TR&C

Pennsylvania Workers' Compensation Bulletin

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WALDAMEER PARK and the "MEDICAL ONLY" CLAIM

While attending college, Shauna Morrison worked during the summer months as a ride operator for an amusement park. On July 10, 1997, a child became stuck in the ride Shauna was operating. While she was attempting to rescue the child, Shauna cut her right hand on a metal overhang. Immediately thereafter, one of the owners of the amusement park took Shauna to the emergency room where she received 17 stitches in her right hand.

Although her hand was painful, Shauna continued to work throughout the summer. She returned to college in the fall, but had trouble writing and limited flexibility in her hand. Eventually, her hand stiffened and became difficult to use. Shauna underwent a variety of treatment, all to little or no avail. Her hand continued to be stiff and painful, although she was able to graduate from college.

The amusement park never acknowledged Shauna's injury, but did pay for her medical expenses. Neither a Notice of Compensation Payable nor a Notice of Compensation Denial was filed.

Shauna never made any claim for wage-loss benefits, but did file a Claim Petition seeking acknowledgment of the injury and payment of any future medical expenses before her right to those benefits was barred by the three-year statute of limitations.

The amusement park denied the allegations of the petition.

1) Is the employer's denial of the claim reasonable?

Clearly, the Act has been violated. The facts set forth above are the facts of the case of Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), No. 2031 C.D., filed March 17, 2003. As the Commonwealth Court noted, the facts of the case establish that the employer knew that the claimant suffered an injury. In fact, the employer paid the claimant' medical bills. However, by failing to issue a notice of compensation payable, the employer forced the claimant to hire an attorney and file a petition. Then, employer filed an answer denying all of the allegations of the petition. Therefore, claimant was forced to proceed further to litigate whether the injury even occurred and whether the employer had sufficient notice of the injury. This was true despite the fact that both the injury and notice to the employer were obvious given the facts of the case. Consequently, the employer's contest was unreasonable and attorneys' fees were assessed.

2) What course of conduct should the employer have followed?

Ideally, on a medical only claim, the employer should issue a "medical only" notice of compensation payable within twenty-one days of the date it has notice of the injury. By proceeding in this fashion, both the claimant and employer are protected. Because the Notice describes the injury, the employer is provided with a basis to challenge any medical bills it believes to be unreasonable or not related to the work injury. The Court indicated this course of conduct as the "proper course of action" in Waldameer Park. Unfortunately, to date, the Bureau has not published a "Notice of Compensation Payable – Medical Only" form. Until the Bureau does so, the regular Notice of Compensation Payable form will need to be appropriately modified in order to comply with the Court's recommendations.

A second option would be to proffer, *in writing*, an Agreement for

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William Johnson v. Workers' Compensation Appeal Board (Abington Memorial Hospital), No. 1669 C.D. 2002, filed February 20, 2003.

(Final Receipt - Where claimant is told he must sign Final Receipt to get his final check, there is fraud and inducement sufficient to set aside the final receipt.)

Claimant, a diabetic, suffered a work-related left foot injury which caused him to cease working. After weeks of antibiotic treatment, he returned to work on February 13, 1989 despite continued pain and swelling. On February 28, 1989, employer informed claimant that his final workers' compensation check would not be distributed unless he signed a final receipt. Claimant was not permitted to read the document inasmuch as the top portion was folded and covered by the check. Claimant later testified that he did not understand that by signing this document he was acknowledging that he was fully recovered.

Eventually, claimant developed osteomyelitis of his left foot, resulting in the amputation of a toe. In February of 1990, claimant resigned his employment for "health reasons."

In June 1992, he filed a reinstatement petition, alleging he was totally disabled as a result of the January 1989 work injury. He subsequently amended the petition to include a petition to set aside the final receipt. The Workers' Compensation Judge granted both petitions. On appeal, the Worker's Compensation Appeal Board affirmed the WCJ's decision, but modified the time of compensable disability based upon the medical evidence of record.

Employer appealed to the Commonwealth Court, contending that claimant was not disabled when the final receipt was signed and the WCJ made no finding of fault or improper conduct in the inducement of its execution. Further, employer challenged the legality of setting aside the final receipt more than three years after the date to which compensation payments were made.

The Court noted that, generally, a final receipt may be set aside if a claimant is not fully recovered. However, if more than three years have passed, it may be set aside only if obtained by fraud, intentional or unintentional deception or other improper conduct of employer.

Here, the WCJ found as fact that claimant was required to sign the final receipt before he could receive his check, that he did not know the significance of the final receipt, and that employer routinely does not explain the effects of a final receipt to its injured employees.

The Court held that while failure to inform a claimant of the significance of a final receipt is not deception, inaccurately informing him that he must sign the final receipt in order to receive a compensation check is improper conduct which will support setting aside a final receipt beyond the three-year period set forth in §434 of the Act. Therefore, the WCAB's order was affirmed.

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309 Nissan v. Workers' Compensation Appeal Board (Horowitz), No. 1279 C.D. 2002, filed January 7, 2003, reported March 7, 2003.

(Suspension - Where claimant is released to full duty and offered his pre-injury job as a commissioned salesman, employer does not need to prove that claimant's earnings match his pre-injury earnings, but rather, must show only that his "earning power" matches his pre-injury earnings.)

Claimant, a car salesman, sustained a work-related cervical strain on May 27, 1998. A Notice of Compensation Payable was issued and claimant began receiving total disability benefits.

On June 28, 1999, employer filed a petition seeking to suspend claimant's benefits alleging that claimant had recovered from his injury, that on May 29, 1999 employer had offered claimant his pre-injury job, and that claimant failed to respond to the job offer in good faith.

