TR&C
Pennsylvania Workers' Compensation Bulletin

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STACKING OF BENEFITS

Act 44 provides that an injured employee may not collect benefits from two or more employers or insurers in excess of the maximum benefit defined by the Workers' Compensation Act. Further, benefits are to be paid on a *pro rata* basis if the employee receives more than one injury while in the employ of more than one employer.

But what if the employee sustains more than one injury while in the employ of the same employer? What if the employer changed carriers between injuries? May the benefits payable for each injury be "stacked" up to the statutory maximum?

In Franklin Steel Company v. Workmen's Compensation Appeal Board (Clark), 665 A.2d 1310 (Pa.Cmwlth. 1995), the Court held that two *insurers* should share the liability for one award where two injuries combine to cause total disability. The claimant suffered a left shoulder injury in 1989 and became totally disabled. As a result, PMA paid the claimant weekly benefits of $399.00, the 1989 statutory maximum allowable benefit. In 1990, the claimant returned to work and signed a final receipt. Two months later, he sustained a right shoulder injury. At that time, the employer's compensation carrier was Liberty Mutual. Consequently, Liberty Mutual paid benefits to the claimant. In June of 1992, a doctor examined the claimant and determined that *both* work injuries were substantial factors contributing to the claimant's total disability. The Commonwealth Court, therefore, ordered *both* PMA and Liberty Mutual to pay a *pro rata* share of the claimant's total disability benefits. The claimant, however, was entitled only to receive a total from both carriers of $399.00 per week, which was the statutory maximum at the time of his first injury.

Likewise, in Tomlinson v. Workmen's Compensation Appeal Board (J. Baker, Inc.), 648 A.2d 96 (Pa.Cmwlth. 1994), the Court held that where a claimant suffers a partial disability, continues to work, and then suffers another injury that renders him totally disabled, he can recover both awards concurrently. The only limitation placed by the Court on the claimant's benefits was, again, the maximum amount prescribed by the statute.

However, the Court took a different view more recently in Westmoreland Regional Hospital v. Workers' Compensation Appeal Board (Stopa), 789 A.2d 413 (Pa.Cmwlth. 2001). In January of 1995, Stopa suffered a shoulder injury and received total disability benefits as a result. In April of 1996, she returned to modified duty work, such that her benefits were modified to reflect her actual earnings. In May of 1996, while performing her modified duty job, she sustained a knee injury which, once again, rendered her totally disabled. Stopa sought reinstatement of her 1995 total disability benefits *and* total disability benefits for the 1996 injury. Relying upon the earlier case law, the Judge and the Board permitted Stopa to recover both awards up to the statutory maximum. As a result, she received compensation benefits that totaled more than she had ever earned while working.

The Commonwealth Court disagreed with this result. The Court concluded that Stopa was not entitled to collect two total disability awards.

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Commonwealth Court Case Reviews

Jeffrey Gingerich c/o Donna S. Gingerich v.Workers' Compensation Appeal Board (US Filter), No. 2044 C.D. 2002, filed June 6, 2003. **(Compromise and Release - Claimant could not release liability for counsel fees simply by waiving right to future benefits.)**

Claimant filed a fatal claim petition and was awarded benefits commencing September 8, 1994. She was represented during the course of the proceedings by Attorney Gebhardt. In the order approving payment of benefits to claimant, the Workers' Compensation Judge approved ongoing attorney fees to Attorney Gebhardt in the amount of 20%.

Subsequently, claimant received monies in a third party action that were in excess of employer's accrued lien. Claimant was represented in that action by Attorney Evans.

On February 26, 2001, claimant, represented by Attorney Evans, entered into a Compromise and Release Agreement with employer providing (1) that claimant was entitled to retain the proceeds from the third party action, (2) that claimant was not required to satisfy employer's lien for benefits already paid, (3) that claimant released employer from all future payments of fatal claim benefits, and, (4) that although employer believes Attorney Gebhardt is not owed ongoing attorney fees, should there be a determination to the contrary, then employer agrees to pay any such fees owed.

The WCJ approved the Compromise and Release Agreement, and determined that Attorney Gebhardt was not entitled to additional attorney fees. Claimant filed an appeal regarding the determination of attorney fees. The Workers' Compensation Appeal Board affirmed the decision of the WCJ.

On appeal to the Commonwealth Court, claimant argued that her waiver of future benefits in the Agreement did not extinguish Attorney Gebhardt's right to ongoing attorney fees. The Court agreed.

Under §449(a) of the Act, parties may compromise and release *"any and all liability"* under the Act. The Court interpreted this language to mean that an agreement may address "any" liability, but not necessarily "all" liability. Here, Attorney Gebhardt did not release claimant form liability for a 20% attorney fee, and claimant could not release herself from this obligation merely by waiving future benefits.

Consequently, employer was held liable for payment of Attorney Gebhardt's ongoing attorney fees. The order of the WCAB was reversed.

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Commonwealth of Pennsylvania, Department of Labor & Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Exel Logistics), No. 185 C.D. 2003, filed June 6, 2003. **(Supersedeas Fund Reimbursement - The Act does not provide for supersedeas fund reimbursement to an employer who succeeds on a petition for forfeiture filed under §306(f.1)(8).)**

Claimant was receiving benefits pursuant to a Notice of Compensation Payable for a work injury that occurred on May 19, 1993.

On August 11, 1997, employer filed a petition seeking forfeiture of the claimant's benefits pursuant to §306(f.1)(8) of the Act, alleging that claimant refused reasonable medical treatment. A request for supersedeas was filed simultaneously with the petition. Supersedeas was denied, such that employer continued to pay claimant compensation and medical benefits. At the conclusion of the litigation, however, the Workers' Compensation Judge granted employer's petition, and ordered that claimant's benefits during the period of July 14, 1995 through September 30, 1998 finding that claimant refused reasonable medical treatment during that time.

