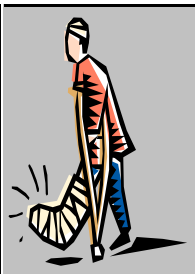
Donna Williams v. Workers' Compensation Appeal Board (South Hills Health System), No. 2749 C.D. 2003, filed June 14, 2005.

(Collateral Estoppel - Claimant who unsuccessfully argues during litigation of termination petition that her injury included a herniated disc is estopped from relitigating the relatedness of the herniated disc in a subsequent reinstatement petition.)

On March 18, 1997, claimant suffered a "lumbosacral strain" while working as a certified nursing assistant. A Notice of Compensation Payable was thus issued.

In June of 1998, employer filed a terminate petition based upon the opinion of Dr. Ronan that the claimant had fully recovered from her lower back muscle strain. Dr. Ronan testified that there were no objective findings to support the claimant's complaints. He further testified that there was no evidence of a disc herniation, but only of a mild disc bulge consistent with claimant's age.

In response, claimant testified



WORKPLACE SAFETY

You may be able to reduce your workers' compensation premium by 5% each year by setting up a workplace safety committee that meets the requirements for state certification. There are three basic committee requirements:

1. The committee must have a minimum of 2 employer and 2 employee representatives, who meet monthly and be in operation for at least 6 full months.

2. All committee members must be trained in in safety committee operation, hazard inspection and accident investigation.

3. Committee meeting minutes must be kept, as well as meeting agendas and attendance lists.

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that she continued to have low back pain that radiated down her right leg. She presented testimony from her treating physician, Dr. Levy, who opined that claimant's condition was chronic, leaving her capable of only light duty work.

The Workers' Compensation Judge credited the testimony of Dr. Ronan, specifically with regard to the existence of a herniated disc. The WCJ therefore terminated claimant's benefits effective May 20, 1998. No appeal was taken from the WCJ's decision.

In April of 2001, claimant filed a petition to reinstate her benefits, alleging that her condition had worsened as of September 10, 1999. In support of her position, claimant testified that her right leg continued to weaken. She also presented testimony from Dr. Kandabarow, who opined that the 1997 work injury had resulted in an L5-S1 disc herniation. He further opined that claimant was incapable of working as a result.

In response, employer presented testimony from Dr. Gause. He stated that claimant was prevented from working solely as a result of the surgery, which was not related to her 1997 work injury. He testified that the work injury resulted in a mild disc bulge, but no herniation. As such, he opined that the work injury of 1997 had resolved, and that her current disability was unrelated to the work injury.

The WCJ found claimant and Dr. Kandabarow to be credible. Thus, he found that claimant had, in fact, suffered a disc herniation as a result of the work injury. The WCJ rejected the notion that the prior decision in the termination petition barred his contrary findings of fact in the reinstatement petition.

Employer filed an appeal with the Workers' Compensation Appeal Board, arguing that claimant was collaterally estopped from seeking reinstatement of benefits based on an injury beyond a strain/sprain to the L5-S1 disc. The WCAB agreed.

Claimant then sought review by the Commonwealth Court. The Court noted that "collateral estoppel" acts to foreclose litigation in a later action of issues of law or fact that were actually litigated, were essential to the judgment, and were material to the judgment.

Here, the first WCJ specifically found that claimant's disc bulge was age-related. Further, the first WCJ found that claimant's injury was only a strain. That determination was essential to the decision as to whether claimant had fully recovered from the work injury. Claimant did not appeal that decision.

The second WCJ then made findings in opposition to the decision on employer's termination petition. This was error. Claimant was collaterally estopped from relitigating the nature of her injury, which is a material fact, in the reinstatement petition.

The order of the WCAB was, thus, affirmed.

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David Johns, Deceased, c/o Lori Jean Thomas v. Workers' Compensation Appeal Board (Balmer Brothers Concrete Works), No. 2717 C.D. 2004, filed June 14, 2005.

(Fatal Claim Petition - *In loco parentis* - Where decedent "intended" to be placed in the situation of child's lawful parent by participating in parenting duties, decedent stood *in loco parentis* to minor claimants so as to entitle them to death benefits under the Act.)