The Workers' Compensation Judge found that claimant had recovered sufficiently that he could return to his pre-injury job. The WCJ further found that employer offered the position to claimant and that claimant would be allowed to draw $200.00 weekly against his commissions, which was the same pay schedule that existed for claimant prior to his injury. Accordingly, the WCJ granted the petition.

Before the Workers' Compensation Appeal Board, claimant argued that his average weekly wage merited only a modification and not a suspension of his benefits. Claimant argued that employer failed to show that the wages claimant would receive in resuming his position would be the same or greater than his average weekly wage. The WCAB agreed and changed the WCJ's suspension of benefits to a modification based on the $200.00 weekly draw provided in the job offer.

Employer petitioned for review by the Commonwealth Court. In relying upon the Supreme Court's decision in Harle v. Workmen's Compensation Appeal Board (Telegraph Press, Inc.), 540 Pa. 482, 658 A.2d 766 (1995), the Court noted that: "*[a]n employee whose earning power is no longer*

affected by his work-related injury is no longer entitled to partial disability benefits, even though his earnings may not match his pre-injury earnings."

The Court compared claimant's pre-injury commission earnings to his post-injury commission earning power. The potential for actual wage loss is irrelevant in the face of the fact that claimant no longer suffered from a *loss of earning power* as a result of the injury. Claimant has the *potential* to achieve his prior commission earnings upon returning to his pre-injury position. As such, the WCAB erred in modifying the WCJ's order.

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Pep Boys, Inc. v. Workers' Compensation Appeal Board (Young), No. 2088 C.D. 2002, filed March 12, 2003.

(Supersedeas Fund Reimbursement - If insurer chooses to compromise the lien amount it is entitled to receive by way of statutory subrogation, it cannot recoup the compromised amount from the Fund.)

Claimant sustained a work-related injury to his left hand on August 1, 1993. A Notice of Compensation Payable was issued.

On January 18, 1994, insurer filed a termination petition on behalf of employer with a supersedeas request, alleging that claimant had fully recovered. The supersedeas request was granted on October 25, 1994.

While the termination petition was pending, claimant settled a third-party tortfeasor action he had filed in connection with his work injury in the amount of $56,000.00. To facilitate the settlement, insurer compromised its $32,520.30 lien for the sum of $16,250.15.

The Workers' Compensation Judge subsequently granted the termination petition by order dated November 3, 1997.

Insurer then filed an Application for Supersedeas Fund Reimbursement, seeking $27,520.40, which represented accrued compensation and medical benefits it had paid to claimant after the date if filed the termination petition.

The Bureau denied the Application because insurer had compromised its subrogation lien for full accord and satisfaction of the overpayments it had made pursuant to claimant's work-related injury.

The WCJ concluded that insurer was entitled to partial reimbursement from the Fund in the amount of $11,260.25, which represented the amount insurer requested ($27,520.40) less the amount it received from the third-party tortfeasor action ($16,260.15)

The Workers' Compensation Appeal Board reversed the WCJ's order and denied insurer reimbursement from the Fund.

The Commonwealth Court affirmed the WCAB's decision. The Court noted that Section 319 of the Act requires an insurer to seek subrogation to the full amount of compensation it is owed from the third-party tortfeasor. Here, because insurer voluntarily chose to compromise the lien amount it was entitled to receive by way of statutory subrogation, it cannot then recoup the amount it gave up through the Fund.

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Philadelphia Gas Works v. Workers' Compensation Appeal Board (Camacho), No. 2190 C.D. 2002, filed March 28, 2003.

(Disfigurement - The WCAB may only modify an award if it is "significantly outside the range" awarded by most WCJs statewide.")

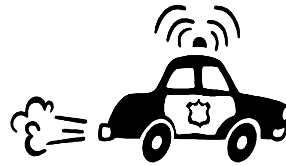
Claimant suffered second and third degree burns on his hands, foot, back and face when he was involved in an explosion. He filed a claim petition alleging that the explosion caused permanent disfigurement to his face.

The Workers' Compensation Judge noted that it was the worst disfigurement he had viewed, in that it appeared as though claimant's features were actually melted. The WCJ concluded that claimant was entitled to 180 weeks of compensation as a result.

Both parties appealed to the Workers' Compensation Appeal Board. The WCAB noted that, given the description of the scar, the range most judges would award is between 180 and 220 weeks. The WCAB modified the WCJ's decision to award claimant 200 weeks of disfigurement benefits.

Employer petitioned for review by the Commonwealth Court. Employer argued that the WCAB erred in modifying the WCJ's decision because the original award was not significantly outside the range most WCJs would award.

The Court agreed. The WCJ's award of 180 weeks was within the range described by the WCAB. An award significantly outside the range of statewide disfigurement awards is necessary before the WCJ's award may be modified. The WCAB had no legal authority to modify the WCJ's award. Therefore, the decision was reversed and the WCJ's award was reinstated.



IT'S THE LAW!!!

Section 305 of the Workers' Compensation Act provides that an employer's failure to insure its workers' compensation liability, or to receive approval as self-insured, is a criminal offense and classifies each day's violation as a sep-

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Careers Express and State Workers' Insurance Fund v. Workers' Compensation Appeal Board (Goodman), No. 2089 C.D. 2002, filed March 31, 2003.

(Termination - Burden of Proof - Medical Evidence - A medical opinion that the claimant will recover at some time in the future is not competent to support a termination order.)

Claimant sustained a work injury on December 16, 1999.

At employer's request, claimant was examined by Dr. Stepanuk on February 3, 2000. Dr. Stepanuk diagnosed claimant as suffering from a work-related lumbar sprain and strain. He recommended that claimant continue with therapy and medication. He also released claimant to return to light duty on February 7, 2000 and to regular duty on February 21, 2000.

Employer filed a Termination Petition given Dr. Stepanuk's opinions. During his testimony, Dr. Stepanuk stated that "my opinion, within a reasonable degree of medical certainty, was that he was fully recovered as of February 21, 2000.

