Pennsylvania Workers' Compensation Bulletin

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Mental/Physical Injuries:
An Important Change in the Burden of Proof

Prior to December 28, 2005, a claimant alleging that he or she was subjected to mental stress at the workplace, which resulted in a physical disability, was required to show "abnormal working conditions." In other words, the claim is not compensable if the claimant's physical disability was caused by his or her subjective reaction to normal working conditions.

This requirement was made clear (or so everyone thought) in the case of Davis v. WCAB (Swarthmore Borough).[1] In that case, the claimant, a police officer, filed a claim for benefits alleging that he had post-traumatic stress disorder and "specific work inhibitions" as a result of being subjected to repeated life-threatening and stressful experiences. In addition to his claim for psychiatric injuries, the claimant also argued that he suffered from "a tremulous right hand," which caused the claimant to become unsteady and incapable of grasping his revolver. He claimed shortness of breath, generalized muscle twitching and nervousness. In reviewing his claim, the Supreme Court stated:

> [W]e hold that the standard to be applied to claims for workers' compensation benefits when the claimant asserts a psychic injury that has manifested itself through psychic and physical symptoms is the same standard that we articulated in Martin[2]: *such a claimant must prove by objective evidence that he has suffered from a psychic injury and that the psychic injury is other than a subjective reaction to normal working conditions.*

Shortly thereafter, the Court applied this standard in the case of Erie Bolt Corp. v. WCAB (Elderkin).[3] There, the claimant was a white-collar worker who suffered a fatal heart attack within an hour of a meeting with the employer in which his employment was terminated. Based upon its decision in Davis, the Supreme Court reversed the award of benefits, finding that termination of employment, either anticipated or sudden, is not a sufficient stressor to allow an award in a mental/physical case when the stressor is insufficient to allow an award in a mental/mental case.

Given these decisions, it was almost universally accepted that the Supreme Court had effectively nullified the distinction between "mental/mental" claims and "mental/physical" claims. It seemed that in both cases, abnormal working conditions needed to exist before benefits could be granted.

After December 28, 2005, however, that is no longer true. Russell Panyko suffered a heart attack following a meeting with his supervisor concerning attendance issues. As a result, he sought benefits for a work-related heart attack. In a completely unexpected decision[4], the Supreme Court stated that: "this Court's decision in Davis should be read narrowly, so as not to require a claimant to meet the restrictive abnormal working conditions test in situations where he suffers a purely physical injury such as a heart attack." The Court went on to explain that:

> "…based on Martin, a claimant seeking benefits for psychic injuries caused by a psychic stimulus was required to prove that: (1) he suffered from a psychic injury; and (2) his psychic injury was either more than a

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United States Steel Corporation v. Workers' Compensation Appeal Board (Luczki), No. 235 C.D. 2004, Filed December 2, 2005.

(Unreasonable Contest - Utilization Review - If an IME is not obtained prior to filing a UR Review Petition, attorneys' fees may be assessed. An *after*-acquired IME is insufficient to establish a reasonable contest.)

Claimant sustained a work-related low back injury in March of 2000. On June 2, 2000, claimant began receiving chiropractic treatment from Dr. Homonai. From August 2, 2000 and ongoing, claimant received treatment from Dr. Homonai at least two times per month.

On August 29, 2000, employer filed a Utilization Review (UR) Request challenging the reasonableness and necessity of Dr. Homonai's treatment from August 2, 2000 and ongoing. The UR Request was assigned to Dr. Camilli, who issued a UR Determination on October 4, 2000 concluding that Dr. Homonai's treatments were, in fact, reasonable and necessary.

Employer then sought review by a Workers' Compensation Judge. Before the WCJ, both parties presented medical evidence regarding the reasonableness and necessity of claimant's treatment. The WCJ found claimant's medical experts more credible and convincing and denied employer's UR Review Petition. The WCJ further noted that the only medical evidence offered by employer was obtained on February 15, 2001, 3 months after employer filed its UR Review Petition. The WCJ thus found that employer's contest of the UR Determination was not reasonable and awarded attorneys' fees against employer.

