TR&C

Pennsylvania Workers' Compensation Bulletin

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I'M NOT RESPONSIBLE – HE IS!

Apportionment of Benefits under Section 322

Amended in 1993, Section 322 of the Pennsylvania Workers' Compensation Act prohibits, among other things, the receipt of benefits for more than one injury in excess of the maximum compensation payable under the Act. Specifically, it sets forth:

> [I]t shall be unlawful for an employee receiving compensation under this act simultaneously from two or more employers or insurers during any period of total disability to receive total compensation in excess of the maximum benefit under this act.

This sounds simple enough, right? So why has this section been the subject of so much dispute over the years? The answer lies in the seemingly infinite number of questions that arise when a claimant suffers more than one injury.

For instance, in the case of Franklin Steel Co. v. WCAB (Clark),[1] the claimant suffered two separate work injuries resulting in two entirely different disabilities, both of which contributed to his total disability. While both injuries occurred during the claimant's employment with the same employer, each injury occurred when a different carrier insured the employer. These facts present the following questions: Was one carrier solely responsible and, if so, which one? Could both be held liable? If so, to what extent? Would they share the responsibility equally? Who bears the responsibility for the claimant's medical expenses?

In an attempt to answer some of these questions, the Commonwealth Court determined that §322 does permit the pro-rating of compensation among different insurers of the same employer. The Court further noted that each injury was a substantial contributing factor to the claimant's disability. As such, each insurance carrier was ordered to pay its pro-rata share of the claimant's benefits. The claimant's total benefits, however, were limited to the total disability benefits payable to the claimant based upon his actual earnings at the time of his second injury. The claimant was *not* entitled to receive two separate benefit payments equal to the statutory maximum compensation rate.

A slightly different factual scenario was presented in the case of Trenton China Pottery v. WCAB (Mensch).[2] In that case, the claimant was partially disabled from one work injury, returned to work in a modified capacity with the same employer at lower wages, and then suffered a second, totally disabling injury. Again, a different carrier covered each injury.

The Court noted that while §322 permits the apportionment of wage loss benefits, the two carriers do not necessarily split the responsibility equally. Rather, the apportionment must be based upon the claimant's earnings at the time each insurer provided coverage. Here, the second insurer was liable for total disability benefits based upon the claimant's average weekly wage at the time of the second injury, when he was working in a modified capacity and earning a lesser amount. The carrier at the time of the first injury was not "off the hook;" but rather, the first carrier was liable for the difference between the claimant's average weekly wage at the time of the first injury and the claimant's earning power thereafter, i.e., his lower average weekly wage at the time of the second injury.

The Court in Trenton China Pottery also noted that each carrier will be held responsible for the medical expenses associated with the injury for which that carrier is liable. While that conclusion may seem self-evident, it was the subject of a

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Commonwealth Court Case Reviews

Josue Bonegre v. Workers' Compensation Appeal Board (Bertolini's), No. 816 C.D. 2004, filed December 6, 2004.

(Evidence - A negative inference may be drawn against the party with the burden of proof for failure to produce a witness who is peculiarly within the reach and knowledge of that party.)

Claimant filed a petition asserting that he suffered an injury to his low and mid-back on November 21, 2001 due to repetitive bending and lifting. Employer denied the allegations of the petition.

At hearings before the Workers' Compensation Judge, claimant testified that he was a line cook and had slipped while carrying a bucket of ice. He testified that he informed his supervisor of the injury, but continued working that day. He did not report to work the next three days he was scheduled to work, but testified that he called each day and left a message with a different co-employee. When he did return to work on November 26, 2001, he was told he was fired for failing to report to work. He then immediately sought medical treatment for his alleged work injury.

Claimant's physician testified that he never treated claimant for back problems prior to November 26, 2001, but that his examination on that date revealed tenderness and limitations in claimant's range of motion. On cross-examination, the doctor admitted that his records indicated that claimant went to New York on November 21, 2001 and did not return to Pennsylvania until November 26, 2001.

Employer presented testimony from a medical expert who opined claimant did not have a significant back injury and was capable of working. Employer also presented testimony from claimant's supervisor, who stated that claimant never reported an injury to him.

The WCJ found claimant's testimony lacked "credibility and persuasiveness" and rejected it in its entirety. The WCJ resolved the conflicting medical testimony in favor of employer's expert. The petition was, therefore, denied. The Workers' Compensation Appeal Board affirmed that decision.

On appeal to the Commonwealth Court, claimant argued that because employer failed to call as witnesses the co-workers to whom he had allegedly reported his injury when he called off, the WCJ should have drawn an adverse inference that their testimony would not have been favorable to employer.

Generally speaking, a negative inference is made against the party with the burden of proof. Where a party has no burden to meet, an adverse inference may not be drawn for failure to produce evidence. Here, claimant had the burden of proof, not employer.

Further, the adverse inference rule only applies in cases where an uncalled witness is "peculiarly within the reach and knowledge of only one of the parties." An employee is not peculiarly within the reach of an employer merely by virtue of his status as an employee. Claimant could have called his co-workers as witnesses on his own behalf. He failed to do so.

Because the evidence of record supported the denial of the claim, and the WCJ did not improperly refuse to apply the adverse inference rule, the order of the WCAB was affirmed.

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PLEASE NOTE:* *MUST AN NCP OR NCD BE ISSUED, EVEN IN A "MEDICAL ONLY" CLAIM? THE ANSWER IS A RESOUNDING "YES!!" SEE THE FOLLOWING TWO DECISIONS...

Barbara Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming Valley Medical Center), No. 647 C.D. 2004, filed December 14, 2004.

(Penalties - Failure to issued NCP or NCD within 21 days of notice of injury may result in assessment of penalties.)

(Unreasonable Contest - Attorneys fees will be awarded where claimant is forced to litigate previously acknowledged claim.)

While working as a registered nurse, claimant sustained a work-related injury to her neck while attempting to position a patient in bed. After receiving treatment, claimant returned to work with orders to avoid heavy lifting.