Claimant filed a Fatal Claim Petition asserting that decedent suffered a fatal head injury while working in the course and scope of his employment. She alleged that she was the common-law wife of decedent and that her two children were eligible for death benefits because decedent stood *in loco parentis* to them.

At hearings, evidence was presented to establish that decedent was responsible for disciplining the children, was involved in the children's school and sporting events, paid the household bills, took family vacations with claimant and her children, and took care of the children like a step-father.

Following hearings, the Workers' Compensation Judge found that claimant did not meet her burden of proving that she was decedent's common-law wife and, thus, was not entitled to benefits. However, the WCJ further found that decedent acted *in loco parentis* to the child and granted the Fatal Claim Petition as to the children. Both parties filed appeals with the Workers' Compensation Appeal Board.

The WCAB reversed the WCJ's order insofar as he found that decedent acted *in loco parentis* to the children, stating that there was no evidence that decedent voluntarily assumed the role of a parent. The WCAB noted that decedent did not claim the children as dependents on his work employment forms. Further, the WCAB noted that decedent did not intend to marry claimant, which would have made him the children's legal stepfather.

Claimant then sought further review by the Commonwealth Court. The Court noted that, under §307 of the Act, a decedent will be considered to stand i*n loco parentis* to the children only if the children can prove that they were members of the decedent's household and actually dependent upon the decedent. In order to establish such a relationship, the decedent must intend to be placed in the role of the child's lawful parent. Mere voluntary assumption of financial support is insufficient. In addition, the decedent must participate in other parenting duties, such as disciplining the child, preparing meals, engaging in leisure activities, selecting the child's clothing, obtaining medical care, etc. The courts must evaluate the facts of each case in order to determine whether a decedent stands *in loco parentis* to a child.

The Court noted that, here, decedent lived in the same home with the children, provided finan-

cial support, assisted with homework, attended school and extracurricular activities, was named as an emergency contact on the children's school and medical records, engaged in multiple activities with the children, and was involved in various parental duties. The Court stated that the fact that the children's actual father paid child support, had visitation, and provided the children with health insurance coverage was relevant but not controlling.

Therefore, the Court disagreed with the WCAB that decedent did not stand *in loco parentis* to the children. Consequently, the order of the WCAB was reversed.

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Superior Lawn Care and State Workers' Insurance Fund v. Workers' Compensation Appeal Board (Hoffer), No. 93 C.D. 2005, filed June 17, 2005.

(Subrogation - Laches does not bar assertion of a subrogation lien against third party recovery.)

Claimant suffered a work injury on August 7, 1990 as a result of which he received temporary total disability benefits. In March of 1993, claimant filed a civil action in the Court of Common Pleas against the Persicos, alleging that his injury occurred when he was being chased by the Persicos' dog. On May 6, 1993, the State Workers' Insurance Fund (SWIF) notified claimant that it was asserting a lien against any settlement or verdict in favor of claimant in the third party action. Claimant's counsel responded by stating that the subrogation claim was barred by the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). No further discursions took place between the parties and claimant did not inform SWIF of the settlement of his claim.

In 2002, employer and SWIF filed a petition to review compensation benefit offset, seeking a credit for subrogation under §319 of the Act, as a result of the third party recovery. The Workers' Compensation Judge found that claimant's injury did not arise out of the use of a motor vehicle, such at that MVFRL was inapplicable. As such, the WCJ determined that the petitioners were entitled to pursue their subrogation interest from the sum received by claimant in the third party action, i.e., $103,723.00. Claimant then appeal the WCJ's decision to the Workers' Compensation Appeal Board.

The WCAB reversed the WCJ's decision, concluding that petitioners' subrogation claim was precluded by the doctrine of laches. The WCAB noted that the petitioners were aware of the filing of claimant's civil action in 1993. The claimant and the Persicos entered into a full and final release in April of 1994. Petitioners did not file their review petition, however, until May of 2002. Due to the excessive delay, the WCAB concluded that the subrogation claim was barred.

On appeal before the Commonwealth Court, petitioners argued that an employer's right to subrogation is *absolute*, so that a claimant may not assert the affirmative defense of laches.