The Workers' Compensation Judge found Dr. Stepanuk to be credible and concluded that employer had met its burden of proving that claimant had fully recovered from the work injury. Hence, claimant's benefits were terminated.

The Workers' Compensation Appeal Board concluded that Dr. Stepanuk's opinion on February 3, 2000 as to claimant's condition at a future date was speculative. Thus, his opinion was not competent to support a termination of claimant's benefits. The WCAB, therefore, reversed the decision of the WCJ.

Employer then petitioned for review by the Commonwealth Court. The Court noted that an employer meets its burden of proof on a termination petition when its medical expert unequivocally testifies that it is his opinion, within a reasonable degree of medical certainty, that the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which can either substantiate the claims of pain or connect them to the work injury.

Here, Dr. Stepanuk did not testify that claimant could return to work as of the day of the examination. Rather, he speculated that claimant would be able to return to work at some time in the future. Therefore, the WCAB correctly determined that Dr. Stepanuk's testimony was insufficient to support a termination of the claimant's benefits.

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Chester Upland School District v. Workers' Compensation Appeal Board (Lee), No. 2217 C.D. 2002, filed April 2, 2003.

(Statute of Limitations - The statute of limitations set forth in §413 of the Act applies to employer who files review petition for credit more than three years after a commutation.)

Claimant sustained a work injury on July 21, 1994. Compensation benefits were subsequently paid. In August of 1996, claimant and employer agreed to a commutation of benefits, as a result of which claimant's benefits were reduced to partial disability in the amount of $78.00 per week over 500 weeks.

Employer terminated claimant in October of 1996. Claimant filed a grievance alleging that he was improperly terminated and that, by September 1997, he could return to full duty. Following a hearing, claimant was reinstated to his prior position at a salary equal to or in excess of his time of injury wage.

On April 12, 2001, employer filed a petition to review compensation benefits, alleging that it was entitled to a credit against claimant's wages in the amount of $78.00. The Workers' Compensation Judge dismissed the petition as being filed beyond the three year statute of limitations set forth in §315 of the Act. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

The Commonwealth Court looked to §413(a) of the Act. That section provides that: "...no notice of compensation payable, agreement or award shall be reviewed, or modified, or reinstated, unless a petition is filed within three years after the date of the most recent payment of compensation..." Section 413(a) is like a countdown timer. In the case of a commutation, the timer begins to count down immediately after the lump sum payment.

Because employer did not file its petition within three years of the date of the commutation payment, the statute of limitations has expired.

The Court noted that a commutation is a gamble for both parties. A claimant who commutes his benefits runs the risk of being beyond the statute of limitations when his injury worsens or his disease progresses. An employer runs the risk of a claimant recovering and returning to work after the three-year statute of limitations has run but prior to the end of the commutation period. Here, employer gambled and lost. The order of the WCAB was affirmed.

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Harry Hoover v. Workers' Compensation Appeal Board (ABF Freight Systems), No. 2597 C.D. 2002, filed April 3, 2003.

(Penalties - Failure to make payment within thirty days pursuant to an Order will result in assessment of penalties.)

Claimant sustained a work-

related injury on September 11, 1993, for which employer accepted liability. In December of 1994, employer sought to modify claimant's benefits based upon claimant's refusal to accept a light-duty position. Claimant responded that employer's offer was not made in good faith inasmuch as the offered position was a non-union position.

The Workers' Compensation Judge issued a decision granting employer's petition. In April of 1998, the Workers' Compensation Appeal Board reversed the WCJ's decision and remanded the case for further findings of fact and conclusions of law. On remand, the WCJ reconsidered the evidence, but still granted employer's petition. By order dated October 11, 2000, the WCAB again reversed the decision of the WCJ, concluding that the offered non-union position was not actually available to claimant.

On October 23, 2000, employer filed an appeal with the Commonwealth Court. The next day, employer filed a request for supersedeas with the WCAB pending its appeal to the Commonwealth Court. The WCAB denied employer's supersedeas request on November 14, 2000. Employer then filed a similar request for supersedeas with the Court, which was also denied. Ultimately, the Court issued an order affirming the WCAB's order of October 11, 2000.

In the meantime, on November 16, 2000, employer forwarded checks to claimant and his counsel for the indemnity benefits owned in the amount of $68,093.73. Prior to the receipt of these checks, however, claimant had filed a petition for penalties alleging employer violated the Act by failing to pay him in accordance with the October 11, 2000 order of the WCAB. Claimant sought 50% penalties, interest and unreasonable contest attorney fees.

As the penalty petition was pending, counsel for claimant amended the petition to request penalties for employer's failure to timely pay claimant's litigation costs.

The WCJ granted claimant's petition, awarding him a 10% penalty on his disability benefits and a 50% penalty with respect to the costs. Employer filed an appeal with the WCAB, which concluded that, although paid a few days late, employer had timely paid the indemnity benefits owed and, as such, had not violated the Act.

Claimant filed an appeal to the Commonwealth Court. The Court noted that it is undisputed that employer failed to make the requisite payment within thirty days of the WCAB's order. Further, employer was not granted a supersedeas. Consequently, by failing to make payment within thirty days, employer violated the Act and the WCJ acted within his discretion in awarding a penalty.

Claimant also argued that the WCJ and WCAB erred in failing to award unreasonable contest attorney fees. The Court agreed. In situations involving a violation of the Act, a contest is not reasonable and an award of attorney fees is appropriate.

The decision of the WCAB was reversed. The award of penalties was reinstated and unreasonable contest attorney fees were assessed.

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James Anthony, Deceased c/o Mary Anthony v. Workers' Compensation Appeal Board (Anderson Box Company, Inc. and Highlands Insurance Company), No. 2611 C.D. 2002, filed April 4, 2003.