Although employer did not issue a Notice of Compensation Payable, employer's self-insured workers' compensation fund paid claimant's medical expenses. Employer did send a letter to claimant stating: "Your injury is currently carried as a medical only claim."

In May of 2001, employer issued a Notice of Compensation Denial refusing to pay certain medical expenses which it believed to be unrelated to her work injury.

Claimant then filed a claim petition, requesting that employer pay her medical expenses and counsel fees. Employer filed an answer denying all of the allegation in the petition, including those pertaining to notice and the injury, despite its prior acknowledgement of the injury and payment of medical bills.

The Workers' Compensation Judge granted claimant's petition,

but did not award penalties or counsel fees for an unreasonable contest, despite the fact that employer did not issue a Notice of Compensation Payable within 21 days of receiving notice of the injury.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, noting that because there was a genuine issue as to the duration of claimant's disability as alleged, as well as claimant's entitlement to ongoing medical benefits, employer's contest was reasonable. The WCAB did not address the issue as to whether penalties were appropriate.

On appeal to the Commonwealth Court, claimant argued that the WCJ erred in failing to award penalties when neither an NCP nor an NCD were issued within 21 days of receiving notice of her injury. The Court agreed. While there had been some dispute prior to the Court's decision in Waldameer Park, Inc. v. WCAB (Morrison), 819 A.2d 164 (Pa.Cmwlth. 2003) *(TR&C Workers' Compensation Bulletin, Vol. VIII, No. 8, p. 1)* as to whether an NCP had to be issued in a "medical only" claim, section 406.1(a) clearly required the issuance of either an NCP or an NCD.

The Court further noted that, since May 29, 2004, a new NCP has been issued which permits a claim for "medical only" compensation to be established. In discussing this form, the Court stated:

> **"Therefore, employers are now required to utilize this form if they choose to pay "medicals only" for an injury but not wage loss for any disability." (emphasis added.)**

The Court went on to note that, because claimant's injury occurred in 2000 and the form was only issued in 2004, it was not applicable. The implication is clear, however, that use of the medical only form is now mandatory.

Here, because employer was required to file an NCP or NCD within 21 days of having received notice of claimant's injury, its failure to do so may be the basis for an imposition of penalties. The assessment and amount of penalties is discretionary. The case was therefore remanded to the WCJ to determine if penalties should be awarded.

Claimant further argued that the WCJ erred in failing to find that employer engaged in an unreasonable contest when it had acknowledged her injury but did not file an NCP, thereby forcing her to file a claim petition. The Court again agreed. Because employer forced claimant to litigate the issue of the occurrence of her injury and the notice of her injury, which it had previously acknowledged through the payment of medical bills and correspondence sent to claimant, the WCJ abused his discretion in failing to award attorneys' fees. Consequently, the case was remanded to the WCJ to determine reasonable counsel fees.

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Beth A. Brutico v. Workers' Compensation Appeal Board (US Airways, Inc.), No. 885 C.D. 2004, filed December 20, 2004.

(Penalties - Failure to file Notice of Compensation Payable or Notice of Denial within 21 days of receiving notice of injury constitutes cause for the imposition of penalties.)

(Unreasonable Contest - When employer acknowledged injury but did not issue "medical only" Notice of Compensation Payable thereby forcing claimant to file Claim Petition, unreasonable contest attorneys' fees may be imposed unless circumstances would have required claimant to file petition to amend NCP.)

Claimant was injured on January 5, 2001 when she fell while working on employer's loading dock. Claimant felt no immediate discomfort and continued working that day. Later, she began to experience back spasms. On January 8, 2001, she reported the incident to her supervisor and completed an injury form.

Claimant was treated by one of employer's panel physicians for complaints of pain in her neck, upper back and lower back, but she had no complaints of pain radiating down her knees or into her lower extremities. Claimant returned to work on March 20, 2001 without any restrictions. Employer paid for her medical bills, including physical therapy related to her neck and back strains.

In May of 2001, claimant began treatment with a chiropractor of her own choosing. She reported to him that, as a result of her work injury, she had low back pain with intermittent pain in both legs, right greater than left. Claimant also returned to the panel physician at that time with complaints of radiation of low back pain into the right lower extremity.

Employer became aware of her visits to the chiropractor and panel physician with different complaints of pain and, on August 21, 2001, issued a Notice of Denial acknowledging that she suffered a work injury but declining to pay benefits because the injury was not disabling.

Claimant then filed a claim petition alleging that she was injured on January 5, 2001, in the nature of "cervical upper back, low back radiating into both legs" and a "disc herniation." She sought unreasonable contest attorneys' fees in connection with the claim petition. She also filed a petition seeking penalties for employer's failure to issue an NCP or NCD within 21 days of notice of the injury.

Employer filed an answer, alleging that claimant did not report the existence of any lower extremity symptoms until early August 2001 and that, as a result, it had a reasonable basis to contest the petition. Employer disputed that claimant suffered a disc herniation, and further denied that the medical care rendered after April 26, 2001 for

her lower extremity symptoms was causally related to the work injury. Further, employer argued that the imposition of penalties was inappropriate when no compensation was due.

Both parties offered medical testimony to support their positions. The Workers' Compensation Judge found employer's expert to be more credible and convincing and found that claimant did not suffer a herniated disc on January 5, 2001. The WCJ further found that employer did not violate the Act, reasoning that employer was only required to issued an NCP or NCD when claimant became disabled, not injured, and claimant never alleged a period of disability as a result of her injury. The Workers' Compensation Appeal Board affirmed.

On appeal before the Commonwealth Court, claimant argued that the WCJ erred in failing to award penalties when employer did not dispute claimant's injury but failed to issue an NCP in violation of the Act, thereby forcing her to file a claim petition.