The Court agreed that an employer's right to subrogation is generally absolute, unless the employer engages in deliberate, bad faith conduct. Here, there is no evidence to suggest that employer or SWIF engaged in deliberate, bad faith conduct. As such, the WCAB improperly applied the doctrine of laches to the case at hand. Accordingly, the order of the WCAB was reversed.

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Barry Bates v. Workers' Compensation Appeal Board (Titan Construction Staffing, LLC), No. 934 C.D. 2004, filed June 29, 2005.

(Penalties - Employer's contest of penalty petition is not *per se* unreasonable as a matter of law even if Judge finds that employer violated the Act.)

Claimant sustained a work-related left wrist sprain in October of 2000. A Notice of Compensation Payable was issued, setting forth an average weekly wage of $521.38 and a corresponding weekly compensation rate of $347.58.

In January of 2001, claimant filed a petition alleging that his wage loss benefits were not being paid in a timely fashion and seeking the maximum penalty of 50%.

Following hearings, the Workers' Compensation Judge found as fact that claimant proved employer violated the Act in that the initial payment of compensation was not made within 21 days after the injury as required by the Act Further, employer did not pay claimant his compensation benefits in the same manner he had been paid his wages as required by the Act. In other words, while working, claimant was paid on a weekly basis. The compensation benefits, however, were paid every two weeks.

The WCJ awarded a twenty (20%) percent penalty for the late first payment, and a ten (10%) percent penalty commencing with the second payment and continuing to the date that employer began making the payments on a weekly basis. The WCJ denied claimant's request for unreasonable contest attorneys' fees.

Before the Workers' Compensation Appeal Board, claimant challenging only the WCJ's finding that employer's contest was reasonable. The WCAB affirmed.

On appeal to the Commonwealth Court, claimant argued that employer's contest of the petition was unreasonable as a matter of law because employer clearly violated the Act.

The Court disagreed. A review of the totality of circumstances as found by the WCJ revealed that the violations were not egregious or in bad faith. Despite these relatively minor nature of the violations, claimant sought a 50% penalty. The WCJ concluded that 50% was not warranted and reduced the

penalty accordingly. Thus, employer's contest of the requested penalty was, in part, successful and reasonable.

Claimant further argued that any time a violation of the Act occurs, the employer's contest must be deemed unreasonable as a matter of law. Again, the Court disagree noting that there is no such *per se* rule. Each case must be decided on its own facts in order to determine if the employer's contest is reasonable.

Consequently, the decision of the WCAB was affirmed.

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Pittsburgh Board of Education v. Workers' Compensation Appeal Board (Davis), No. 2371 C.D. 2004, filed June 30, 2005.

(Offsets - Where claimant applies for and is entitled to Social Security benefits before a work injury, no credit or offset is allowed even if he receives his first benefit from Social Security after the injury.)

Claimant began receiving benefits after he suffered a work-related back injury on March 21, 2000. Thereafter, employer filed a Review Petition seeking a credit against claimant's workers' compensation benefits based upon his receipt of old age Social Security benefits.

The Workers' Compensation Judge found that claimant's entitlement to Social Security benefits commenced prior to the date of his work-related injury and, therefore, concluded that employer was not entitled to an offset against those benefits. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer then filed an appeal with the Commonwealth Court. Employer argued that, under the plain language of §204(a) of the Act, it is entitled to a credit. That section provides that: "the Social Security offset shall not apply if old age Social Security benefits were received prior to the compensable injury." Employer maintained that because claimant did not receive any Social Security benefits until after the compensable injury, an offset was appropriate.

The Court disagreed. The Court stated that, although claimant did not receive his check from the Social Security Administration until May 2000, after the injury, his first check included money for benefits starting in January of 2000, prior to the work injury. Thus, the Court found that claimant did "receive" benefits starting in January of 2000. The Court found this to be true even though he did not get the check until May 2000.