(Meretricious Relationship - Termination of widow's benefits based upon meretricious relationship may not be granted in the absence of sexual relationship.)

Claimant is the widow of James Anthony, who died in a work-related auto accident. As a result, claimant began receiving compensation benefits.

Employer subsequently filed a termination petition alleging that claimant had entered into a meretricious relationship.

Evidence was presented to the Workers' Compensation Judge from two private investigators. One testified that he observed the claimant's residence and established that a gentleman, Mr. Oster, was spending the night there. The other testified that he observed claimant exit her home at 5:57 AM to feed her dogs. A male was observed on the porch. he saw the male and the claimant embrace twice and then the male departed. A video tape of the encounter was played for the WCJ.

Claimant, who was 60 years old, testified that Mr. Oster moved in with her in February of 1998 because his house was in the process of being remodeled. She stated that she never had sexual relations with him and had not had sex since her husband died.

Mr. Oster confirmed that he moved in with claimant while repairs were being made on his home. He testified that he never had sex with claimant and that he is unable to have sex. Mr. Oster's doctor also testified, stating that it would be virtually impossible for him to

Did You K now...

Under Act 57, 50% of a claimant's Social Security Retirement Benefits may be credited against workers' compensation benefits. The credit is not available for Social Security Disability Benefits. However, at age 62, Social Security Disability Benefits convert to Social Security Retirement Benefits. Therefore, a claimant who is receiving disability benefits in addition to workers' compensation benefits, and who attains the age of 62, may be

engage in a sexual relationship with anyone in light of his having Diabetes Mellitus for 25 years.

The WCJ did not find claimant, Mr. Oster or his physician to be credible. The WCJ noted that the surveillance video showed the claimant and Mr. Oster engaged in an embrace and lingering kiss, not the type of which most Pennsylvanians give to their platonic friends. The WCJ thus found that claimant had engaged in a meretricious relationship and terminated claimant's benefits.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, finding that there was substantial evidence of a meretricious relationship.

Claimant petitioned for review by the Commonwealth Court. The Court noted that §307(7) of the Act provides that if a widow is living in a meretricious relationship with a man on the date that the termination petition is filed, her benefits may be terminated. A meretricious relationship is defined as one in which the individuals are living together, without the benefit of marriage, in a carnal way. The Courts have further defined carnal as meaning sexual.

Here, the evidence presented by employer established that claimant and Mr. Oster were living together; however, no evidence was presented that established a sexual relationship. The Court disagreed with the WCJ that the video evidence was sufficient to establish that a carnal relationship existed. Therefore, because employer did not meet its burden of proof, the order of the WCAB was reversed.

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Independence Blue Cross v. Workers' Compensation Appeal Board (Frankford Hospital and Susan Nothnagel), No. 1299 C.D. 2002, filed April 7, 2003.

(Subrogation - Right to subrogation must be agreed to by the parties or established at the time of hearing or is forever lost.)

Claimant sustained a back injury in 1994. Employer denied the claim, and claimant filed a Claim Petition. During the litigation, claimant submitted her medical expenses to Blue Cross and Blue Shield, her health insurance carriers.

In 1997, the Workers' Compensation Judge granted claimant's petition and employer appealed. Blue Cross and Blue Shield continued to pay her medical expenses.

While the appeal was pending, employer and claimant entered into a Compromise and Release Agreement. Based on information received from Blue Shield, claimant paid it $11,000 from the proceeds of the settlement. The Agreement did not refer to Blue Cross, but did state that there was no further subrogation lien.

Fourteen months later, Blue Cross filed a Review Petition against employer, seeking subrogation, and a penalty petition, seeking to set aside the Compromise and Release Agreement alleging that it contained material and fraudulent misrepresentations regarding the existence of a subrogation lien.

Claimant and employer moved to dismiss the petitions, asserting that Blue Cross never provided notice of its subrogation lien to either of them and that Blue Cross was now time-barred from asserting a lien.

The Workers' Compensation Judge found that Blue Cross did not assert its subrogation interest during the claim proceeding and did not participate in the negotiation or hearing on the Compromise and Release Agreement. The WCJ therefore concluded that Blue Cross waived its subrogation interest by failing to raise it in a timely manner. That determination was affirmed by the Workers' Compensation Appeal Board.

Blue Cross filed an appeal with the Commonwealth Court asserting that its right to subrogation under §319 of the Act is an absolute statutory right which cannot be defeated by lack of due diligence. The Court noted, however, that the second paragraph of §319 contemplates that subrogation will be established either by contract (agreed to by the parties) or by litigation (established at the time of the hearing). The right is neither absolute nor automatic. A right to subrogation must be asserted with reasonable diligence. Here, Blue Cross did not prove that an agreement for subrogation existed, that a request for subrogation was made at any of the hearings, or a that a request was directed to any party that a subrogation interest be protected. The order of WCAB was therefore affirmed.

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Sloane Nissan v. Workers' Compensation Appeal Board (Zeyl), No. 2712 C.D. 2002, filed April 10, 2003.

(Course and Scope of Employment - To and From Work Doctrine - Employee who is directed to leave work place to change attire and who immediately returns upon doing so is on a special mission for employer.)

Employer has a general company dress code requiring employees to wear a suit coat and tie on weekdays, and allowing casual dress on Saturdays, such as a golf shirt with employer's logo and khakis.

In July 1999, employer's air conditioning system malfunctioned. Consequently, casual dress was permitted during the week. On July 8, 1999, claimant went to work in a nondescript white golf shirt and trousers. Employer's manager advised claimant to either purchase a shirt bearing employer's logo or return home and change into such a shirt.

Claimant opted to return home. He left employer's premises, returned home, changed into a golf shirt bearing employer's logo, and, on the way back to employer's premises, was involved in a horrific traffic accident leaving him in a

persistent vegetative state.