Referring to its decision in the Orenich case, *infra*, the Court found that employer was clearly required to file an NCP or NCD within 21 days of receiving notice of claimant's injury. The Court further noted that employer's failure to do so may have been cause for the WCJ to impose a penalty. However, penalties are within the WCJ's discretion. Here, the claim petition was not granted so there was no "measure" against which the WCJ could use to award penalties. Because the claim petition was denied, no penalties could be awarded.

Claimant next argued that unreasonable contest attorneys' fees should have been awarded because employer had essentially acknowledged that she suffered a work injury, but did not issue a "medical only" NCP, thereby forcing her to file a petition. However, here, the filing of an NCP or NCD at the time of injury would not have saved claimant the expense of hiring an attorney or litigating her claim because the nature of her alleged injuries changed. Even if employer had filed an NCP, she would have had to file a claim petition to have the NCP amended. Because there was a genuinely disputed issue before the WCJ as to the existence of a disc herniation with pain radiating into the lower extremities, the WCJ did not err in determining that employer presented a reasonable contest.

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

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Verizon Pennsylvania, Inc. v. Workers' Compensation Appeal Board (Baun), No. 1513 C.D. 2004, filed December 22, 2004.

("Fellow Employee" Limitation on Compensation - Where employer fails to prove fellow employees were engaged in employment similar to that of claimant at time of injury, employer is not entitled to modify claimant's benefits under §306(b)(1) of the Act.)

Claimant, a splicing technician, sustained a work-related injury in 2001. As a result he received total disability benefits based on an average weekly wage of $1,642.00.

Employer filed a petition seeking to modify claimant's benefits effective 8 days after the injury. Employer contended a company-wide reduction in overtime resulted in a substantial decrease in current earnings of splicing technicians.

The Workers' Compensation Judge found that, although claimant had returned to full-time modified duty work, he was not allowed to climb poles. Consequently, he was not eligible for overtime given employer's policy that an employee under work restrictions may not work overtime.

The WCJ denied employer's petition for 4 reasons:

1) The other splicing technicians were not similarly situated because they do not share claimant's restrictions and there was no proof of their time of injury wage.

2) A determination of whether fellow employees are similarly situated requires information on each individual co-worker. Proof of average wages is legally insufficient.

3) An employer must prove that a reduction in wages of fellow employees occurred as a result of economic duress.

EROID: ELECTRONIC SUBMISSION REQUIRED

The Bureau will soon require electronic filing of the Employer's Report of Occupational Injury or Diseases (LIBC-344). There are two means of compliance currently available:

1) Electronic Data Interchange (EDI). This allows a claims representative to input data into the company's computer system once. The EDI process takes over and automatically submits the data to the Bureau. This method is somewhat costly, but would be highly cost effective for companies filing high volumes of claims.

2) The Internet. Claims representatives merely enter all of the data onto the Internet screens, much like completing the paper form. This method requires no special software or outside vendors, is free, and saves mailing costs.

For additional information, please visit the Bureau's website at: www.dli.state.pa.us.

4) The post-injury wages of some splicing technicians were higher than claimant's pre-injury average weekly wage.

The Workers' Compensation Appeal Board affirmed the decision of the WCAB.

Employer then sought review by the Commonwealth Court. The Court noted first that §306(b)(1) of the Act provides that:

> "[I]n no instance shall an employe receiving compensation under this section receive more in compensation and wages combined that the current wages of a fellow employe in employment similar to that in which the injured employe was engaged at the time of injury."

The Court agreed with employer that the WCJ erred in focusing on claimant's current restrictions and inability to work overtime when comparing claimant to fellow employees. The Court stated that the proper basis for comparison is the employment "in which the claimant was engaged at the time of the injury." However, the WCJ's error in this regard did not warrant reversal because employer failed to provide information regarding the wages and overtime of the other splicing technicians at the time of injury.

Employer next contended that the WCJ erred in concluding that each individual "fellow employee" was to be compared, not a comparison of averages. The Court agreed, but also stated that the WCJ was free to reject employer's evidence as unpersuasive and lacking in detail.

Employer then argued that the WCJ erred in requiring employer to prove as a required element wage reduction caused by economic distress. Again, the Court agreed. It is of no moment why the overall wages were reduced. Nevertheless, the WCJ's error in this regard did not merit reversal because employer failed to persuade the WCJ that a class of similarly situated fellow employees existed.

Finally, the Court noted that the WCJ compared claimant's pre-injury average weekly wage with the post-injury wages of certain fellow employees. This is not contemplated by the Act. However, because employer failed in its preliminary proof on whether co-workers were similarly situated, the WCJ's error in this regard was harmless.

The decision was affirmed.

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James Gillyard v. Workers' Compensation Appeal Board (Pennsylvania Liquor Control Board), No. 762 C.D. 2004, filed January 11, 2005.

(Unreasonable Contest Attorneys' Fees - Where employer bases termination petition on testimony ultimately deemed to be legally insufficient, counsel fees will be assessed.)

Claimant, a liquor store manager, injured his low back on December 2, 1992. A Notice of Compensation Payable was issued describing the injury as as a "lower back sprain and strain."

In 1995, employer sought to terminate claimant's benefits. In his decision denying the petition, the Workers' Compensation Judge found that claimant continued to suffer from disabling "chronic sciatica at the L5-S1 distribution on the right side with disc bulging at L4-5 and L5-S1 area," which was caused by the work injury.

In 2001, employer filed a second termination petition. Employer offered testimony from an orthopedic expert who testified that claimant's back essentially was normal, with no sign of chronic sciatica or L5-S1 radiculopathy. The expert diagnosed claimant with a lumbar sprain/strain by history, which had fully resolved at the time of his May 14, 2001 examination. On cross-examination, the doctor affirmed his opinion that claimant suffered only sprains and strains and agreed that his opinion differed from the other physicians, who believed claimant suffered from chronic L5-S1 radiculopathy.

The WCJ found the testimony of employer's expert to be credible and concluded that employer met its burden of proving that claimant had fully recovered from the work injury as of May 14, 2001, and that employer's contest was reasonable. The Workers' Compensation Appeal Board affirmed that decision.