In rendering its decision, the Court relied upon the Social Security Act, which provides that one becomes "entitled" to old age bene-

EMPLOYER'S CORNER

"NO COMMENT" POLICY MAY STILL BE THE SAFEST WAY TO HANDLE JOB REFERENCES EVEN WITH PENNSYLVANIA'S NEW LAW SHIELDING EMPLOYERS FROM LIABILITY

In response to employers' fear of landing in court for giving a job reference, state legislators over the past 10 years have been passing or introducing bills to protect employers who provide "good faith" job references. At present, the majority of states have laws on the books dealing with employment references.

After approximately 8 years since it was originally introduced, Pennsylvania, on June 15, 2005, enacted legislation providing employers with limited immunity for job references. [42 PCSA §8340.1] The law reads as follows:

Employer Immunity from Liability for Disclosure of Information Regarding Former or Current Employees

An Employer who discloses information about a current or former employee's job performance to a prospective employer of the current or former employee, upon request of the prospective employer or of the current or former employee, is presumed to be acting in good faith and, unless lack of good faith is demonstrated by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences in any case brought against the employer by the current or former employee. The presumption of good faith may be rebutted only by clear and convincing evidence establishing that the employer disclosed information that:

(1) The employer knew was false or in the exercise of due diligence should have known was false;

(2) The employer knew was materially misleading;

(3) Was false and rendered with reckless disregard as to the truth or falsity of the information; or

(4) Was information the disclosure of which is prohibited by any contract, civil, common law, or statutory right of the current or former employee.

Practice Tips regarding References. The following practice tips will minimize the risks of being involved in an employment reference lawsuit.

1. Adopt a mandatory "no comment" policy.

2. Communicate the policy to all people who may be asked to give references.

3. Take reasonable steps to verify that the person or company requesting the reference is who he/it purports to be and document those efforts.

4. When possible and appropriate, have the employee execute a waiver and release regarding reference liability.

5. If you do give a reference, never make a false or intentionally misleading statement and never render an opinion with reckless disregard as to the truth or falsity of the information.

6. Establish a procedure where one or more employees act as employment reference gate keepers.

7. If the departing employee is executing a Separation, Release and Waiver Agreement, you may want to address the reference issue in the agreement. (Remember, agreeing to provide an employment reference can be consideration, in whole or in part, to a release and a waiver).

8. Consult with an expert when dealing with references involving employees who may pose a significant threat of serious harm to others in the course of future employment.

fits upon application. From that provision, the Court then leapt to the conclusion that because claimant was entitled to benefits in January of 2000, he "received" those benefits prior to the work injury in March of 2000.

Accordingly, the order of the WCAB was affirmed and employer was denied the credit.

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Stephen D. Weissman v. Workers' Compensation Appeal Board (Podiatry Care Center, P.C.), No. 1218 C.D. 2004, filed July 8, 2005.
(Average Weekly Wage - Employer is not entitled to a credit for all of claimant's self-employment income where claimant was self-employed prior to the injury and his income therefrom was not included in the AWW calculation.)

Prior to his work injury, claimant held two jobs. First, he was employed by Podiatry Care Center, a Subchapter S corporation, as its president and its sole shareholder. He worked for Podiatry Care Center as a podiatrist who performed surgery. His wages represented the profits of the corporation, and those profits were directly related to his ability to perform surgery. In a second job, claimant was self-employed through a sole proprietorship trading under the name of Diagnostic Lab (DXL). For DXL, claimant provided medical/legal consulting services.

On March 28, 1997, while working as a podiatrist, claimant sustained a torn rotator cuff. As a result, he began receiving temporary total disability benefits. He was also forced to cease functioning as a podiatric surgeon. Because employer's profits were directly related to claimant's ability to perform surgery, employer wound down its business and eventually ceased functioning.

In the interim, the parties filed a number of petitions, including a Petition to Review the Notice of Compensation Payable, which sought to determine if claimant had correctly calculated his average weekly wage (AWW).

The Workers' Compensation Judge determined that the AWW was, in fact, incorrect and that employer was entitled to credit for 1) the disability benefits received by claimant, 2) any overpayment of compensation caused by miscalculation of the AWW, and 3) any increase in claimant's earnings after the date of injury form his self-employment as a consultant with DXL.