Employer filed a timely appeal with the Workers' Compensation Appeal Board, which affirmed the WCJ's decision. Employer then sought review by the Commonwealth Court.

The Court noted that it has long been held that an employer's contest of a claim under the Act is not reasonable and that a claimant is entitled to an award of counsel fees under §440(a) of the Act where the employer bases its contest on medical evidence obtained after the employer filed its contest. The Court further noted that §440(a) of the Act expressly states that a claimant *shall* be awarded a reasonable amount for attorneys fees in the absence of a reasonable contest in *any* contested case where the insurer has c*ontested liability in whole or in part.*

Here, employer contests its liability for the treatment at issue. A "reasonable contest" must be prompted by a genuine dispute, one based upon medical evidence that supports a contest, and possessed by employer at the time the choice is made to file the UR Review Petition. Because employer did not have medical evidence in its possession to support its UR Review Petition at the time that the petition was filed, employer's contest was unreasonable and attorneys' fees were properly assessed.

The decision of the WCAB was, therefore, affirmed.

(The Court did note that the initial Request for UR Review by a URO is not a "contest" for purposes of §440(a), but rather is a determination by an impartial third party, is not driven by presentation of evidence by either party, and, as such, carries no evidentiary requirements on an employer's part. Hence, attorneys' fees may not be assessed at that stage. However, an employer's *continued* pursuit of a challenge to a claimant's treatment before a WCJ triggers an examination of the reasonableness of the employer's contest. Unless an employer has an evidentiary basis to support its contest, the employer is subject to an award of attorneys' fees under §440(a) of the Act.)

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Lorna Virgo v. Workers' Compensation Appeal Board (County of Lehigh-Cedarbrook), No. 1167 C.D. 2005, Filed December 22, 2005.

(Reinstatement - Claimant discharged from modified employment due to "bad faith" in carrying out job responsibilities is not entitled to reinstatement of total disability benefits.)

Claimant was hired as a full-time certified nursing assistant on July 7, 2000. On December 19, 2000, claimant received a written warning for failure to follow her supervisor's instructions with regard to the care of a resident at the employer's facility. On December 15, 2001, claimant suffered work injuries in the form of right knee, right hip and low back sprain/strains. Claimant was not required to stop working as a result.

Claimant received an unsatisfactory score on her annual evaluation for the 2001 calendar year, due to a lack of initiative and uncooperative attitude. On February 25, 2002, claimant arrived late for work and was suspended for three days without pay. On March 8, 2002, claimant was suspended for 10 days because she had accumulated 6 episodes of sick days or late time during the preceding 8 pay periods, which dated back to November 1, 2001, prior to her injury. On June 8, 2002, claimant received an unsatisfactory 6-month evaluation due to poor performance, attitude and lack of initiative. On December 30, 2002, claimant again received an

unsatisfactory evaluation for the calendar year 2002. Claimant never stopped working as a result of her work injuries, but was eventually placed on restricted duty by her physician on December 18, 2002. On January 3, 2003, claimant was terminated due to her unsatisfactory work performance, having received two unsatisfactory annual reviews.

Claimant then filed a petition seeking reinstatement of her total disability benefits. The Workers' Compensation Judge denied the petition despite the fact that claimant continued to have ongoing symptoms and limitations from her work injury. The WCJ concluded that claimant's discharge and loss of earnings was due to her misconduct rather than to her work injury. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant argued that employer had failed to meet its burden of proving that she was terminated due to her wrongful conduct on the job. The Court agreed that employer did have the burden of establishing "lack of good faith" or "bad faith" on the part of claimant.

The Court stated that "bad faith" may be established if the employer shows that the claimant was capable of performing but did not do so. Under such circumstances, a claimant is not entitled to continuing benefits. On the other hand, if the evidence establishes that the claimant was not capable of performing the job requirements, then benefits should continue or be reinstated.