Employer denied liability, contending that claimant was not within the course and scope of his employment at the time of the car accident.

The Workers' Compensation Judge found that claimant was on a "special mission" for employer and, thus, was within the course and scope of his employment at the time of the accident. The Workers' Compensation Appeal Board affirmed.

Employer sought review by the Commonwealth Court. Employer argued that because claimant was dressed in violation of the company dress code, upon returning home, claimant was furthering his own interests and not those of employer.

The Court disagreed,noting that an injury sustained by an employee traveling to and from work is not compensable under the Act, unless (1) the employee's employment contract included transportation to and from work; (2) the employee had no fixed place of work; (3) the employee was on a special mission for the employer; or (4) special circumstances indicate that the employee was furthering the business of the employer.

Here, the shirt claimant was wearing did not bear the company logo. At the direction of employer, he returned home to change into a shirt that did bear the company logo. This was clearly in furtherance of employer's interest. Since claimant was to return to the work place upon changing his shirt, the claimant was indeed on a special mission for employer. The order of the WCAB was affirmed.

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Jeffrey Reifsnyder v. Workers' Compensation Appeal Board (Dana Corporation), No. 780 C.D. 2002, filed April 23, 2003.

(Average Weekly Wage - Even where an "employment relationship" exists during the 52 weeks prior to injury, if claimant did not *work* one *complete* 13-week period in that 52 weeks, the AWW is calculated under §309(d.2) of the Act.)

The parties stipulated that claimant did not have continuous earnings for 52 weeks prior to his injury due to layoffs for lack of work. The parties further stipulated that claimant maintained an employment relationship with employer during that time period inasmuch as during the periods of layoff, claimant retained his entitlement to be recalled as soon as work was available and he retained his plant seniority.

Employer calculated claimant's average weekly wage by dividing the total wages earned in each of the 3 highest of the last 4 consecutive periods by 13, and averaging the total amounts earned during those periods.

Claimant filed a review petition alleging that the AWW was improperly calculated. The Workers' Compensation Judge agreed with employer's calculation under §309(d) of the Act. The Workers' Compensation Appeal Board affirmed that decision.

On appeal to the Commonwealth Court, claimant argued that his benefits should have been calculated under §309(d.2) because he had not worked a complete calendar quarter in the 52 weeks prior to his injury. The Court noted that §309(d) applies to situations where the claimant has been *employed* by the employer for at least 3 consecutive 13 week periods in the 52 weeks preceding the injury. Subsection (d.1) applies when the claimant has not been *employed* for at least 3 consecutive 13 week periods. Subsection (d.1) applies when the claimant has not *worked* a complete period of 13 weeks. Because, although employed, claimant did not actually *work* a complete 13 week period due to the layoffs, the Court held that his benefits should be calculated under §309(d.2). The decision of the WCJ was reversed.

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Westinghouse Electric Corporation v. Workers' Compensation Appeal Board (Weaver), No. 1614 C.D. 2002, filed February 14, 2003, reported May 7, 2003.

(Penalties - Payment of Medical

EMPLOYER'S CORNER

Q. What amount, if any, is deducted from unemployment compensation payments when a claimant is also receiving an employer-funded pension?

A. Section 404 of the Unemployment Compensation Law provides that: *"If the pension is entirely contributed to by the employer, then 100% of the pro-rated weekly amount of the pension shall be deducted. If the pension is contributed to by the individual, in any amount, then 50% of the pro-rated weekly amount of the pension shall be deducted."*

The critical question then is what constitutes a "*contribution*" within the meaning of the above-emphasized language.

Actual monetary contributions by the employee are obviously to be included, such that there should be only a 50% pension offset.

In addition, prior case law had held that giving up cost of living adjustments in exchange for the employer using that money to increase the pension benefits of past and present employees was also a contribution.

That is no longer the case, however. In a decision issued by the Commonwealth Court on March 6, 2003[1], the term "contribution" was determined to only be represented by "a line-item deduction appearing on the pay stub or a specific provision in the pension plan indicating a contribution to the pension fund has been made by the employee." Absent either one of these conditions, a 100% deduction applies.

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[1]United States Steel Corporation (USX Clairton Works) v. Unemployment Compensation Board of Review, Nos. 1379-1399 C.D. 2002, filed March 6, 2003.

Bills - When medical bills are awarded by a WCJ, there is no longer a need to submit them on approved forms. If employer does not appeal the award, failure to pay the medicals based on lack of proper forms will result in assessment of penalty.)

By decision issued on June 28, 1996, a Workers' Compensation Judge found that claimant sustained a work injury and that, as a result, had incurred certain medical bills for reasonable and necessary treatment. The medical expenses were to be repriced in accordance with the medical cost containment regulations and employer was directed to reimburse claimant's medical insurer eighty percent of the repriced expenses with statutory interest.

Over a year later, claimant filed a penalty petition alleging that employer failed to make payment for the medical expenses that the WCJ had ordered to be paid. Employer denied the allegations of the petition.

The WCJ issued a decision on April 24, 2001 and found that employer violated the Act and delayed in making payment for periods of up to four years after the June 28, 1996 decision. Penalties of ten and fifty percent were assessed along with statutory interest. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, employer argued that the WCJ erred in awarding penalties on medical bills which were never presented to employer on the proper form for repricing. In the case of AT&T v. WCAB (DiNapoli), 728 A.2d 381 (Pa.Cmwlth. 1999), the Court held that medical expenses must be submitted on the proper forms as required by Section 306(f.1)(2) of the Act.

The Court here, however, found that AT&T is distinguishable. In AT&T, the employer was challenging the award of medical expenses. Here, employer did not appeal the WCJ's June 28, 1996 decision. Accordingly, employer cannot now complain that it is not required to pay the bills related to those medical expenses because they were not submitted on the proper forms.