The Workers' Compensation Appeal Board did not agree that employer should be entitled to a credit only for the increase in claimant's self-employment income after the injury, but rather ordered the WCJ to recalculate claimant's actual self-employment earnings, taking into account all income he earned at DXL since the injury.

The WCJ then circulated another decision, in which he was "constrained to find that at all times relevant to these proceedings, the claimant's post-injury average weekly wage exceeded his pre-injury average weekly wage." Consequently, the WCJ suspended claimant's weekly compensation benefits.

On appeal, claimant argued that the WCJ erred by considering none of his self-employment income for purposes of calculating his AWW, but all of his self-employment income for purposes of determining his earning capacity, when that same income existed both before and after the work injury.

The Court noted the obvious disparity: where before his injury, claimant received both earnings from DXL and wages from employer, after his injury, he is receiving earnings solely from DXL. The opinion of the WCJ and WCAB, which allowed employer to credit all of claimant's self-employment income against his compensation benefits, gave employer a windfall and punished claimant with a significant loss of income.

The Court further noted that the wages claimant earned from employer, which were used to calculate his AWW, did not reasonably or accurately reflect the economic reality of his pre-injury experience for use as a projection of potential future wages and, correspondingly, his earnings loss. The economic reality of his pre-injury experience should include the self-employment income; however, by statute, that income is not to be included in the AWW calculation.

In order to deal with the dilemma, the Court held that employer is entitled to a credit only of any *increase* in self-employment income that claimant earns following his work injury.

The decisions of the WCAB was reversed and the case was remanded for a recalculation of claimant's post-injury earnings to determine the credit, if any, to which the employer may be entitled.

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James Howrie v. Workers' Compensation Appeal Board (CMC Equipment Rental), No. 171 C.D. 2005, filed July 20, 2005.
(Utilization Review - Although treatment may be palliative and reduce discomfort, treatment may still be unreasonable and unnecessary if it is of "little value."

Claimant suffered a work injury to his right shoulder in 1990. As a result, he received treatment from a number of providers, including Spencer Broad, D.C. Dr. Broad's treatment included spinal manipulation, myofascial release techniques, massage and electrical acupuncture.

Employer filed an initial utilization review request in 1994. Jesse Rothenberger, D.C., was assigned as the Reviewer. He determined that Dr. Broad's treatment rendered after August 1993 was not reasonable nor necessary.

Dr. Broad filed a petition for review, which ultimately proceeded to a hearing. At that time, Dr. Broad testified that his treatment

was reasonable and necessary. He stated that, although claimant attained maximum medical improvement in November of 1993, his treatment thereafter was supportive in nature.

Dr. Rothenberger testified that he concluded that so much time had passed from the 1990 injury that, by August of 1993, Dr. Broad's treatment was of little value. He stated that while some continuing treatment may have been required, other means of treatment should have been explored.

The Workers' Compensation Judge credited Dr. Rothenberger over Dr. Broad and concluded that the treatment rendered after August 1993 was neither reasonable nor necessary. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Claimant then appealed to the Commonwealth Court, arguing 1) that Dr. Broad's treatment was reasonable and necessary as palliative in nature, and 2) that treatment may not be deemed unreasonable or unnecessary solely on the basis that other courses of treatment exist.

The Court noted that medical treatment may indeed be reasonable and necessary even if the treatment does not cure the underlying condition, *so long as it acts to relieve pain and treats the symptomatology,* i.e., even if it is palliative in nature. Here, however, Dr. Rothenberger testified that Dr. Broad's treatments, "that far past the initial injury," were of "little value." The WCJ credited that opinion. Such a credibility determination is binding on appeal.

As to claimant's second argument, the Court noted that while reviewers may not determine that treatment is unreasonable or unnecessary based *solely* on the fact that other means of treatment exist, Dr. Rothenberger did not render such an opinion. Rather, Dr. Rothenberger based his conclusion that the treatment is neither reasonable nor necessary on his opinion that the treatment was of little value, regardless of the fact that other treatments are available.

The decision of the WCAB was, therefore, affirmed.

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City of Philadelphia v. Workers' Compensation Appeal Board (McGinn), No. 402 C.D. 2005, filed July 21, 2005.