Employer then filed a petition for supersedeas fund reimbursement for $17,798.67 in compensation and $1,375.25 in medical benefits paid to or on behalf of claimant. The Bureau opposed the request, contending that reimbursement was not authorized in cases where compensation was ordered suspended because of a claimant's failure to seek reasonable medical care. The WCJ agreed with the Bureau and denied employer's request for reimbursement.

The Workers' Compensation Appeal Board reversed the decision of the WCJ. Although §306(f.1)(8) of the Act does not provide such a remedy, the WCAB concluded that employer's request for reimbursement fell within §430 of the Act, which compels employers to file petitions to establish that compensation should not have been paid and provides that employers may seek to recoup that compensation through the supersedeas fund.

The Commonwealth Court disagreed. Sections 413 and 430 of the Act provide the only mechanism by which an employer may seek supersedeas. In this case, employer filed a petition under §306(f.1)(8). Such a petition does not seek to modify a claimant's disability status like a termination, suspension or modification petition filed pursuant to §413 of the Act, but instead seeks only to penalize the claimant. Consequently, reimbursement is not allowed under the Act.

The order of the WCAB was reversed and the decision of the WCJ was reinstated.

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Village Auto Body v. Workers' Compensation Appeal Board (Eggert), No. 2673 C.D. 2002, filed June 19, 2003.

(Death Benefits - Decedent, an employee of his father in a family business, was within the scope of his employment when killed in an accident while traveling from his father's house after allegedly discussing business.)

(Death Benefits - Medical expenses incurred by decedent's wife and children for psychological treatment and grief counseling are not compensation as defined by §307.)

Employer is a family owned business. Typically, decedent worked for employer Monday through Friday, 7 AM to 8 PM. On July 21, 2000, a Friday, decedent was requested to stop at his father's house over the weekend to discuss a special job that had to be completed the following Monday. On Sunday, July 23, 2000, decedent stopped by his father's home as requested and they discussed business for 30-45 minutes. Thereafter, claimant (decedent's wife) and their children arrived at the home, followed by decedent's grandmother. Although invited to stay for dinner, decedent declined. He left on his motorcycle at about 6:30 PM and was followed by claimant and their children. Five minutes later, claimant and her children came upon an accident scene. Decedent's motorcycle had collided with a car. Claimant pulled off the road and found decedent lying on the ground, barely alive. Paramedics then arrived, and pronounced him dead at the scene. Claimant and her children then received psychological treatment and counseling as a result of the accident.

The Workers' Compensation Judge granted claimant's fatal claim petition, concluding that decedent was on a special mission in furtherance of employer's business when he was injured and, therefore, employer's carrier was liable for death benefits. Further, the WCJ held the carrier liable for payment of psychological services and medication provided to claimant and her children as a result of decedent's death.

The Workers' Compensation Appeal Board agreed that the carrier was liable for death benefits; however, it reversed the WCJ's order to pay for the medical expenses incurred by claimant and her children.

Both parties appealed to the Commonwealth Court. Section 301(c)(1) of the Act provides that a fatal injury is compensable if the injury arises during the course of employment and is related thereto. Generally, an injury received while traveling to and from work is not compensable. There are 4 exceptions to the general rule: 1) the employment contract includes transportation to and from work; 2) the employee has no fixed place of work; 3) the employee is on a special mission; or 4) special circumstances are such that the employee was furthering the business of the employer.

Here, the Court found the third exception applicable. Decedent was required to meet with his father over the weekend to discuss jobs. The meeting, at the time and place of employer's choosing, was necessary to discuss business matters. Therefore, decedent was on a "special mission" for employer when he met his father. The Court noted that decedent socialized with his family after the business meeting; however, the Court also found that decedent continued to discuss business matters with his father "even as decedent left the house." Therefore, decedent did not deviate from the special mission by socializing after the business meeting. An employee on his way home from a special mission for employer is considered to be in the scope of employment.

Under the Act, "compensation" has been interpreted to include medical expenses; however, it does not have that meaning in every section of the Act. Under §307, which specifies payments to be made to survivors in the event of a work-related death, the word "compensation" does not include the payment of medical expenses.

Therefore, the determination of the WCAB was affirmed.

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David Sekulski v. Workers' Compensation Appeal Board (Indy Associates), No. 2903 C.D. 2002, filed June 18, 2003.

(Course of Employment - "On call" does not necessarily mean in the course of employment.)

Claimant worked as a maintenance man for the owner of an apartment building. Every other week, he was "on call." which required that he carry a beeper and remain within 15 minutes of the property so that he could respond promptly to any page.

One night in December of 1998, claimant was "on call." While walking home from a bar, he was beaten and robbed. Due to the attack, he could not remember if he had been paged while at the bar or was responding to a call at the time of the attack. Employer had no rules against drinking while "on call."

Employer testified that none of the tenants notified her that their call had not been responded to on the night in question. Further, her answering service did not indicate that claimant failed to answer a page during the time in question. Finally, the other maintenance man testified that he did not page claimant on the night in question.

The Workers' Compensation Judge denied claimant's petition, concluding that claimant was not furthering employer's affairs at the time of the attack. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

The Commonwealth Court

noted that, under the applicable case law, an injury may be considered to be in the "course of employment" if the employee is on or off the employer's premises while actually engaged in the furtherance of employer's business or affairs. The nature of the employment and the conduct must be considered.

The Court further noted, however, that the case law does not support the claimant's proposition that an employee is in the course of employment if he sustains an injury while he is "on call" and reachable by employer but engaged in non-work-related activities off of the employer's premises. Such an "on call," non-traveling employee, limited to carrying a pager and remaining in the area in order to respond timely to work communications, is not considered to have sustained an injury in the course of employment unless he is actively engaged in work-related activities at the time of his injury. To hold otherwise would impose liability on an employer for the safety of its employees 24 hours a day, regardless of whether the employee is actually furthering its business when injured.