Consequently, employer's argument was rejected. The WCJ appropriately assessed penalties.

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Saint Luke's Hospital v. Workers' Compensation Appeal Board (Ingle), No. 1471 C.D. 2002, filed May 13, 2003.

(Reinstatement - Discharge for Criminal Conduct - A claimant who is working modified duty, but who is subsequently discharged for criminal conduct unrelated to her employment, is not entitled to reinstatement of benefits.)

Claimant sustained injury in the course of her employment as a practical nurse. She returned to work in a modified capacity in the admissions office, working 20 hours per week. Consequently, she received partial disability benefits to supplement her wages as an admissions clerk. However, when employer learned that criminal charges of child abuse had been lodged against claimant, she was discharged. Employer did continue to pay her partial disability benefits to account for her loss of earning power relative to her injury.

Claimant filed a reinstatement petition and a petition for penalties asserting that she became entitled to total disability benefits as of the date of her discharge.

Employer explained that although it did not have a written policy on employee criminal conduct, newspaper articles which identified claimant as an employee of St. Luke's Hospital contained lurid accounts of the injuries sustained by claimant's stepchildren. Therefore, because of the adverse publicity brought to the employer by claimant, employer considered claimant responsible for her own discharge.

The Workers' Compensation Judge granted claimant's reinstatement petition but denied her penalty petition. The WCJ found that there was no evidence of misconduct by claimant with respect to her employment and, therefore, employer's firing of claimant was unjustified. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, employer argued that claimant' s loss of earnings after her discharge was a result of her actions, not her injury.

The Court noted that a claimant seeking reinstatement must prove that, through no fault of his own, his earning power is once again adversely affected by his disability. In addition, claimant must prove that the disability that gave rise to his original claim continues. Here, there was no dispute that claimant's injury continues to limit her to modified duty; however, claimant failed to prove that her loss of earnings from the job as admissions clerk occurred through "no fault of her own."

A reinstatement of total disability benefits will not be permitted where work was available or "would have been available but for circumstances which merit allocation of the consequences of the discharge to the claimant." Here, claimant lost her job because of her criminal conduct. Her criminal conduct did not transform her into a totally disabled person. She was capable of performing the admissions clerk job and would still be performing that job but for her criminal assault upon a child committed to her care. One of the consequences of this conduct was her discharge from employment, and so claimant - not employer - is responsible for the lack of suitable work. This caused burden of proof to shift to her to establish that her loss in earnings was the result of her injury. In order for claimant to have her total disability benefits reinstated, she had to prove a worsening of her medical condition to the point where she could no longer

perform the modified duty position from which she had been discharged. The order of the WCAB was reversed.

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Paul Dowhower v. Workers' Compensation Appeal Board (Capco Contracting), No. 1667 C.D. 2002, filed May 13, 2003.

(Impairment Rating Evaluation - IRE requested *prior* to the expiration of the 104-week term but which did not take place until after expiration of the 104-week period complies with the requirements of Section 306(a.2)(1) of the Act.)

Claimant sustained a work injury on September 13, 1996. Disability benefits were awarded effective April 18, 1997.

On May 20, 1999, insurer filed a petition requesting that a physician be designated to perform an impairment rating evaluation in accordance with §306(a.2)(1) of the Act. The petition alleged that claimant had received total disability benefits for 104 weeks as of April 14, 1999. The Bureau appointed Dr. Van Do to conduct the IRE and he did so on September 1, 1999.

Dr. Van Do found an impairment rating of 10%. Consequently, insurer filed a Notice of Change of Workers' Compensation Disability Status requesting that claimant's total disability be reduced to partial. In response, claimant filed a Review Petition alleging that the timing of the insurer' s request for an IRE violated the Act.

The Workers' Compensation Judge found that 104 weeks of total disability expired on July 23, 1999, rather than in April as alleged in insurer's petition. The WCJ also concluded that the Act did not permit insurer to request the IRE until after expiration of the 104 weeks of total disability. Because insurer filed its request prior to the expiration of the 104 week period, the WCJ found the request to be untimely and, therefore, invalid.

The Workers' Compensation Appeal Board reversed the WCJ's decision, reasoning that the claimant had already attended the IRE and, therefore, claimant waived any dispute as to the timeliness of the IRE request.

The Commonwealth Court disagreed with the WCAB's analysis, stating that the claimant had to attend the IRE or face the possibility of having his benefits suspended. Therefore, claimant did not waive his challenge to the timeliness of the IRE petition by attending the exam.

The Court went on to state, however, that the statute requires only that the insurer request the IRE *no later than* day 61 after expiration of the 104 weeks. Here, insurer requested the IRE *before* day 61 after claimant's 104-week period of collecting total disability benefits. Further, the IRE did not take place until after expiration of the 104-week period, and this complies with §306(a.2)(1) of the Act.

If the claimant disagreed with the outcome of the IRE, he has the right to appeal the change to partial disability at any time during the 500-week period of partial disability. Therefore, claimant is not without an adequate remedy.

The IRE was not made in an untimely manner. Therefore, although the Court disagreed with the WCAB's rationale, the Court did agree with it's result. The decision of the WCAB was affirmed, but "on different grounds."

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Bernestine Hill v. Workers' Compensation Appeal Board (Ballard, Spahr, Andrews & Ingersoll and Great Northern Insurance Co.), No. 627 C.D. 1999, filed May 13, 2003.

(Modification - Job Availability - In a claim petition, the claimant must prove extent and <u>duration</u> of disability. Hence, employer may offer evidence of job availability and have it considered under the <u>Kachinski</u> framework.)

Claimant filed a claim petition alleging that she sustained daily aggravation of cardiac disease, angina pectoris, and mitral valve collapse in the course and scope of her employment, causing her to cease working as of March 14, 1994.