Here, the performance evaluations that were made a part of the record constitute substantial evidence to support a finding that claimant's discharge was the result of her bad faith. Accordingly, the order of the WCAB was affirmed.

(Editor's Note: The decision rendered in this case is very fact specific. Chances are that if the evidence had not established that claimant engaged in willful misconduct prior to the work injury, then the claimant's benefits would have been reinstated. Had her poor performance begun after the work injury, it would most likely have been ascribed to the work injury and her physical inability to put forth a good effort.)

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City of Philadelphia v. Workers' Compensation Appeal Board (Sites), No. 1410 C.D. 2005, Filed December 21, 2005.

(Occupational Disease - Infectious hepatitis, or hepatitis C, is a compensable occupational disease under §108(m) and (m.1) of the Act and claimant is entitled to statutory presumption that the disease arose out of and in the course of employment.)

Claimant had worked for the City as both a firefighter and a "First Responder," i.e., an emergency medical technician, since 1966. As a firefighter, claimant routinely came into contact with the blood and bodily fluids of victims. As a First Responder, claimant participated in about 1,000 medical runs, many of which left him covered in victims' blood.

In 1982, claimant was told that his liver enzymes were elevated, but was given no information about the significance of that fact. On December 6, 1999, claimant was diagnosed with hepatitis C. In March of 2000, he entered a 48-week treatment program which caused severe side effects that required claimant to call off sick. Even after completing the program, claimant continued to call off sick due to fatigue. Overall, claimant was absent periodically between March 23, 2000 and October 8, 2002.

On December 9, 1999, three days after first being diagnosed with hepatitis C, claimant notified the City of his belief that the disease was work-related. On November 22, 2002, he filed a claim petition.

In support of his petition, claimant offered testimony from his treating physician, Dr. Rothstein. Dr. Rothstein explained that claimant's history of elevated liver enzymes reflects ongoing inflammation and damage in the liver. A liver biopsy indicated that claimant had chronic hepatitis C that would progress to cirrhosis without treatment. Dr. Rothstein further testified that claimant had a good response to the treatment, and that his hepatitis C went into remission. Notwithstanding that fact, the damage to his liver will continue to cause the claimant to become fatigued, thereby affecting his ability to work.

Dr. Rothstein opined that the cause of claimant's hepatitis C was his exposure to blood while working as a firefighter and First Responder. Dr. Rothstein also admitted, however, that First Responders and healthcare workers have a low rate of acquiring hepatitis C because the virus is not efficiently transmitted through occupational exposure.

In response, the City presented testimony from Dr. Gluckman, who testified that it was impossible to determine when and where claimant became infected with hepatitis C and that it was "possible" that claimant became infected from his work or from his tattoos.

The Workers' Compensation Judge granted claimant's petition and awarded total disability benefits for 210 intermittent days from March 23, 2000 through October 8, 2002. Benefits were suspended thereafter. Both parties filed appeals and the Workers' Compensation Appeal Board affirmed the WCJ's decision.

The City then sought review by the Commonwealth Court. First, the City argued that claimant's petition is barred by the statute of limitations inasmuch as it was not filed within 3 years of claimant's learning that his liver enzymes were elevated. The Court noted that the statute of limitations for an occupational disease begins to run from the date a claimant learns that his disability is caused by an occupational disease. Here, claimant did

not learn that he suffered from hepatitis C until December 5, 1999. Further, claimant was not disabled by hepatitis C until 2000. Because he filed his petition within 3 years of learning of his diagnosis, and within 3 years after his first day of disability, the City's argument that the statute of limitations had expired was rejected.