The Commonwealth Court, however, determined that the work-related injury was "chronic sciatica at the L5-S1 distribution on the right side with disc bulging at L5-S1," as determined by the WCJ in his decision relative to the initial termination petition. Under the doctrine of collateral estoppel, the parties are bound by that finding. Because employer's expert's testimony in this proceeding conflicts with that finding, his opinion that claimant has fully recovered from the work injury is not substantial, competent evidence to support the WCJ's decision. Consequently, the order terminating claimant's benefits was reversed.

The Court went one step further, however, and found that employer's contest was not reasonable and awarded counsel fees. The Court noted that employer was aware that the description of the claimant's injury had been judicially expanded during the first round of litigation. Because employer based its second petition on testimony that failed to acknowledge the established work injury, the only evidence presented by employer was insufficient as a matter of law, to support an award in its favor. Consequently, employer's petition was not reasonable. Hence, counsel fees were deemed to be appropriate. The matter was remanded to the WCJ for a calculation of those fees.

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Johnstown Housing Authority and H.A.R.I.E. v. Workers' Compensation Appeal Board (Lewis), No. 1980 C.D. 2004, filed January 12, 2005.

(Penalties - If claimant denies re-

ceipt of Notice of Denial and employer has no proof of service of Notice on claimant, penalties will be awarded.)

(Unreasonable Contest - Counsel fees will be awarded where panel physician found injury and claimant has surgery before filing petition, even where employer requested IME at the time the petition was filed.)

Claimant, a maintenance worker, tripped over a raised rubber tile in employer's garage, twisting his right ankle. He reported the injury to his supervisor and was treated by Dr. Albert, a panel physician. Dr. Albert diagnosed the claimant with a sprained ankle and released him to return to work in a sedentary, "seated only" position. Consequently, claimant returned to work doing parts inventory, counting screws, nuts and bolts.

Dr. Albert then referred claimant to Dr. Gunnlaugson, an orthopedic surgeon. He, in turn, recommended that claimant get a second opinion regarding surgery. Employer did not authorize the second opinion.

Claimant eventually obtained a referral from his PCP to see Dr. Hasselman, an orthopedic surgeon. Dr. Hasselman recommended arthroscopy and ligament reconstruction surgery.

Claimant then submitted to an IME by Dr. Bailey. He opined that claimant had fully recovered and issued an affidavit of recovery. Based upon that affidavit, employer filed a termination petition.

After Dr. Bailey's IME, claimant underwent the surgery recommended by Dr. Hasselman. Consequently, claimant remained off work from January 31, 2003 through May 17, 2003, when he was again released to sedentary duty.

At the hearing relative to the termination petition, employer stated that a Notice of Denial had been filed with the Bureau. The Notice acknowledged that an injury took place, but denied any disability. Claimant testified that he never saw or received the Notice of Denial. Because the injury was never formally accepted, the termination petition was withdrawn as premature.

Claimant then filed a claim petition, which included a request for penalties and unreasonable contest attorney fees. The Workers' Compensation Judge granted the petition and awarded counsel fees and penalties given employer's refusal to issue an acceptance document for the injury.

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

Employer appealed to the Commonwealth Court, arguing that the WCJ erred in awarding penalties and unreasonable contest attorney fees. Employer argued that it did not violate the Act because it issued a Notice of Denial and agreed to pay claimant's medical expenses within 21 days of receiving notice of the injury. While employer did issue the requisite notice within the applicable time frame, the Court noted that employer failed to provide actual notice to claimant as required by the Act. Claimant testified that he had not received the Notice of Denial. Consequently, employer's Notice of Denial was invalid. The assessment of penalties was thus appropriate.

Employer next argued that, because it had Dr. Bailey's report and affidavit of recovery at the time it filed its answer to claimant's petition, it had a reasonable basis to contest the petition. The Court disagreed. Employer had denied virtually every factual averment in the claim petition, including the fact that claimant had suffered an injury and that the injury was work-related. At the time employer filed its answer, employer had no basis to dispute that claimant suffered an injury in the course of his employment. This is demonstrated by employer's payment of claimant's medical expenses and the sedentary duty work made available to claimant. Because of employer's contest, claimant was forced to incur attorneys' fees to litigate his claim. Hence, the WCJ appropriately assessed counsel fees.

The decision of the WCAB was affirmed.

(Editor's Note: Given this case, "filing" a Notice of Denial without service on the claimant is inadequate. The claimant may, as was done here, simply testify that he or she never received it. You must, therefore, have proof of service. Always send Notice to the claimant by certified mail, return receipt requested!)

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Temple University Hospital v. Workers' Compensation Appeal Board (Sinnott), No. 1395 C.D. 2004, filed January 14, 2005.

(Termination - Analysis of termination petition is limited to whether injuries as set forth on original NCP or award, as well as all disability arising as a natural consequence of those injuries, have been resolved.)

In 1995, claimant was awarded total disability benefits based on findings by a workers' compensation judge that his exposure to radioactive chemicals resulted in a cognitive dysfunction injury. In granting claimant's petition, the WCJ expressly found that other conditions suffered by claimant, including obesity, diabetes and depression, were not work related.

In 2001, employer filed a termination petition alleging that claimant did not have any cognitive, physical and/or emotional problems and had fully recovered from the work injury identified as "cognitive dysfunction."

Employer presented testimony from Dr. Samuel, who defined "cognitive dysfunction" as difficulties in memory, attention, and concentration. He further opined that he found no evidence of cognitive dysfunction and that claimant had fully recovered from the work injury.

In response, claimant presented testimony from Dr. Gomberg, his treating psychiatrist. Dr. Gomberg stated that claimant continued to suffer from lethargy, fatigue, poor memory, lack of motivation and paranoia. He diagnosed claimant with "chemical induced persisting dementia" and "organic mood disorder." He testified that claimant's exposure to chemicals at work "caused the cognitive dysfunction then and all the deterioration that has occurred since then."