(Occupational disease - Once it is established that claimant suffers from an occupational disease, claimant is entitled to ongoing benefits unless employer can prove that the disease is reversible and that claimant's condition has, in fact, improved.)

Claimant, a City firefighter for 21 years, also held a second job as a plumber. After retiring as a firefighter in 1990, he became a master plumber and opened his own business.

In August of 1993, claimant filed a claim petition alleging that he quit his firefighting position due to lung disease caused by occupational exposure to heat, smoke, fumes, etc. Claimant continued his plumbing business.

In April of 1999, the Workers' Compensation Judge found claimant's medical expert, Dr. Gelfand, to be credible and awarded the claimant benefits. Dr. Gelfand had diagnosed the claimant with severe chronic obstructive pulmonary disease (COPD) with components of emphysema and chronic bronchitis. He further opined that this condition was due to the hazards of firefighting.

In October of 2001, the City filed a notice of suspension based upon claimant's earnings as a plumber. Claimant filed an Employee Challenge and a Reinstatement Petition, alleging that his COPD had worsened, causing him to close his plumbing business as of March 2001.

Claimant again presented testimony from Dr. Gelfand, who opined that claimant's COPD had been unresponsive to medical therapy and further opined that claimant's condition had worsened to the point that claimant is incapable of doing any kind of work.

The City presented testimony from Dr. Manaker, who opined that claimant's occupationally induced COPD had resolved, leaving only evidence of the tobacco-induced component of claimant's disease. Dr. Manaker testified that COPD of the occupationally-induced type can be reversible, although COPD caused by smoking cigarettes is not. He opined that the increase in claimant's disability could not be attributed to occupational exposure and, thus, claimant's increased level of disability was not work-related.

The WCJ found Dr. Manaker to be more credible and convincing than Dr. Gelfand, and denied claimant's challenge and reinstatement petition.

The Workers' Compensation Appeal Board reversed the WCJ, relying upon Hebden v. WCAB (Bethenergy Mines, Inc.), 632 A.2d 1302 (Pa.Cmwlth 1993). In Hebden, the Supreme Court found that relitigating the basic cause of an occupational disease is barred by the doctrine of res judicata. Thus, the WCAB found that the City could not meet its burden of proving the occupational disease was reversible by re-litigating the extent cigarette smoking as opposed to work exposure caused claimant's disability.

The City appealed to the Commonwealth Court, contending that the WCAB misapplied Hebden in precluding, as a matter of law, the City's evidence that the occupational component of claimant's lung disease was no longer present.

The Court disagreed. In the original claim petition, the WCJ did not find that claimant's cigarette smoking played any role in causing claimant to have COPD. To the contrary, the WCJ found that claimant's COPD was caused by his repeated exposures while fighting fires. Under Hebden, the disease must be found to be reversible. A change in the cause of the disease

does not equal a finding that the disease itself is irreversible. Here, while Dr. Manaker claimed that claimant's occupationally induced COPD had resolved, he conceded that the disease itself had worsened. Consequently, his testimony does not support a finding that the disease itself was irreversible.

The burden was not on claimant to prove that the increase in his disability was work-related. The burden was on employer to show that the disease itself was reversible and that, in fact, the claimant's condition had improved.

Accordingly, the decision of the WCAB was affirmed.

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William D. Rex v. Workers' Compensation Appeal Board (City of Oil City), No. 2779 C.D. 2004, filed July 25, 2005.

(Occupational Disease - The term "occupational disease under the Occupational Disease Act and Section 108(o) of the Act is a condition that develops over time as the result of some type of exposure and is not the result of an accidental and sudden injury.)

Claimant, a firefighter and paramedic, filed a claim petition under §108(o) of the Act. He alleged that he suffered an injury or occupational disease on September 22, 1998 as a result of exposure to firefighting hazards, including physical and emotional stress, inhalation of smoke and other toxins for over four years.

On September 22, 1998, claimant had suffered a heart attack. Expert testimony was presented which established that the claimant's medical problem and disability did not result from a disease of the heart or lungs, but rather, claimant suffered a vasospasm, which resulted in myocardial infarction. A certain percentage of the population is prone to developing vasospasm, and this tendency was not caused by claimant's cumulative exposure to heat and smoke.