The order of the WCAB was affirmed.

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City of Philadelphia v. Workers' Compensation Appeal Board (Rilling), No. 2652 C.D. 2002, filed June 23, 2003.

(Occupational Disease - Where claimant testifies that he was a firefighter for more than 4 years, was exposed to smoke and heat and contracted lung cancer, the §301(e) presumption exists as to causation even though original WCJ finds that cancer was not occupationally induced.)

Claimant filed a petition alleging that he contracted lung cancer as a result of working as a firefighter for 24 years. Employer denied the allegations of the petition. During the course of the litigation, claimant passed away. His widow then filed two claim petitions, the first alleging that he died of work-related asbestos and the second alleging that he sustained an occupational disease under §108(o) of the Act.

Claimant had testified prior to his death. He stated that during his employment, he was exposed to smoke, heat, fumes and gasses in all extremes of weather and under stressful conditions. He also testified that he had a history of cigarette smoking.

Claimant's expert testified that the claimant had metastatic lung cancer and that his work as a firefighter was a substantial contributing factor in his contraction of lung cancer.

Employer's experts did not dispute that claimant died of lung cancer, but based upon their study of claimant's medical records and pathology slides, opined that the cancer originated in the adrenal glands and that, as such, there was no relationship between the exposure as a firefighter and the claimant's development of cancer.

The Workers' Compensation Judge deemed employer's experts to be credible and denied the petitions.

The Workers' Compensation Appeal Board remanded the case, however, inasmuch as the WCJ failed to indicate that she applied the presumption set forth in §301(e) of the Act. That section provides that had claimant shown he was disabled by a lung disease after four or more years of service as a firefighter, he was entitled to a rebuttable presumption that his disease was related to his employment.

On remand, the matter was assigned to a different WCJ. He determined that employer's evidence failed to rebut the presumption that claimant's lung cancer was caused by his employment and the claimant's petitions were thus granted. The WCAB affirmed.

On appeal to the Commonwealth Court, employer argued that in order for the §301(e) presumption to apply, a claimant must show that he or she is disabled from an occupational disease and that, inasmuch as the first WCJ rejected claimant's expert, claimant failed to meet that burden. The Court disagreed stating that the fact that claimant's medical witness was not deemed credible does not lead to the conclusion that claimant failed to establish his right to the presumption. Under §108(o) the Legislature determined that lung cancer is causally related to being a firefighter. Therefore, claimant here was entitled to the presumption of a causal relationship. It was up to employer to rebut that presumption.

Employer then argued that the second WCJ erred in arriving at different credibility determinations than those made by the first WCJ. The WCAB, however, did not restrict the WCJ on remand from making new credibility determinations. Therefore, the Court found that the WCAB had specifically granted the WCJ on remand the leeway to credit or discredit the employer's experts in light of the presumption afforded to the claimant.

The order of the WCAB was, therefore, affirmed.

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Anne Cryder v. Workers' Compensation Appeal Board (National City), No. 2552 C.D. 2002, filed June 23, 2003.

(Reinstatement - Burden of Proof - Where claimant returns to work with restrictions and then is discharged for poor performance, reinstatement is appropriate unless employer can prove bad faith on claimant's part.)

Claimant sustained a work-related back injury in December of 1997. Employer issued a Notice of Compensation Payable and began paying benefits. Pursuant to a notification of suspension or modification, claimant's benefits were suspended based upon her return to work at no loss of earnings. Al-

though claimant had returned to work, she had returned to modified duty given residual disability from the work injury.

Shortly thereafter, claimant was terminated from her employment due to poor work performance. Consequently, she filed a reinstatement petition.

Claimant testified that prior to her termination she had no discussions with her supervisor regarding poor work performance.

Employer's human resources consultant testified that she terminated claimant for her failure to meet production goals. She stated that, pursuant to employer's policy, claimant was verbally notified of the problem on November 19, 1997, placed on formal written discipline on January 12, 1998 and terminated on March 24, 1998.

The Workers' Compensation Judge credited employer's testimony and found that claimant was terminated for failure to meet production goals. Hence, her loss of earnings after March 24, 1998 was not causally related to her work injury. The Workers' Compensation Appeal Board affirmed the WCJ's denial of the reinstatement petition.

On appeal to the Commonwealth Court, claimant argued that she was only required to establish that, through no fault of her own, her earning capacity had been adversely affected by her disability. In order to find that the claimant failed to meet her burden, the employer must establish that the circumstances of claimant's termination rose to the level of bad faith.

The Court agreed. No evidence was presented by employer to show that claimant failed to act in good faith in carrying out the duties of her job. Instead, employer merely alleged that claimant was terminated because she failed to meet production goals established by management. Because this cannot be characterized as bad faith on the claimant' s part, the Court refused to find that claimant's earning power was adversely affected through any fault of hers and, therefore, claimant met her burden of proof. The decision of the WCAB was reversed.

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Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach), No. 2228 C.D. 2002, filed July 1, 2003.

(Statute of Limitations - Employer's payment of claimant's bills for psychiatric care constitutes payments in lieu of compensation that toll 3 year statute of limitations in §315 of the Act.)

On December 14, 1984, employer issued a notice of compensation payable acknowledging that claimant sustained a work-related 'back sprain." Following the injury, claimant became severely depressed and sought psychiatric care. Although claimant's psychological disorder was not identified in the NCP, employer paid all bills submitted for claimant's psychiatric treatment.

By order dated February 28, 1990, claimant's benefits were commuted in the sum of $77,000. As a part of the commutation agreement, the parties stipulated that employer would remain responsible for payment of reasonable and necessary medical expenses related to the work injury. Although the commutation documents did not refer to a psychiatric component of the work injury, employer continued to pay all bills arising out of claimant's psychiatric care through August of 1998.