The WCJ found Dr. Gomberg to be credible and concluded that employer failed to meet its burden of proving claimant had fully recovered. The Workers' Compensation Appeal Board affirmed the WCJ's decision, and employer appealed to the Commonwealth Court.

Employer argued that Dr. Gomberg's opinions were legally incompetent because his diagnosis of chemically induced persisting dementia contradicted the description of the injury as found in the claim proceeding, i.e., cognitive dysfunction, but not depression.

The Court disagreed, noting that Dr. Gomberg testified that dementia is a form of cognitive dysfunction. Further, Dr. Gomberg's description of organic mood disorder reflects that this diagnosis is different from depression.

Employer next challenged that WCJ's authority to modify the description of the work injury to include organic mood disorder where claimant did not file a claim or review petition. The Court noted again, however, that Dr. Gomberg's testimony indicates that claimant's mood disorder is the natural consequence of the established work injury, such that the amendment is permitted under §413(a) of the Act without the filing of a claim petition. Here, however, the WCJ did not find that the description of the injury was materially incorrect at the time it was issued. Consequently, the WCJ did err in issuing findings that effectively modified the description of the injury to include organic mood disorder.

The error was meaningless, however, because, given Dr. Gomberg's credited testimony that claimant continues to suffer a cognitive dysfunction injury, the WCJ properly concluded that employer failed to meet its burden of proof in the termination proceeding.

The Order of the WCAB was affirmed.

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Rita Farner v. Workers' Compensation Appeal Board (Rockwell International), No. 1793 C.D. 2004, filed February 9, 2005.

(Compromise and Release - Claimant's failure to understand that her medical insurance coverage would cease following her resignation is insufficient basis to set aside the C&R Agreement.)

The parties entered into a Compromise and Release Agreement pursuant to which claimant agreed to release all claims related to her work injury in exchange for a lump sum payment of $45,000.00. In addition, claimant agreed to resign her employment.

At the hearing before the Workers' Compensation Judge, claimant testified that she understood that she would still be entitled to receive her pension from employer and to

EMPLOYER'S CORNER

When Johnny Comes Marching Home Again,
Hurrah! Hurrah!
We'll give him a hearty welcome then
Hurrah! Hurrah!
The men will cheer and the boys will shout
The ladies they will all turn out
And we'll all feel gay,
*When Johnny comes marching home.**

In addition to the hearty welcome, Johnny will also have, pursuant to federal and state statutes, certain reemployment and anti-discrimination in employment rights. Subject to meeting all of the qualifications, these rights apply to active-duty national guard and reserve members, who's numbers, according to a U.S. Department of Defense news release dated April 7, 2004, total 174,378.

The most comprehensive protection is afforded by federal law under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA is intended to provide prompt reemployment to those who engage in non career service in the uniformed services. The courts have held that the statute is to be interpreted liberally to benefit those who have served our country. Virtually all employers are covered without regard to size or whether public or private. Although USERRA's focus is on reemployment, it also includes the right to be free of discrimination in initial employment, retention, promotion, or benefits. The Act also protects covered employees from retaliation and requires employers to make special provisions for service members with disabilities incurred or aggravated during service. Remedies for violating the Act include equitable relief, lost wages and benefits, liquidated damages, attorney fees and litigation costs.

In addition to protection under federal law, every state offers some level of protection regarding a military leave of absence. Pennsylvania (51 Pa.C.S.A. §7309) protects service persons against employment discrimination because of membership in the national guard or any of the reserve components of the armed forces and requires employers to reemploy such persons upon completion of emergency duty unless the soldier is not qualified for the same or substitute position or unless circumstances have so changed as to make it impossible or unreasonable to reemploy. Additionally, for at least the first 30 days of duty, the employer shall, at no cost to the member, continue health and other insurance benefits and thereafter allow participation in the group plan at his/her own expense at the same rate paid by the employer.

**Attributed to Patrick S. Gilmore, 1863*

receive medical benefits under employer's plan. However, on the same date of the hearing, claimant executed a written "Voluntary Resignation Statement" in which she stated: "I fully realize that with this resignation, I am no longer entitled to any of the privileges or benefits to which employees of [Employer] may be entitled except those benefits and rights which are vested at the time of my resignation."

The WCJ found that claimant fully understood the legal significance of the C&R, and approved the agreement. Neither party appealed.

Over one and one-half years later, claimant filed a review petition alleging employer breached the C&R Agreement by failing to pay her medical insurance premiums following the WCJ's approval of the agreement.

At the hearing relative to the review petition, claimant testified that her former attorney had assured her that she would continue to receive health care benefits through employer's plan. Claimant did not testify that any representative of employer discussed this aspect of the settlement with her.

The WCJ then set aside the C&R Agreement, finding that the claimant had a mistaken understanding as to whether her medical insurance coverage would continue following the approval of the C&R Agreement.

Employer appealed to the Workers' Compensation Appeal Board. The WCAB concluded that claimant's unilateral mistake was insufficient to set aside the C&R Agreement.

Claimant then sought review by the Commonwealth Court. She argued that the WCAB erred inasmuch as she had established that the C&R Agreement was materially incorrect and that employer was aware of her mistake at the time she signed the C&R Agreement, but did nothing to dispel her misunderstanding. Claimant argued that employer's silence at the approval hearing is evidence of mutual mistake.

The Court disagreed. In order for mutual mistake to constitute a basis for invalidating a C&R Agreement, the party seeking to set aside the agreement must prove both parities are mistaken as to a present, material fact that existed at the time the agreement was executed. Here, the WCJ made no finding that employer shared in claimant's mistaken belief as to employer's duty to continue paying medical insurance premiums. The absence of any finding as to employer's state of mind results in the conclusion that claimant failed to prove mutual mistake.

The order of the WCAB reversing the decision of the WCJ was affirmed.

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City of Wilkes-Barre v. Workers' Compensation Appeal Board (Spaide), No. 1281 C.D. 2004, filed December 22, 2004, reported February 18, 2005.