Based upon the expert testimony, the Workers' Compensation Judge concluded that this was an injury case, not an occupational disease claim. As such, the WCJ applied a heightened burden of proof. He required the claimant to prove a greater incident of his condition among firefighters as compared to the general public.

Ultimately, the Workers' Compensation Appeal Board affirmed the WCJ's decision. Claimant then filed an appeal with the Commonwealth Court. On appeal, claimant argued that the WCJ and WCAB erred in failing to recognize that he was entitled to a presumption that his heart condition is a result of his employment as a firefighter. The Court disagreed.

Section 108(o) of the Act provides that a claimant "must first establish that he or she is suffering from and disabled by a particular occupational disease." Once the occupational disease is established, then the claimant is entitled to a presumption that the occupational disease arose out of and in the course of his employment.

The term "occupational disease" is defined in §108. Diseases of the heart and lungs that occur in firemen are described in §108(o). It is clear, however, that an "occupational disease" under both the Occupational Disease Act and §108 of the Workers' Compensation Act means a disease which is not the result of an accidental and sudden injury, but is of gradual development from long-continued exposure to natural dangers incident to one's employment.

Here, the claimant's vasospasm was not a condition that developed over time; but rather, was a one-time occurrence that produced a heart attack. As such, the WCJ and WCAB correctly determined that claimant did not suffer an "occupational disease" and was not entitled to the presumption that his condition was work-related.

The order of the WCAB was affirmed.

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Northwest Medical Center v. Workers' Compensation Appeal Board (Cornmesser), No. 409 C.D. 2005, filed August 12, 2005.

(Counsel Fees - Unreasonable contest fees are appropriate where the only evidence presented challenging the claimant's petition is the fact that the injury was not witnesses, as well as a history of a pre-existing problem or injury.)

Claimant, a registered nurse, filed a claim petition alleging that, on March 21, 2001, he suffered a work injury when, while moving a large patient, he felt something pop in his back. On March 28, 2001, claimant was hospitalized for a herniated disc at the L5-S1 level. A microdiscectomy was subsequently performed on April 8, 2001. Claimant was released to return to his regular duties on May 20, 2001.

The Workers' Compensation Judge awarded claimant benefits, as well as attorney's fees, medical expenses and litigation costs.

Employer appealed, alleging that claimant failed to present unequivocal medical evidence to establish a causal relationship between the work incident and claimant's disability. The Court disagreed, noting that, as here where the causal connection is obvious, medical evidence of causation is not necessary. The WCJ credited claimant's testimony regarding the incident and the medical care that he received thereafter as a result. Such testimony, if deemed credible, will support a finding that an injury occurred.

Employer next argued that the WCJ erred in awarding counsel fees for an unreasonable contest because claimant did not submit medical evidence as to causation and claimant had a previous back injury. Again, the Court disagreed noting that it was employer's burden to produce evidence to establish that claimant's injury was not work-related. Absent some evi-

dence to contradict or challenge the claimant's allegations that he suffered a work-related injury, a bald credibility challenge to an unwitnessed work-related injury is insufficient to show a reasonable contest.

Consequently, the award of unreasonable contest attorney's fees was affirmed.

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American Rock Mechanics, Inc. v. Workers' Compensation Appeal Board (Bik and Lehigh Concrete Technologies), No. 518 C.D. 2005, filed August 19, 2005.

(Borrowed Servants - The employer leasing equipment and operator to another entity is presumed to be the employer unless that employer rebuts the presumption with evidence that the second entity controls not only the work to be done, but also the manner in which it is to be performed.)

Claimant filed two claim petitions, one against Amroc and another against Lehigh Concrete Technologies for injuries he sustained to his right arm on February 19, 2002. Claimant worked as a drill operator for Amroc, which sent him and his drill to various locations where he operated the drill. On the date of his injury, claimant was operating the drill for Lehigh at a property owned by PA Power & Light. Amroc owned the drill and compressor, and provided claimant with safety equipment and health insurance. Lehigh directed claimant where to drill. Claimant was required to fill out a work report for his supervisor at Amroc to describe the work done on-site.