On September 25, 1998, employer refused to continue with these payments. Claimant then filed a claim petition alleging that he suffered a psychiatric injury in the nature of depression that was causally related to his 1984 back injury. In response, employer asserted that the claim was barred by the statute of limitations set forth in §315 of the Workers' Compensation Act.

The Workers' Compensation Judge found that during the period of time that claimant was receiving psychiatric care and medications and the insurance carrier was paying, claimant was lulled into a false sense of security that this was the reasonable care related to his work injury that was contemplated in the commutation agreement. The WCJ further held that employer's payment of claimant's psychiatric bills constituted payments in lieu of compensation that tolled the 3-year statute of limitations, making claimant's claim petition timely.

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

Employer then appealed to the Commonwealth Court, again contending that the claim was barred by the statute of limitations. The Court, however, agreed with the WCJ that claimant was lulled into a false sense of security by employer's payment of his psychiatric bills, both before and after the commutation was executed. Further, employer's payment of the bills for 8 years after the commutation agreement was signed confirms that employer considered its responsibility under that stipulation as including liability for claimant's psychiatric bills.

Consequently, the Court held that the commutation agreement required employer to pay for claimant's ongoing work-related psychiatric care. Employer's unilateral refusal to continue making those payments after August of 1998 was contrary to the terms of the commutation agreement as reflected by employer's 8 years of performance pursuant to that agreement.

The order of the WCJ was affirmed by the Court.

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Theodore Shire, Jr. v. Workers' Compensation Appeal Board (General Motors), No. 2906 C.D. 2002, filed July 8, 2003.

(Average Weekly Wage - Sickness and accident benefits for non-work related illness are in-

cluded in calculation of average weekly wage.)

Claimant sustained a work injury on September 9, 1999, and, as a result, was totally disabled through January 2, 2000. He returned to work on January 3, 2000, but became totally disabled once again on May 20, 2000.

The parties were unable to reach an agreement as to the calculation of the claimant's average weekly wage. Claimant had received sickness and accident benefits through an employer sponsored program for days he missed prior to the work injury due to a non-work related condition.

Employer contended that payments made under the sickness and accident program should be deducted from his wages when calculating his AWW. Claimant alleged that the sickness and accident benefits should be included when calculating his AWW.

The Workers' Compensation Judge, without explanation, determined that sickness and accident benefits were not wages to be included in the calculation of an AWW under §309 of the Act.

Claimant appealed to the Workers' Compensation Appeal Board. The WCAB focused on the following language in §309:

> "The terms average weekly wage...shall not include...*fringe benefits, including, but not limited to, employer payments for or contributions to a retirement, pension, health and welfare, life insurance, social security or any other plan for the benefit of the employe or his dependents...*"

The WCAB thus determined that sickness and accident benefits could be considered a "plan for the benefit of the employe" and, as such, are not to be included in the AWW calculation.

Claimant sought further review by the Commonwealth Court. The Court noted that the intent of §309 of the Act is to establish an AWW that "*reasonably reflects* the *reality* of the the claimant's pre-injury earning experience as a predictor of *future earning potential*." Based on this analysis, the Court held that §309 does not preclude sickness and accident benefits received as compensation for days missed from work from being included in the calculation of a claimant's AWW. To exclude sickness and accident benefits from the calculation could severely harm long-term employees who sustain work-related injuries upon their return from an extended sickness and accident leave. Thus, the order of the WCAB was reversed.

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George Zink v. Workers' Compensation Appeal Board (Graphic Packaging, Inc.), No. 2219 C.D. 2002, filed July 10, 2003.

(Mental/Physical Claim - Rotating shifts created abnormal working condition for claimant given his preexisting post-traumatic stress disorder.)

Claimant, a Vietnam War veteran, was diagnosed in 1974 with post-traumatic stress disorder (PTSD) related to his war experience.

Employer hired claimant in 1983 as a maintenance mechanic. He continued to work for 13 years. During that time, because his PTSD prevents him from sleeping at night, he voluntarily traded shifts with other employees so that he could steadily work the third shift. This also allowed him to take his medications, which caused drowsiness, during the day.

In September of 1995, employer adopted a rotating shift schedule, which required claimant to work one week of day shift, one week of second shift and one week of third shift. Claimant was thus unable to get the sleep and rest he required, which led to a worsening of his condition. On July 23, 1996, claimant informed employer that he could no longer handle the stress of rotating shifts.

In August of 1996, claimant then filed a claim petition for the aggravation of his pre-existing condition. He presented medical evidence in support of his position.

Employer denied the petition, presenting medical evidence as well as testimony to establish that in August of 1996, it sent a letter to claimant honoring his request for permanent third shift work, but that claimant failed to respond.

The Workers' Compensation Judge found the claimant and his medical experts to be credible and determined that the rotating shift schedule aggravated claimant's PTSD and left him temporarily totally disabled as of July 24, 1996, but further held that compensation was not payable inasmuch as claimant had failed to prove the existence of an abnormal working condition.

The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Claimant then appealed to the Commonwealth Court. The Court noted that, in a psychic injury case, a claimant must prove by objective evidence that he or she has suffered from a psychic injury and that it is other than a subjective reaction to normal working conditions.

Here, employer hired claimant with full knowledge of his preexisting PTSD. Employer further knew that claimant worked the third shift for 13 years to accommodate his condition. Consequently, employer's requirement that claimant work rotating shifts constituted an abnormal working condition for this claimant. The WCJ and the WCAB therefore erred in determining that claimant failed to prove a compensable injury under the Act.

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The City of Nanticoke and State Workers' Insurance Fund v. Workers' Compensation Appeal Board (Ziolkowski), No. 210 C.D. 2003, filed July 10, 2003.

(Collateral Estoppel - Where the

employer accepts an injury as compensable under the Heart and Lung Act, the causation issue in the workers' compensation proceedings is estopped.)

Claimant alleged that he suffered work-related coronary artery disease caused by his occupation as a firefighter. Employer denied the allegation.