After hearings, the Workers' Compensation Judge granted the claim petition, but awarded benefits only from March 14, 1994 through September 20, 1994, the date that employer offered claimant alterna-

Were you aware of this??

Recently, in its opinion in <u>Allied Products and Services v. WCAB (Click),</u> No. 2661 C.D. 2002, filed May 14, 2003, the Commonwealth Court stated in footnote number 6 that the standards of <u>Kachinski v. WCAB (Vepco Construction Co.)</u>, 516 Pa. 240, 532 A.2d 374 (1987) are "still applicable in situations where an employer seeks a modification of benefits based on an offer of a specific job **with the employer.**" (emphasis added).

What option is then available in an Act 57 case to an employer seeking to modify or suspend a claimant's benefits if that employer does not have a position to offer to the claimant?

Apparently, the <u>Kachinski</u> standards may not apply to a specific job offered by an employer other than the defendant employer!

At the same time, labor market surveys and earning power assessment is of no value given the decisions of <u>Caso v. WCAB (School District of Philadelphia)</u>, 790 A.2d 1078 (Pa.Cmwlth. 2002) and <u>Walker v. WCAB (Temple University Hospital)</u>, 792 A.2d 628 (Pa.Cmwlth. 2002).

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tive employment. The WCJ found that claimant's burden to establish the duration of her disability was not met beyond September 20, 1994. The WCJ held claimant to a duty to pursue in good faith the job offered to her by employer before her injury had been recognized as compensable. Claimant's refusal to accept the alternative position supported the WCJ's conclusion that claimant's disability had decreased as of the date the alternative position was offered to her.

The Commonwealth Court reversed the WCJ's decision to the extent that it modified claimant's benefits, stating that a claimant has no duty to pursue any job offer or referral by an employer until such time as the initial injury is recognized as compensable. Therefore, the Court held that the fact that claimant failed to pursue a job offer before she had a duty to do so, i.e., before her injury had been recognized, was irrelevant. *See TR&C Bulletin, Vol. VI, No. 4, p. 1.*

Employer petitioned the Supreme Court for an allowance of appeal which was granted. That Court vacated the Commonwealth Court's decision and remanded the matter back to the Commonwealth Court for reconsideration.

Reviewing its recent opinion in the case of Montgomery Hospital v. Workers' Compensation Appeal Board (Armstrong), 793 A.2d 182 (Pa. Cmwlth. 2002), the Court noted that an employer can offer evidence of an available position within a claimant's restrictions within the context of a claim petition. The Court also noted that its prior decision in this case yielded an impractical result, inasmuch as it afforded no motivation for a medically-cleared claimant to accept job referrals until such time as the litigation is concluded. Therefore, the standards of Kachinski v. Workers' Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987) are applicable:

1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, e.g., light work, sedentary work, etc.
3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
4. If the referral fails to result in a job, then claimant's benefits should continue.

In this case, the second prong of Kachinski was not met. The record is bereft of evidence showing that the offered position was both open and available, or that the job fit within claimant's medical clearance.

Consequently, the WCJ's order granting the claim petition was affirmed, but the order modifying claimant's disability status was reversed.

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Wausau Insurance Companies v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania), No. 3061 C.D. 2002 (filed May 13, 2003.

(Supersedeas Fund Reimbursement - In a claim setting where benefits are awarded and the matter is appealed with supersedeas requested, reimbursement is only available from the date supersedeas is requested at the time of appeal.)

On September 11, 1997, insurer filed an application for supersedeas fund reimbursement seeking $56,092.95 for overpayment of compensation from April 19, 1989 through December 3, 1992. The Bureau filed an answer denying insurer's entitlement to reimbursement.

The Workers' Compensation Judge found as fact that, in the underlying litigation, claimant's claim petition was granted, but his benefits were also terminated as of July 7, 1986. Claimant appealed the termination decision to the Workers' Compensation Appeal Board, which reversed the WCJ's decision and ordered benefits to be paid from the date terminated and continuing into the future. Insurer filed a petition for rehearing and a petition for supersedeas with the WCAB, both of which were denied. In addition, on September 9, 1992, insurer filed a petition to terminate and requested a supersedeas as of September 11, 1989. A petition for supersedeas was then filed with the Commonwealth Court, which was also denied. The Court ultimately remanded the case, however, for a determination as to when, if at all, the claimant had fully recovered from his work injury. By order issued on June 18, 1997, the date of termination was subsequently amended by the WCAB to September 11, 1989.

In the instant litigation, the WCJ noted that the Bureau did not contest insurer's entitlement to reimbursement, but that the controversy centered on the beginning and ending dates of the period of reimbursement. Relying upon the decision in Robb, Leonard and Mulvihill v. Workers' Compensation Appeal Board (Hooper), 746 A.2d 1175 (Pa.Cmwlth. 2000), the WCJ determined that the beginning date for reimbursement is the date that the request was filed and not before. Reimbursement is only proper to the date of the final decision determining that compensation was not, in fact, payable. Therefore, the WCJ concluded that September 9, 1992, the date insurer filed its petition to terminate, was the beginning date for reimbursement. Based on the WCAB's final determination on June 18, 1997 that compensation was not payable after September 11, 1989, the WCJ further con-

cluded that only the payments made by insurer between September 9, 1992 and June 18, 1997 were reimbursable.

Insurer appealed, arguing that it was entitled to reimbursement form September 11, 1989, the date from which compensation was denied in the underlying claim petition. The WCAB, however, affirmed the WCJ's decision.

Insurer petitioned for further review by the Commonwealth Court. That Court recognized that the purpose of the supersedeas fund is to provide a means to protect an insurer who makes compensation payments to a claimant who is ultimately determined not to be entitled to them. The Court also stated that the supersedeas fund was created by the General Assembly and it is up to that body, not the Courts, to correct any inequities in its operation.