(Supersedeas Fund Reimbursement - Employer is not entitled to reimbursement where there has been no determination the compensation benefits were not payable.)

(Supersedeas Fund Reimbursement/Pension Offset - Employer is not entitled to reimbursement from Fund for monies previously paid to claimant and to which employer was entitled to a future credit due to claimant's receipt of pension benefits.)

By order of May 16, 2002, in response to a Petition to Review Compensation Benefit Offset, employer was granted a credit for pension benefits paid to claimant to the extent employer funded such benefits. No appeal was filed from that order.

On June 14, 2002, employer filed an application for supersedeas fund reimbursement requesting reimbursement of overpayments of compensation paid to claimant from December 1, 2000 to May 16, 2002. The Bureau denied the application and the matter was thereafter assigned to a Workers' Compensation Judge.

The WCJ determined that employer met the requirements of §443(a) and entered an order directing reimbursement. The Bureau filed an appeal with the Workers' Compensation Appeal Board, which reversed the WCJ's order. Employer then sought review by the Commonwealth Court.

The Court noted that §443(a) provides the criteria by which reimbursement is to be sought. The party seeking reimbursement must show:

1) a request for supersedeas was made in a proceeding under §413 or §430 of the Act;

2) the request was denied;

3) payment of compensation continued due to the denial of supersedeas; and,

4) at the final outcome of the proceedings, a determination was rendered that compensation was not, in fact, payable.

Here, employer argued that because it filed a petition to review utilizing Bureau Form LIBC-378, its request for supersedeas was necessarily filed pursuant to §413(a)(2) of the Act. The Court disagreed. The Court stated that Form LIBC-378 may be used to seek relief under a variety of provisions of the Act, in addition to §413. For instance, the form may be used to seek approval of a Compromise and Release Agreement, the authority for which is found in §449 of the Act. Likewise, an employer's right to a credit against compensation paid, which is the substance of employer's petition here, is not found in §413 of the Act, but rather is found in §204(a).

Further, the Court noted that to allow employer to receive reimbursement from the Fund would allow employer a double recovery inasmuch as employer is now receiving a credit against claimant's compensation benefits for benefits paid since December of 2000.

Finally, the Court stated that employer did not seek to modify, suspend or terminate claimant's right to benefits. Absent the pension offset, claimant would continue to receive his benefits. Consequently, because there has been no determination that claimant was not entitled to compensation, reimbursement from the Fund is inappropriate.

The decision of the WCAB was affirmed.

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Frank Wright v. Workers' Compensation Appeal Board (Larpat Muffler, Inc.), No. 1584 C.D. 2004, filed March 1, 2005.

(Course and Scope of Employment - Claimant who is neither required to be on a public roadway nor acting in the furtherance of employer's affairs at the time of his injury is not in the course of his employment at the time of injury.)

Claimant was employed as a mechanic. Employer's place of business is located on Route 51, a 5 lane highway. Due to construction, employer's parking lots were inaccessible and all employees, including claimant, were instructed to park across Route 51 in the Kmart parking lot.

On April 7, 1998, after claimant had already parked in Kmart's lot, crossed Route 51 and punched in at work, claimant decided to retrieve some auto parts for his personal vehicle that he wished to exchange. While crossing Route 51 to get to his car, claimant was struck by an automobile and sustained injuries to his leg, back and neck.

Claimant filed a petition alleging that his injuries were work-related. The Workers' Compensation Judge denied claimant's petition on the ground that he failed to establish that he was in the course of his employment because he was pursuing his personal affairs at the time of his injury. The Workers' Compensation Appeal Board vacated and remanded the case to the WCJ for a determination as to whether claimant was on employer's premises when injured, whether he was required to be there by the nature of his employment and whether the condition of employer's premises caused the injuries.

On remand, the WCJ concluded that Route 51 could be considered part of employer's premises inasmuch as it was necessary for the employees to cross Route 51 in order to go from employer's shop to the parking lot where employees were required to park. The WCJ further found, however, that claimant was not required to be crossing Route 51 at the time he was injured, was on personal business and not in furtherance of employer's affairs, and further concluded that claimant was jaywalking when struck and thus barred from receiving benefits due to his violation of the law. On appeal, the WCAB affirmed the WCJ's decision.

Claimant then sought review by the Commonwealth Court. The Court, however, was not sympathetic to claimant's plight. Relying upon the Supreme Court's decision in Kmart Corp. v. Workers' Compensation Appeal Board (Fitzsimmons), 561 Pa. 111, 748 A.2d 660 (2000) (*TR&C Workers' Compensation Bulletin, Vol. VI, No. 4, pp. 9-10, 12*), the Commonwealth Court concluded that claimant was neither required by the nature of his employment to be crossing Route 51 at the time of the accident nor was he in the furtherance of employer's affairs in doing so. Consequently, the WCJ did not err in determining that claimant was not in the course of his employment at the time he was injured.

The decision of the WCAB was thus affirmed.

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City of Philadelphia v. Workers' Compensation Appeal Board (Shanks), No. 2316 C.D. 2004, filed March 1, 2005.

(Modification - Availability of Proffered Position - Where claimant would permanently lose "qualitative benefits" from his pension plan by accepting position, the position is thus rendered "unavailable" to him.)

Claimant, a firefighter and emergency medical technician, suffered a neck injury on March 14, 1990. As a result, he began receiving workers' compensation benefits, non-service-related pension benefits and social security benefits.

After receiving extensive medical care, claimant was eventually released to return to work in the capacity of a fire communications dispatcher. On January 25, 1996, employer directed claimant to report to work as a fire communications dispatcher; however, claimant never reported for work.

Because claimant refused the proffered position, employer filed a petition seeking to modify or suspend claimant's benefits. In response, claimant argued that employer failed to make a good faith job offer.