The Workers' Compensation Judge found as fact that claimant had been employed as a firefighter for 23 years. In April of 1995, he became incapacitated. In September of 1995, employer agreed to pay claimant Heart and Lung benefits, retroactive to April of 1995. Therefore, through December of 1996, claimant received his full salary in the form of Heart and Lung benefits. In January of 1997, however, the parties stipulated that claimant's disability was permanent. Claimant's employment and his right to Heart and Lung benefits was thus terminated.

The issue before the WCJ was whether the receipt of Heart and Lung benefits by the claimant precludes the workers' compensation insurance carrier from denying causation of claimant's heart condition based on the doctrine of collateral estoppel. The WCJ held that the doctrine did apply, and granted claimant's petition.

The Workers' Compensation Appeal Board affirmed, concluding that employer could have investigated the issue of causation before awarding Heart and Lung benefits in 1995. Employer cannot now deny causation where it has already awarded benefits.

The Commonwealth Court agreed. Employer had more than 15 months while paying benefits to claimant to investigate his eligibility for benefits and instead chose to simply pay. Employer may not now claim that it mistakenly paid benefits to claimant. Employer waived the issue of claimant's original eligibility for benefits under the Act when it began paying Heart and Lung benefits, thereby accepting liability for his injury, and cannot now dispute the issue of causation on the basis that it made a mistake previously.

The grant of compensation benefits was affirmed.

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CBS/Westinghouse and Constitution State Company v. Workers' Compensation Appeal Board (Fontana), No. 321 C.D. 2003, filed August 8, 2003.

(Hearing Loss - Statute of Limitations - Under §306(c)(8)(viii), a claimant need only show that he was exposed to occupational noise while working for employer during the 3 years preceding the claim in order for the claim to be timely.)

Claimant filed a petition alleging that he sustained a greater than 10% binaural hearing loss as a result of long and continuous exposure to hazardous occupational noise.

Claimant had not worked from March 14, 1994 to February 10, 1996. He then returned for 10 days and retired on February 28, 1996. He filed his claim petition on February 23, 1999.

Both parties presented evidence to the Workers' Compensation Judge, including expert medical testimony. The WCJ concluded that claimant established a 29.375% binaural hearing loss caused by continuous exposure to occupational noise while working for employer.

Employer, however, had raised a statute of limitations defense. The WCJ made no findings as to whether the 3 year statute of limitations in §306(c)(8)(viii) barred the claimant's petition. Employer, therefore, filed an appeal with the Workers' Compensation Appeal Board.

The WCAB stated that although the WCJ did not make specific findings with regard to claimant's work history and his exposure to hazardous occupational noise, no error was committed. Claimant was last exposed on February 28, 1996. The relevant period for determining long-term exposure is 3 years. Thus, exposure as of February 23, 1993 would entitle claimant to benefits. The fact that claimant was not working and hence not exposed to work related hazardous noise from March 14, 1994 to February 10, 1996 does not defeat his claim, given that he was exposed from February 28, 1993 through March 13, 1994. The decision of the WCJ was affirmed.

Employer then sought review by the Commonwealth Court. Employer contended that the WCAB erred and that §306(c)(8)(x) of the Act provides an employer with an affirmative defense if it can establish that claimant was not exposed to long-term hazardous exposure during the 3 years period prior to the filing of the petition.

The Court disagreed. Under §306(c)(8)(ix), the correct "date of injury" for purposes of hearing loss claims is the date of last exposure to occupational hazardous noise. Consequently, the relevant 3-year time period for a claimant who is still working begins to run from the date his claim is filed. In contrast, where a claimant is no longer working, his date of injury is the date of last exposure, which is normally his last date of employment. Here, claimant's date of injury was February 28, 1996. As a result, as long as claimant was exposed to long-term hazardous occupational noise from February 28, 1993 through March 13, 1994, his claim was not barred by the statute of limitations. That period of time exceeds the required exposure of three days per week for forty weeks needed to qualify as "long-term exposure" under §105.6 of the Act.

The order of the WCAB was affirmed.

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Harley Davidson, Inc. v. Workers' Compensation Appeal Board (Emig, Jr.), No. 2900 C.D. 2002,

filed August 13, 2003.

(Statute of Limitations - Medical benefits received within 3 years of filing claim petition toll the limitations period in §315 of the Act.)

Claimant injured his back in the course of his employment in November of 1993. After the injury, he missed a few days of work, and then returned with restrictions. Over the years, he would receive medical care from time to time when his condition would flare-up. The workers' compensation carrier paid for the medical bills incurred.

In January of 1998, claimant again experienced back pain while moving a piece of equipment at work. He reported the incident to his supervisor, who considered it to be a recurrence of his previous back injury. The supervisor did not fill out a new accident report form, but sent claimant to the medical dispensary at the plant. The company doctor told him to go home and buy Motrin.

In 1999, claimant's condition worsened. He missed several weeks of work and did not return to full-time work until May 10, 2000.

Claimant filed two petitions. The first alleged injuries in 1998 and 1999 when CNA was the carrier. The second alleged an injury date of November 3, 1993, when Travelers was the carrier. Both claims were denied.

The Workers' Compensation Judge concluded that claimant's disability related to the original 1993 work injury. The WCJ further concluded that employer paid claimant's medical expenses with the intent to toll the statute of limitations set forth in §315 of the Act:

> 'Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of three years from the time of the making of the most recent payment prior to date of filing such petition..."

The WCJ thus granted the claim against Travelers and dismissed the claim against CNA. The Workers' Compensation Appeal Board affirmed.

The Commonwealth Court noted that §315 of the Act is a statute of repose that entirely extinguishes a claimant's right to benefits unless, within 3 years of the date of injury, compensation is paid or a petition is filed. When neither case is met, the claimant has the burden of proving that (1) payments of compensation were made within 3 years of the filing of the petition and (2) that the payments were made with the intent that they be 'in lieu of compensation." Here, no evidence was presented that payment had been made to toll the statute.