The City next contended that claimant was not entitled to occupational disease benefits under §108(m) of the Act because hepatitis C was not a recognized occupational disease at the time claimant contracted the virus and because claimant was not engaged in an occupation recognized to expose him to the virus. The Court noted that, in December of 2001, the Act was amended so as to substitute "infectious hepatitis or hepatitis C" for "infectious hepatitis" in subsection (m) and added subsection (m.1), which sets forth with specificity the types of employment entitled to a presumption that the disease arose out of the claimant's employment. Firefighters and emergency medical services personnel are among those specified. The Court noted further that the December 2001 amendment to §108 was to take effect "immediately." In the Court's view, this indicates that the amendment was to apply to any claimant whose claim is not barred by the statute of limitations. Thus, claimant was entitled to the statutory presumption in §108(m.1), which was in effect on the day he filed his petition.

The City could have rebutted that presumption with competent, substantial evidence. The only testimony presented by the City was that of Dr. Gluckman, who stated only that it was "possible" that claimant became infected while receiving his tattoos. Such medical testimony, which is less than positive, is not legally competent to establish a causal relationship between claimant's hepatitis C and the tattoos he received as a youth. The decision of the WCAB was, therefore, affirmed.

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Acme Markets, Inc. v. Workers' Compensation Appeal Board (Brown), No. 1174 C.D. 2005, filed January 3, 2006.

(Earning Power - Claimant's net income rather than gross income from self-employment is appropriate method of determining claimant's earning power.)

Claimant worked as a produce manager when he suffered an injury to his shoulder on May 17, 1988. A Notice of Compensation Payable was issued pursuant to which claimant received total disability benefits.

Claimant's benefits were subsequently suspended on November 30, 1988, when claimant returned to work without a loss of earnings. Claimant also began working as an independent real estate appraiser in 1992. Claimant continued working for employer until December 14, 1996, at which time he quit due to "pain in his arm and shoulder." Claimant continued, however, to work as a real estate appraiser following his separation from employer.

In 1997, claimant filed a reinstatement petition alleging that, as of December 14, 1996, he was incapable of returning to his pre-injury position with employer. The Workers' Compensation Judge reinstated claimant benefits based upon his per-injury average weekly wage of $720.94. The WCJ further awarded employer a credit for claimant's earnings as a self-employed real estate appraiser. The WCJ based the credit upon claimant's net income as shown on his filed tax returns as opposed to his gross income.

Employer appealed to the Worker's Compensation Appeal Board, which remanded the case for additional evidence.

On remand, the WCJ considered claimant's testimony that his gross income was $50,758 in 1997, $76,435 in 1998 and $68,775 in 1999. Claimant testified that he took numerous deductions, including his wife's salary inasmuch as she acted as both his bookkeeper and his secretary. Her salary was $25,000 in 1997, $38,000 in 1998 and $34,388 in 1999. As a result of these deductions, claimant's net income from his business was $6,739 in 1997, $14,926 in 1998 and $15,569 in 1999.

In opposition, employer presented testimony from a vocational expert who conducted a wage survey for real estate appraisers, bookkeepers and secretaries in the claimant's geographical area. She testified that real estate appraisers earned, on average, $40,780 in 1997, $64,020 in 1998 and $62,000 in 1999. Secretaries earned $25,460 in 1997, $26,900 in 1998 and between $16,640 and $28,000 in 1999. Bookkeepers salaries ranged from $17,680 to $24,960.

The WCJ found claimant to be credible regarding his earnings for 1997, 1998 and 1999. The WCJ also found the testimony of the vocational expert to be unconvincing and inappropriate with regard to claimant. Again, the WCJ ordered reinstatement of claimant's benefits in amount equivalent to 2/3 of the difference between claimant's time of injury AWW and his net earnings in 1997, 1998 and 1999.

Employer again appealed to the WCAB, which again remanded the case to the WCJ to make findings "regarding which income accurately reflects claimant's earning power."

The WCJ issued a third decision, concluding that claimant's earning power is more accurately reflected by his net income rather than his gross income, and, thus, granted claimant's reinstatement petition. Employer appealed to the WCAB, which affirmed the WCJ's decision.