The Workers' Compensation Judge determined that claimant's failure to accept the position was bad faith and granted employer's petition. The Workers' Compensation Appeal Board reversed, noting that had claimant accepted the position, he would have effectively forfeited the normal retirement age of 45 for firefighters, thus causing him a loss of "qualitative benefits" and rendering the position "unavailable" to him.

Noting the Supreme Court's decision in St. Joe Container Co. v. WCAB (Staroschuck), 534 Pa. 347, 633 A.2d 128 (1993) *(TR&C Workers' Compensation Bulletin, Vol. II, No. 1, p. 44; Vol. VI, No. 7, p. 4; Vol. VI, No. 8 (Fall), p. 6)* the Commonwealth Court stated that a job is not available if, upon taking the position, the claimant would suffer a loss of "qualitative benefits" associated with the claimant's former position. The Court further noted that, under City of Philadelphia v.

WCAB (Szparagowski), 574 Pa. 372, 831 A.2d 577(2003) *(TR&C Workers' Compensation Bulletin, Vol. VI, No. 7, p. 3; Vol. VIII, No. 9, pp. 10-11)*, qualitative benefits are not lost when those benefits are merely suspended.

Here, the evidence revealed that if claimant,who had not yet reached the age of 45, returned to work for employer at a municipal position, his service time would roll over into a different, less favorable, pension plan. Under that plan, he would not be eligible for retirement at the same age and, in fact, would have to work an extra 10 years before being eligible to receive his pension. Further, the monetary value of his pension benefit would be reduced.

Therefore, because claimant would be forced to work an extra 10 years and would never be entitled to the retirement benefits associated with his former position, the Court concluded that the fire communication dispatcher position was "unavailable" to him because he would have suffered a "qualitative loss" in benefits associated with his former position.

The order of the WCAB was affirmed.

SUPERIOR COURT CASE REVIEWS

Debbie Gillette, Individually and as Administratrix of the Estate of John Gillette, Deceased, v. Catherine Wurst, as Parent and Guardian of Andrew Wurst, a Minor, Jerome J. Wurst and Catherine Wurst, and J.J. Wurst Landscape Contractor, Inc., Jacob Tury, a Minor, and Joe Tury and Noreen Tury, Individually, v. Jerome Wurst and Catherine Wurst v. Utica National Insurance Group and General McLane School District, No. 355 WDA 2004, filed January 24, 2005.

(Subrogation - In the case of payment of fatal claims benefits, a decedent's employer is entitled to a subrogation lien against recovery in tort made by the widow against a third party; however, the widow has the right to disclaim her interest in such settlement, thereby defeating the employer's subrogation interest.)

Claimant's husband was employed as a teacher when, while acting as a chaperone at a school dance, he was shot and killed by one of the students, Andrew Wurst. Wurst also shot a fellow student, Jacob Tury. Tury sustained non-permanent injuries.

Claimant and Tury each commenced a civil action against Wurst and his parents seeking compensation. The actions were consolidated and, ultimately, claimant and Tury agreed to settle their actions upon payment on the Wursts' behalf of the $300,000 limit of their homeowners' insurance coverage. Under the proposed settlement, claimant was to receive $288,000, with the remainder payable to Tury.

Claimant's action was based upon the Wrongful Death Act, which provides that damages recovered shall be distributed to the beneficiaries in the proportions they would take the personal estate of the decedent in the case of intestacy. Following deduction of counsel fees, intestate succession would have provided claimant with a spousal share of $109,493.77, and each of her three children with a share of $26,497.93. However, claimant retained only $12,000 for payment of her husband's funeral expenses, and disclaimed her spousal share in favor of her children.

Utica filed a Petition to Intervene, asserting employer's right to subrogation for fatal claim benefits of $167,934.00 it had paid to claimant on her husband's behalf (294 weeks at $561.00 per week plus $3,000.00 in burial expenses). The trial court found no merit in Utica's challenge, noting that there is nothing in the law that precludes those entitled to recovery under the Wrongful Death Act from agreeing upon a manner of distribution other than intestate succession. Further, the Decedents, Estate and Fiduciaries Code (DEF Code) expressly permits persons in the line of intestate succession to disclaim their interests in favor of others.

Utica appealed to the Superior Court to no avail. That Court agreed that nothing in the applicable provisions precludes the disclaimer.

The Court noted that the Wrongful Death Act specifically exempts the proceeds from such actions from the claims of the decedent's creditors and specifies distribution to the decedent's intestate beneficiaries. The DEF Code specifically provides an intestate beneficiary with the right to disclaim his or her intestate share.

While a workers' compensation claimant may not apportion his interest in a third party tort recovery to defeat a workers' compensation subrogation interest, he or she may disclaim his interest in that recovery. Consequently, the trial court did not err. The Order approving the proposed settlement and distribution was affirmed.

SUPREME COURT CASE REVIEWS

Patric Gibson, c/o Kathy J. Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products), No. 39 WAP 2003, Decided November 22, 2004.

(Evidence - A lay witness may not testify as to matters of a technical nature unless evidence is intro-

duced sufficient to support a finding that the witness has personal knowledge of the matter.)

Claimant filed a Fatal Claim Petition alleging that her husband died as a result of continuous exposure to asbestos while working for employer in its maintenance department.

In support of her petition, claimant presented testimony from one of her husband's co-workers. He testified that he had seen a dark gray, heavy, cotton-type material that he believed to be asbestos falling off piping in employer's plant. He also testified that there was a dark gray material that looked like it was sprayed on, which was falling off the wall and laying on the ground. He stated that he did not have training or education concerning asbestos, that he would not be able to identify asbestos from other similar materials, and that he could not state with certainty that what he saw at employer's plant was asbestos.

Claimant offered medical testimony from Dr. Laman, who opined that decedent's lung cancer was due to asbestos exposure as well as his long history of cigarette smoking. Dr. Laman further testified, however, that 1) there was nothing in the records to indicate asbestos exposure, 2) he was unaware of the specifics of decedent's job or any exposure decedent may have had, 3) he "assumed" decedent had exposure to asbestos due to his occupation, and 4) interstitial fibrosis may develop from causes other than asbestos exposure.