Claimant argued, however, that his visit to the company doctor on January 29, 1998 tolls the statute. The Court agreed. The company doctor received payment from employer for providing medical treatment to claimant. Thus, payment of compensation in the form of medical benefits was made on behalf of and received by claimant for his work-related injury.

The order of the WCAB was affirmed.

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South Hills Movers v. Workers' Compensation Appeal Board (Porter), No. 2526 C.D. 2002, filed August 13, 2003.

(Job Availability - If an offered post-injury job places obligations different from claimant's pre-injury job, employer must produce evidence that the new obligations are within claimant's capabilities or the job is not "available.")

Claimant suffered an injury while working as a mover/packer and was awarded full disability benefits. In June of 2000, employer filed a modification/suspension petition alleging that claimant was released to light duty work and that there was such light duty work available in its warehouse.

The Workers' Compensation Judge found that the distance between claimant's home and the warehouse is 46 miles one way. The Judge further found that claimant does not have a valid driver's license and did not have one for years prior to his injury. Previously, his wife drove him to work; however, she is no longer capable of doing so for medical reasons. Therefore, although the WCJ found that claimant was physically capable of performing the proffered employment, the WCJ concluded that employer did not meet its burden of establishing that the job was available to claimant due to his lack of transportation.

The Workers' Compensation Appeal Board affirmed and employer appealed.

Employer contended that the WCJ erred by taking into account claimant's 'transportation difficulties" in determining whether the light duty position was actually available. Employer further argued that non-medically-related problems that inhibit a disabled worker from accepting suitable employment are irrelevant in determining whether a position is actually available, provided that the worker had the same problems when the injury occurred.

The Court disagreed. Because the new position requires claimant to commute 46 miles each way (which he was not previously required to do), the job places a new obligation on claimant that was not part of his pre-injury employment. Consequently, employer must demonstrate that claimant can overcome his travel limitations and can comply with the commuting requirements of the light duty job. Inasmuch as employer failed to meet that burden, the decision of the WCAB affirming the order of the WCJ denying the employer's petition was affirmed.

Supreme Court Case Reviews

Rosalyn Gunter v. Workers' Compensation Appeal Board (City of Philadelphia), No. 37 EAP 2001, decided June 16, 2003.

(Estoppel - Mistakenly paid IOD benefits to City police officer do not preclude employer from denying liability under the Workers' Compensation Act.)

Claimant, a City of Philadelphia uniformed police officer, returned home from work one day to find a man tampering with the locks on the gates to her backyard. Claimant remained in her vehicle with the window halfway down. She told the man to leave, but he punched her in the face and reached into the car for her pocketbook, which contained her personal revolver. A struggle ensued, causing claimant to suffer a fractured ankle. As a result, she did not work from February through August 1995, at which time she returned to clerical duty. She was unable to perform patrol duty.

Claimant's supervisor approved IOD benefits and she received them from February through June 16, 1995. At that point, the Police Safety Office determined that her supervisor did not have authority to approve IOD benefits and stopped payments. Claimant then filed a workers' compensation claim and a penalty petition based upon the termination of her IOD benefits.

The City defended the petitions on the basis that claimant was not injured in the course and scope of her employment. The Workers' Compensation Judge agreed, and dismissed the petitions.

On appeal to the Workers' Compensation Appeal Board, claimant argued that the City was estopped from denying liability by virtue of its previous payment of IOD benefits to her. The WCAB held that IOD benefits are not the equivalent of workers' compensation benefits. The WCAB found that the payment of IOD benefits was not in lieu of workers' compensation, but rather was payment for an injury ostensibly compensable under the City's own internal rules and regulations. The WCAB thus upheld the WCJ's decision.

Claimant further appealed to the Commonwealth Court. That Court affirmed the WCAB's decision, stating that the standard of proof for the award of IOD benefits differs from the 'in the course of employment" standard applicable in workers' compensation matters. Therefore, payment of IOD benefits is not equivalent to the issuance of a Notice of Compensation Payable. The payment of IOD benefits did not prevent the City from later opposing claimant's workers' compensation claim and arguing that the injuries were not work-related.

The Supreme Court reviewed the City's regulations and determined that, in fact, claimant's supervisor did not have the authority to approve payment of IOD benefits. The Court further noted that claimant was not now suggesting that she was entitled to IOD benefits. Instead, she was arguing that the windfall she received when the City inappropriately paid her IOD benefits should act as a binding admission of liability by the City under the Workers' Compensation Act. The Court refused to accept claimant's argument.

Pursuant to the Workers' Compensation Act, an employer who issues an NCP may still challenge an employee's right to compensation under certain circumstances, particularly when the NCP is based upon a 'material mistake." That is precisely what occurred here. The City, through claimant's supervisor's unauthorized act, paid claimant IOD benefits without the Police Commissioner determining whether her injury qualified her for those benefits. Therefore, even if the City's payment of IOD benefits is deemed the equivalent of issuing an NCP, the City is not precluded from contesting the workers' compensation claim where the payment of IOD benefits was based upon a material mistake of fact made by an unauthorized official. Accordingly, the order of the Commonwealth Court was affirmed.

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Wayne Daniels v. Workers' Compensation Appeal Board (Tristate Transport), No. 51 EAP 2000, decided July 22, 2003.

(Reasoned Decision - A decision is "reasoned" for purposes of §422(a) of the Act 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.)

(Reasoned Decision - Credibility Determinations - Unless the WCJ heard the witness' testimony live and had the opportunity to observe the witness' demeanor, the WCJ must articulate an actual objective basis for his or her credibility determination in order for the WCJ's decision to be "reasoned.")