On appeal to the Commonwealth Court, employer argued that claimant's deductions for his wife's income resulted in artificially low

net earnings for claimant, and that the other deductions claimed by claimant were not supported by any documentation. The Court disagreed, noting that the WCJ credited claimant's testimony, which supports the WCJ's conclusion that claimant's net income, rather than his gross income, reflects his earning power for purposes of the Act.

Employer further argued that the WCJ capriciously disregarded the testimony of its vocational expert. Again, the Court disagreed. The WCJ concluded the expert's testimony was not "appropriate as it applies to claimant." This is not capricious disregard.

Finally, employer argued that the WCJ's decision was not a "reasoned decision" as required by §422 of the Act. Employer argued that the WCJ selectively omitted claimant's testimony that he waited until the end of each tax year to determine his wife's salary, and failed to note that claimant offered no documentation to support his business deductions. Again, the Court disagreed. These "omissions" by the WCJ pertain to the claimant's credibility, and are matters which will not be disturbed on appeal.

The decision of the WCAB was affirmed.

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Michael Blong v. Workers' Compensation Appeal Board (Fluid Containment, Inservco Insurance Service and Gallagher Bassett Services), No. 1569 C.D. 2005, Filed January 19, 2006.

(Suspension - Benefits are appropriately suspended if the claimant voluntarily removes himself from the workforce, such as by leaving the United States to reside with his wife in New Zealand.)

Claimant sustained a work-related injury on September 21, 1998 in the form of bilateral carpal tunnel syndrome for which he was awarded compensation benefits. In December of 2003, employer scheduled an IME. Claimant's counsel then informed employer that claimant would be unable to attend the IME inasmuch as he had moved to New Zealand. Employer then filed a petition seeking to terminate or suspend claimant's benefits because claimant had voluntarily removed himself from the workforce.

The Workers' Compensation Judge concluded that it would be fruitless for employer to establish that claimant had an earning power in Pennsylvania inasmuch as claimant had voluntarily removed himself from the workplace. As such, the WCJ suspended claimant's benefits, but denied employer's termination petition. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant argued that a suspension of benefits was inappropriate in the absence of evidence showing that work would have been available to him had he stayed in Pennsylvania. Claimant argued that he is not working in New Zealand, but that he simply moved there. Therefore, he argued that he is available for jobs in Pennsylvania.

The Court disagreed. There was no evidence to suggest that the claimant's move to New Zealand was temporary. The fact that he chose not to seek work in New Zealand does not render him eligible for compensation.

The critical fact is the claimant's removal of himself from the workplace. He has offered no indication of an intention to move back to the United States should he learn of employment in Pennsylvania. As such, he removed himself from the workplace with as much certainty as one who becomes incarcerated or retires. The decision of the WCAB was thus affirmed.

SUPREME COURT CASE REVIEWS

Barbara Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), No. 14 EAP 2004; Wal-Mart Stores, Inc. v. Workers' Compensation Appeal Board (Rider), No. 103 MAP 2004, Decided December 28, 2005.

(Impairment Rating Evaluation - Insurer has 60 days from date claimant actually receives 104 weeks of total disability benefits to request an IRE for the purposes of obtaining the automatic relief set forth in 77 P.S. §511.2(1). Insurer may request an IRE at a later date, not for the purpose of obtaining the automatic relief, but for purposes applicable to traditional administrative process.)

Gardner sustained a work injury on October 2, 1996. As of October 2, 1998, she had received 104 weeks of temporary total disability (TTD) benefits.

On June 13, 2001, her employer, Genesis, requested that she submit to an IRE. Gardner objected inasmuch as the IRE was not requested within 60 days of her receipt of 104 weeks of TTD. Following proceedings before a Workers' Compensation Judge and the Workers' Compensation Appeal Board, the Commonwealth Court held that an insurer must request an IRE within 60 days of the claimant's receipt of 104 weeks of TTD or be forever precluded from automatically modifying the claimant's benefits under the procedures set forth in 77 P.S. §511.2. The Court further acknowledged that the employer may, at any time, request a medical examination in order to modify a claimant's benefits based on a change in medical condition and earning power.