No written agreement existed between Amroc and Lehigh for the lease of claimant and the drill.

The Workers' Compensation Judge found Amroc to be the responsible employer. The WCJ noted that case law holds that when a piece of equipment is leased with an operator, the lessor is not responsible for injuries to the operator. Accordingly, the WCJ granted claimant's petition against Amroc and dismissed the petition against Lehigh.

Amroc appealed to the Workers' Compensation Appeal Board, which concluded that Amroc maintained the right of control over claimant and, thus, was the responsible employer. Although Lehigh directed where the holes were to be drilled, this did not rise to the level of giving Lehigh "control" over claimant. As such, the WCAB affirmed the WCJ's decision.

Amroc then filed a Petition for Review with the Commonwealth Court, arguing that under the Supreme Court's decision in JFC Temps, Inc. v. WCAB (Lindsay and G&B Packing), 680 A.2d 862 (Pa. 1996), the claimant was the employee of Lehigh at the time of injury. In JFC Temps the Court stated: "The test for determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done but also to the manner of performing it. The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised."

The Court, however, disagreed as to the applicability of the decision in JFC Temps to the instant matter. JFC Temps did not involve a leased employee and equipment. In such cases, a presumption arises that the operator remains in the employ of his original master. Unless that presumption is overcome by evidence that the borrowing employer in fact assumed control of the employee's manner of performing his work, the servant remains in the service of his original employer.

Here, there was no evidence that Lehigh enjoyed any authority to hire or fire claimant, or to select the operator of the drill. These aspects of control remained with Amroc. There was no evidence that Lehigh was involved with the details of the drill operation, except to direct the location and depth of the holes. The Court found this evidence to be insufficient to overcome the presumption that Amroc remained claimant's employer.

The decision of the WCAB was, thus, affirmed.

AVERAGE WEEKLY WAGE

(Continued from page 1)

wages were earned solely because the worker was unfortunate enough to have suffered a previous work injury, as if the worker had no earning capacity for those periods. Such an approach would severely underestimate the reality of the worker's typical earnings, punish the worker for no reason approved in the legislation, and contradict the overriding legislative goal of accuracy in calculation.

…

…[T]he simplest and most accurate measure of AWW in these cases is to accept the previously established AWW as the measure for periods of work disability, and then apply the formula in Section 309(d). To the extent that the workers' wages may have risen or fallen in the periods during which he was actually on the job and receiving wages in the previous year, the formula set forth in Section 309(d) will help

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ensure an accurate measurement.

…

In Hannaberry, … we recognized that the Act was not designed to punish a worker merely because a work calamity befell him. Thus, we noted that Section 309, as amended, was "an attempt to ensure that the calculation of wages would be a more accurate and realistic measure of what the employee could have expected to earn had he not been injured which, in turn, would ensure both that the employee was not over-compensation and the employer not over-burdened."

Simply stated, it is not necessarily the claimant's *"actual earnings"* that will determine his or her average weekly wage, but rather *"a fair ascertainment of the employee's wages."*

Is the method of calculation outlined by the Court "fair?" While the seeks to not punish the employee, does this formula not punish the employer? What about that situation where the first injury occurs while the claimant is employed by Employer A, and the second occurs while he or she is employed by Employer B. Should Employer B be required to pay compensation based upon the wages paid by Employer A? What if both injuries occur while the claimant is employed by the same employer, but when different carriers insure the employer? What if, following his first injury, the claimant voluntarily chooses a position which pays lower wages? Should the employer still be required to pay benefits based upon a wage he never would have received had the second injury not occurred?

While the Supreme Court may have addressed the calculation of the average weekly wage given the specific factual scenario before them in Colpetzer and Zerby, there are still many unanswered questions should there be a variation in those facts. Each case is different and subject to different interpretations, which will undoubtedly lead to additional disputes and litigation. Therefore, look forward to future decisions addressing the calculation of the average weekly wage.

[1] Colpetzer v. WCAB (Standard Steel); Zerby v. WCAB (Reading Anthracite Co.), ___ Pa., ___, 870 A.2d 875 (2005).

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