Employer filed a termination petition and submitted the deposition testimony of John Williams, M.D., a board certified orthopedic surgeon. Dr. Williams opined that claimant's work related injury had resolved and that claimant was capable of returning to work without restrictions. Dr. Williams did not review the x-rays, CAT scan or nerve conduction studies.

In response, claimant offered the deposition testimony of Steven Fabian, M.D., his treating physician. Dr. Fabian opined that claimant's condition had substantially improved, but also opined that claimant suffered from post-traumatic cervical and lumbar sprains with a protruding disc. Dr. Fabian had reviewed the diagnostic studies, and opined that claimant could not return to his regular job or to any other employment due to

his pain and limited mobility. Claimant testified that he continued to have pain in his lower back and legs, and that he did not believe he could return to his work as an ambulance driver.

The Workers' Compensation Judge found in favor of employer and terminated claimant's benefits. After summarizing the testimony before her, the WCJ merely stated that she did not find claimant to be credible and found Dr. Williams to be more credible and persuasive than Dr. Fabian. The Workers' Compensation Appeal Board and the Commonwealth Court affirmed.

On appeal to the Supreme Court, claimant argued that the WCJ's decision was not a reasoned decision as required by §422(a). Claimant argued that the WCJ's credibility determinations were not accompanied by an adequate explanation for the rejection of claimant's evidence.

The Court noted that it is appropriate for the WCJ to base his or her credibility determinations upon the demeanor of the witnesses. The statute does not require the WCJ to explain such inherently subjective credibility determinations.

However, when the testimony is submitted by deposition, the WCJ does not have the opportunity to observe the witness. Hence, the WCJ's resolution of the conflicting evidence cannot be supported by a mere assertion that one witness is deemed more credible and convincing than another. Objective factors in support of the credibility determination must be set forth. Examples of such factors are: 1) expert's opinion is based upon erroneous assumptions; 2) expert may have had less interaction with the claimant; 3) expert's interaction with the claimant may not have been timely; 4) expert may be unqualified or less qualified than the opposing expert; 5) expert's testimony may be inconsistent with records or reports. The Court noted that these are merely examples of relevant factors used to determine credibility.

Here, because the WCJ failed to articulate the basis for her conclusion that Dr. Williams was more credible and convincing than Dr. Fabian, the order of the Commonwealth Court was vacated and the matter was remanded to the WCJ for an amended decision under §422(a) explaining the basis for her credibility determination.

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Irvin East, Deceased v. Workers' Compensation Appeal Board (USX Corporation), No. 34 WAP 2002, decided July 22, 2003.

(Statute of Limitations - The Minority Tolling Statute is inapplicable to a claim for benefits under the Workers' Compensation Act.)

In November of 1983, decedent became disabled as a result of a work-related injury. He subsequently died as a result. Employer paid death benefits to his widow and his son, Irvin. Employer ceased paying benefits to Irvin on his 18th birthday in 1989, and to decedent's widow upon her death in 1993.

On April 20, 1998, claimant filed a Review Petition, requesting that death benefits be paid to her minor son, Bradley, whom claimant alleged was fathered by decedent. Employer filed an answer denying that decedent had any dependent children entitled to compensation and asserting that the claim was time-barred under §315 of the Act inasmuch as the petition was filed more than 3 years after employer made its last benefit payment.

Claimant acknowledged that her petition was filed outside of the time requirements of §315, but argued that her minor son's rights were preserved by the Minority Tolling Statute. That statute allows an individual who is a minor at the time a cause of action arises to bring a civil action after he or she attains the age of 18.

The Workers' Compensation Judge found that the time limitations set forth in the Workers' Compensation Act are not tolled by the Minority Tolling Statute and denied the petition. The Workers' Compensation Appeal Board affirmed. The Commonwealth Court reversed the order of the WCAB, finding that the phrase "civil action" merely distinguishes criminal actions. Therefore, even though workers' compensation matters are administrative in nature, they are non-criminal and fall within the definition of a civil action.

Employer sought review by the Supreme Court. Employer argued that workers' compensation proceedings are administrative actions, distinct from civil actions, and that, therefore, the Minority Tolling Statute does not apply. The Court agreed.

The Court noted that the Legislature replaced an employee's right to file a civil action against his employer with an administrative action in the form of workers' compensation proceedings. Workers' compensation proceedings are distinct and separate from civil actions, with different substantive and procedural provisions and remedies. The Workers' Compensation Act is the exclusive means for obtaining compensation for injuries.

Though not defined by statute, the Court held that the term "civil action" does not include workers' compensation proceedings. Thus, the Court held that the Minority Tolling Statute is not applicable to workers' compensation proceedings. The order of the Commonwealth Court was thus reversed.

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City of Philadelphia v. Workers' Compensation Appeal Board (Szparagowski), No. 46 EAP 2001, Decided October 21, 2002.

(Modification - Benefits may be modified if claimant refuses alternative employment on the basis that such employment would result in a suspension of claimant's pension benefits.)

Claimant worked as a firefighter when he sustained a disabling injury. As a result, he began receiving total indemnity benefits.

Employer subsequently requested claimant to undergo an independent medical evaluation. The IME physician concluded that claimant had recovered to the point of being able to perform sedentary to light duty work. Employer had an opening for a fire communications dispatcher, a position within claimant's physical limitations. Employer offered the position to claimant, who refused it.

Employer then filed a petition to modify claimant's benefits. Claimant responded that he refused the position because accepting it would result in a suspension of his pension benefits. The Workers' Compensation Judge reduced claimant's benefits. Claimant's anticipated loss of pension benefits was not a valid reason to refuse the job offer. The Workers' Compensation Appeal Board, however, reversed, holding that the dispatcher position was not "available" because it required claimant to forfeit a "qualitative benefit." The Commonwealth Court affirmed.