Section 443(a) of the Act applies to "any case" in which supersedeas has been requested and denied under the provisions of §413 or §430 of the Act. Under its prior decision in Hooper, "if an employer files an application for supersedeas, the supersedeas can be effective no earlier than the date on which the employer files such application." The Court held that this principle applies in the context of a contested claim petition proceeding wherein, as here, an insurer or employer requests a supersedeas pursuant to §430 of the Act. Here, insurer filed its first application for supersedeas under §430 of the Act on September 9, 1992. Therefore, under §443 of the Act and the Court's holding in Hooper, insurer is entitled to reimbursement only from that date, regardless of the fact that it was later determined that claimant did not establish ongoing disability after April 19, 1989. The order of the WCAB was affirmed.

(Editor's Note - This decision creates somewhat of a quandary for employers and insurers. Is it now necessary to file a termination or suspension petition with a supersedeas request in connection with every claim petition? In that way, if benefits are awarded but the award is eventually reversed on appeal, reimbursement may clearly be had from the date of the employer's petition, rather than the date of appeal. The filing of such a termination or suspension petition, however, may be deemed by some Judges to be frivolous and therefore warrant the imposition of counsel fees.)

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Robert Jackson v. Workers' Compensation Appeal Board (Boeing), No. 2901 C.D. 2002, filed June 2, 2003.

(Utilization Review - Where a UR petition seeking both retrospective and prospective review was filed by the employer more than 30 days after receipt of bill, the *prospective* treatment will be subject to review, but the request as to the *retrospective* review will be deemed untimely.)

Claimant sustained a low back injury on May 4, 1998. On February 3, 1999, he began chiropractic treatment. On November 13, 2000, the Workers' Compensation Judge granted claimant's Claim Petition, and directed employer to pay for all reasonable and necessary chiropractic treatment. On November 15, 2000, the chiropractor issued a bill to employer for services rendered to claimant. On December 26, 2000, employer filed a UR request challenging the reasonableness and necessity of the treatment on and after February 3, 1999.

The URO determined that the chiropractic care was reasonable and necessary from February 3, 1999 through July 10, 2000, but was unnecessary thereafter. The chiropractor then filed a petition for review of the UR determination. The WCJ, however, agreed with the UR determination and denied the chiropractor's petition for review. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Claimant then appealed to the Commonwealth Court raising three issues:

1) Claimant argued that the WCJ improperly shifted the burden of proof from employer to the chiropractor. The Court disagreed stating that the WCJ clearly articulated the burden of proof and correctly applied it. A review of the record reveals the facts necessary to support the WCJ's decision. The WCJ was free to reject the chiropractor's opinions and, in fact, did so.

2) Claimant next argued that the WCJ erred inasmuch as case law has established that mere palliative treatment may be deemed to be both reasonable and necessary. Again, the Court disagreed. While it is true that medical treatment may be reasonable and necessary even when it is designed to manage the claimant's symptoms rather than to cure or improve the underlying condition, the evidence here does not reflect that claimant was receiving even palliative treatment. In fact, the URO determination which was deemed credible by the WCJ, noted that the proposed treatment was not only not-palliative, but could actually prove to be detrimental.

3) Finally, claimant argued that employer's initial review petition was untimely. UR petitions must be filed within 30 days of receipt of the bill in question. Here, the bill was issued November 15, 2000, but the petition was not submitted until December 26, 2000, past the 30 day filing period. The Court noted, however, that the petition sought both retrospective and prospective review. While the 30 day period renders the retrospective portion of the petition untimely, the prospective review portion was appropriately before the WCJ. Inasmuch as the WCJ's conclusion that further chiropractic treatment was unnecessary had prospective application, the WCJ's decision was appropriate and correctly affirmed by the WCAB.

(continued from page 1)

Compensation, also within twenty-one days after notice is received. The Agreement should state that an injury occurred and describe the exact nature of the injury. Further, the Agreement should call for an immediate suspension of benefits, indicating that the claim is a "medical only" claim, that no wage loss benefits will be paid, and that only reasonable, necessary and causally related medical bills will be paid. If the claimant refuses to sign the Agreement, the employer has, at the very least, made an effort to acknowledge the claim under a process provided by the Act such that penalties should not be awarded.

Finally, the employer could issue a Notice of Workers' Compensation Denial, again within twenty-one days, indicating that "although an injury took place, the employee is not disabled as a result of this injury within the meaning of the Workers' Compensation Act." The employer should also indicate on the form a description of the injury and that all reasonable and necessary medical expenses causally related to the injury will be paid. The *benefit* to the employer here is that, three years after the date of the last payment, the statute of limitations will expire and the claim will then be forever closed. The *risk* that the employer runs with proceeding in this manner is that the claimant may still file a Claim Petition in order to establish his or her claim within three years of the date of injury. If that happens, the employer would be wise to immediately accept the claim in order to avoid the imposition of attorneys' fees and costs. Chances are that the claimant will have incurred some attorneys' fees and costs merely by filing the petition. Again, the employer would then be wise to voluntarily pay those fees and costs rather than possibly incur additional fees and penalties.

The problem faced by the employer in Waldameer Park is that *none* of these procedures were followed. *No* documents were issued relative to the injury within twenty-days as required by the Act. Consequently, the Act was violated and penalties could have been assessed. Further, because the claimant was forced to litigate her claim so as to establish the fact that an injury occurred and that notice was given to the employer, unreasonable contest attorneys' fees were awarded.

The lesson to be learned is that, on a "medical only" claim, *some* action must be taken. Ideally, a Notice of Compensation Payable should be issued. Failing that, an Agreement for Compensation or a Notice of Denial must be issued. Any of these forms, in the state currently available from the Bureau, will need to be modified as set forth above. It is better, however, to take the time necessary to modify the forms than to incur penalties and attorneys' fees.

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