Employer presented expert testimony from Dr. Kaplan, who opined that decedent had well-documented lung carcinoma and died as a result of the disease. He believed decedent's heavy cigarette smoking to be the cause of his condition, and opined that there was no support for the assertion that asbestos played any role in decedent's death.

The Workers' Compensation Judge credited the testimony of claimant's witnesses and granted the petition. The Workers' Compensation Appeal Board reversed the WCJ's decision on the premise that there was insufficient competent evidence to support a finding that claimant's decedent was exposed to asbestos while working for employer.

The Commonwealth Court reversed the WCAB's decision on the basis that a claimant's description of his working conditions is sufficient to establish occupational exposure that may be rebutted by the employer.

Employer then sought review by the Supreme Court. The Court noted that at common law, if a witness is not testifying as an expert, the witness' testimony is limited to those things that they had seen, heard, felt, tasted, smelled or done. The rules of evidence do permit individuals who are not qualified as experts, but who possess experience or specialized knowledge, to testify about technical matters that might have been thought to be within the exclusive province of experts.

Here, claimant's burden was to show that decedent was exposed to asbestos. That proof was a critical element of her case.

No witness with first-hand knowledge testified that there was asbestos in the workplace. The co-worker simply testified that he saw a dusty, cottony material that he was unable to identify. No witness with first-hand knowledge testified that decedent had an asbestos-related disease, nor did any of decedent's medical records state that he had spoken of asbestos exposure to any of his treating physicians. There is simply a lack of substantial evidence, either sufficient or competent, to support a finding that decedent's death was caused in substantial part by an asbestos-related disease.

Although the Workers' Compensation Act provides that the rules of evidence are to be relaxed, an untrained person cannot be permitted to identify a workplace substance without personal knowledge or specialized training.

Because the record is devoid of substantial evidence to support a finding of long-term asbestos exposure in the workplace, the order of the Commonwealth Court was reversed.

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lengthy discussion by the Court.

A different outcome (with regard to liability for wage loss benefits) appears to result in the case of L.E. Smith Glass Co. v. WCAB (Clawson).[3] There, the Supreme Court noted a distinction, however, between the facts of L.E. Smith Glass and Trenton China Pottery. In L.E. Smith Glass, the claimant suffered injury #1, returned to work without restrictions, suffered injury #2, which was totally disabling, and then suffered a recurrence of injury #1, which also resulted in total disability. Unlike the claimant in Trenton China Pottery, though, the claimant here was not entitled to receive benefits based upon both injuries. In determining that the claimant was not entitled to concurrent awards of total disability benefits, the Court stated that, since the claimant was already totally disabled due to his second injury at the time he suffered a recurrence of the first injury, he suffered no loss of earning power as a result of the recurrence. No loss of earning power results in no award of benefits. Consequently, the claimant's recovery was limited to temporary total disability benefits in connection with his second injury.

The Court did go on to note that, should the claimant's condition relative to the second injury improve such that he was no longer totally disabled, then the carrier responsible for the first injury may have some liability. But until the first injury accounts for any portion of the claimant's loss of earning power, there will be no apportionment of benefits.

What if the second "injury" is not really an injury at all, but is

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merely a recurrence of the first injury? The Commonwealth Court addressed that issue in the case of South Abington Township v. WCAB (Becker).[4] Mr. Becker, a police officer, suffered an injury to his right hip while investigating an auto accident. At the time, the employer's carrier was Hartford. Mr. Becker subsequently returned to work and continued to work for a period of about four years. Then, while training a new police officer, Mr. Becker began to experience extreme pain in his right hip. At that time, the employer's carrier was St. Paul. In discussing which carrier would be liable, the Court stated:

> For purposes of apportionment between employers or insurers, if a compensable disability results directly from a prior injury but manifests itself on the occasion of an intervening incident which does not contribute materially to the physical disability, then the claimant has suffered a recurrence and the former insurer or employer is responsible for all medical and wage loss benefits. Conversely, where the intervening incident does materially contribute to the renewed disability, a new injury, or aggravation, has occurred, and the current employer or insurer is responsible.

Because Mr. Becker had worked for so long after the first injury without incident, the Court found the second incident to be an aggravation, pinning the responsibility for the claimant's right hip condition on the second carrier, St. Paul.

The Commonwealth Court most recently discussed the issue of apportionment in the case of Guard Insurance Group v. WCAB (York).[5] A detailed history of §322 and the case law interpreting it and the apportionment of benefits may be found in the Court's opinion. Of note to our readers, however, is the final argument presented to the Court, i.e., whether the imposition of counsel fees is appropriate. The Court held that, where the only issue in a case is which one of the employer's two insurance carriers is liable for the claim, unreasonable contest attorney's fees will be assessed under §440 of the Act. That section requires the imposition of attorneys' fees and costs in addition to the award of compensation benefits unless a reasonable basis for the contest has been established. Simply arguing: "I'm not responsible – he is!" is insufficient.

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[1] Franklin Steel Co. and the PMA Group v. WCAB (Clark and Liberty Mutual Insurance Co.), 665 A.2d 1310 (Pa.Cmwlth. 1995).

[2] Trenton China Pottery & AIG Claims Service, Inc. v. WCAB (Mensch and Public Service Mutual), 773 A.2d 1265 (Pa.Cmwlth. 2001).

[3] L.E. Smith Glass Co. v. WCAB (Clawson), 634 A.2d 813 (Pa. 2002).

[4] South Abington Township and St. Paul Fire & Marine Insurance Co. v. WCAB (Becker and ITT Specialty Risk Services), 831 A.2d 175 (Pa.Cmwlth. 2003).

[5] Guard Insurance Group and Railworks a/k/a H.P. McGinley v. WCAB (York and TIG Premier Insurance), 864 A.2d 1285 (Pa.Cmwlth. 2005).

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.