The Supreme Court disagreed. The record reflected that if a former firefighter retires after performing a civilian position for the City, he will not, under any circumstances, receive lower monthly pension benefits than those he received prior to his re-employment in the civilian position. Hence, claimant was not required to forfeit accumulated pension benefits if he accepted the dispatcher position. That the City offered claimant a job within his physical limitations that permits him to retain his vested pension and accumulate additional pension benefits is more than sufficient to satisfy the City's obligation to offer claimant an "available" job that does not deprive him of "qualitative benefits" associated with his pension. The Commonwealth Court's order was reversed and the decision of the WCJ was reinstated.

Common Pleas Court Case

Dennis Johnson and Deborah Johnson, his wife, v. William M. Swartz, M.D. and Specialties of Plastic, Hand and Microsurgery, P.C., No. GD 02-010325, In the Court of Common Pleas of Allegheny County, Civil Division.

(IME Physician Liability - Physician is not liable to patient for negligence or breach of contract when the physician has been retained by an insurance carrier or employer for purposes of an independent medical evaluation.)

Plaintiff sustained a work injury in January of 1999. As a consequence, he underwent several surgeries for neck and shoulder injuries.

On May 22, 2001, his employer requested that he undergo an independent medical evaluation limited to evaluating his scars rather than the extent of his disability. Dr. Swartz conducted the examination. Dr. Swartz, however, performed a physical examination of the plaintiff rather than a mere scar evaluation.

Plaintiff filed suit against Dr. Swartz on two separate grounds.

First, plaintiff alleged that Dr. Swartz negligently performed the medical examination causing him to sustain personal injury. The Court noted, however, that no physician-patient relationship existed between plaintiff and Dr. Swartz and, therefore, Dr. Swartz had no duty to plaintiff. Pennsylvania courts have consistently held that a physician is not liable to a patient for negligence when the physician has been retained by an insurance carrier or employer for purposes of an independent medical evaluation.

Second, plaintiff argued that he was an intended beneficiary of the contract between the employer and Dr. Swartz. He maintained that Dr. Swartz breached the contract by performing a physical examination rather than a scar evaluation. Plaintiff claimed that his injuries were the direct result of Dr. Swartz' failure to perform according to his contract with the employer. The Court, however, noted that Pennsylvania courts have consistently held that a workers' compensation claimant is not an intended third party beneficiary of a contract between the workers' compensation carrier and the physician for the purpose of an IME because the interest of the carrier is separate and distinct from the interest of the plaintiff. Here, neither the employer nor Dr. Swartz had any interest in benefiting Mr. Johnson through the IME. Therefore, he had no standing to bring a breach of contract action against Dr. Swartz as a third party beneficiary.

The Complaint was dismissed.

EMPLOYER'S CORNER

Q. In an unemployment compensation claim, may a "hostile work environment" be found to be a "necessitous and compelling" reason to voluntarily quit?

A. In hostile work environment cases, Pennsylvania courts have long found that profanity in the workplace, abusive conduct and unjust accusations represent adequate justification to terminate one's employment and that the employee need not be subjected to such conduct or language indefinitely.

Therefore, an employee who can demonstrate 1) that he or she was compelled to voluntarily leave his or her position due to such conditions, and 2) that those conditions would have compelled a reasonable person to act in the same manner, may be entitled to benefits.

However, in order to obtain benefits, the employee must also demonstrate that he or she took some common sense action to obviate the problem so that he or she does not have to terminate employment. Such action may be accomplished by informing his or her superiors of the harassing, humiliating or abusive conduct. *See e.g., Daniel A. Porco v. Unemployment Compensation Board of Review, No. 427 C.D. 2003, filed July 7, 2003.*

(continued from page 1)

At no time was her loss of earning power greater than her 1995 average weekly wage. Therefore, stacking of benefits was not permitted. Her benefits were limited to total disability benefits based not on the maximum statutory amount, but rather based upon her *loss of earning power.*

The Supreme Court adopted the Commonwealth Court's reasoning in Stopa to arrive at a slightly different conclusion in the case of L.E. Smith Glass Company v. Workers' Compensation Appeal Board (Clawson), 813 A.2d 634 (Pa. 2002).

Clawson sustained a work injury to his right wrist on October 23, 1989. As a result, he received total disability benefits in the amount of $324.69 based upon his average weekly wage of $487.03. The liable carrier at the time was Amerisure. Clawson returned to work, without restrictions, on September 4, 1990. On August 8, 1991, he suffered another injury to his wrist. Again, he received total disability benefits based upon his average weekly wage at the time of $396.90, or $264.20 per week. This time, the responsible carrier was the State Workers' Insurance Fund.

In 1992, while receiving total disability benefits for the 1991 injury, Clawson alleged that he suffered a recurrence of his original injury and sought reinstatement of total disability benefits based upon the 1989 injury. The Commonwealth Court held 1) that the 1989 injury had, in fact, recurred; 2) that Clawson was entitled to receive total disability benefits up to the 1991 statutory maximum of $436.00; and, 3) that benefits should be apportioned pro rata between Amerisure and SWIF. Based upon the rationale in Stopa, the Supreme Court reversed that portion of the Commonwealth Court's order that permitted stacking of benefits up to the 1991 statutory maximum.

The Court noted that at no time did Clawson possess earning power greater than $487.03 per week. Further, at the time of the 1992 recurrence, Clawson had no earning power. He was already receiving total disability benefits as a result of the 1991-work injury. Therefore, because the 1989 injury was not contributing to his current loss of earning power, Clawson was not entitled to benefits as a result of the recurrence of that injury. Because his current loss of earning power related solely to the 1991 injury, SWIF was determined to be solely liable to Clawson for total disability benefits in the amount of $263.20 per week. Amerisure was off the hook until such time as Clawson's entitlement to benefits for the 1991 injury changes.

The recent cases reflect an accurate and fair result. Under the current case law, stacking of benefits is limited to the claimant's loss of earning power. Stacking is not permitted so as to allow a potential windfall to the claimant given the maximum benefit amounts payable under the Act.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.