Rider sustained a work injury on July 31, 1998. He stopped working on October 21, 1998, and subsequently filed a Claim Petition. Wal-Mart opposed the petition and, after the WCJ issued an order granting Rider benefits, Wal-Mart appealed to the WCAB. The WCAB remanded the case to the WCJ,

which again found for Rider, awarding him TTD benefits from October 21, 1998. Wal-Mart did not seek further review. On December 10, 2001, 163 weeks after the date Rider's disability began but within 60 days of the final adjudication of the Claim Petition, Wal-Mart requested Rider to submit to an IRE. Rider objected to the request. After hearings before the WCJ and the WCAB, the Commonwealth Court held that Rider had not "received" 104 weeks of TTD benefits until the WCJ rendered his decision following the remand order of the WCAB.

The Supreme Court granted petitions for review filed by Genesis and Rider and joined the cases for purposes of decision. Both cases involve the timing requirements of 77 P.S. §511.2 for the IRE to have an automatic effect on benefits.

After reviewing the statute in detail, the Court reversed the Commonwealth Court's decision in Rider, holding that the 60-day window for an insurer to request an IRE under 77 P.S. §511.2 begins once the employee has *received*, that is, acquired or comes into possession of 104 weeks of TTD benefits. The Court also affirmed the Commonwealth Court's decision in Gardner. Although the Court acknowledged that the rules promulgated by the Bureau indicate that there are no time limits within which an insurer may request an IRE, the Act itself mandates the insurer to request the IRE for the purposes of obtaining an automatic modification of benefits under 77 P.S. §511.2(2) within the 60-day period. The Court further agreed with the Commonwealth Court's interpretation that, under 77 P.S. §511.2(6), an insurer may request an employee to submit to an IRE beyond the 60-day window; however, the consequences of such an examination cannot operate to automatically reduce the claimant's benefits.

Overall, the Court held that, "once a claimant receives, that is, comes into possession, of 104 weeks of total disability benefits, the insurer has sixty days from that date during which it must request that the claimant submit to an IRE for the purposes of obtaining the automatic relief set forth in 77 P.S. §511.2(2). An insurer's failure to request an employee to submit to an IRE within the prescribed time frames..., however, does not preclude an insurer from requesting that an employee submit to an IRE at a later time. As mentioned above, 77 P.S. §511.2(6) permits an insurer to request the claimant submit to an IRE, the results of which are not, as in §511.2(2) self-executing, but rather, applicable to a traditional administrative process."

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Commonwealth of Pennsylvania, Department of Labor & Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal board (Exel Logistics), No. 23 EAP 2004, decided December 30, 2005. **(Supersedeas Fund Reimbursement - Supersedeas Fund relief is not available where "suspension" of benefits is due to forfeiture under §306(f.1)(8) of the Act.)**

Claimant suffered a work-related shoulder injury in May of 1993.

In August of 1997, pursuant to §306(f.1)(8) of the Act, employer filed a petition for forfeiture alleging claimant refused reasonable medical treatment, and requested supersedeas while its petition was pending. In January of 1998, the Workers' Compensation Judge denied employer's request for supersedeas.

In January of 1999, however, the WCJ granted employer's petition for forfeiture for the period of July 14, 1995 through September 30, 1998, finding claimant refused reasonable medical treatment.

Employer then filed an application for reimbursement from the Supersedeas Fund, requesting $17,798.67 in compensation and $1,375.25 in medical bills paid while its petition was pending. The WCJ denied employer's application inasmuch as its request for forfeiture was made pursuant to §308(f.1)(8) and not pursuant to §§413 or 430 of the Act.

The Workers' Compensation Appeal Board reversed and granted employer's request for reimbursement. The WCAB concluded that the employer's request did fall within §430 of the Act.

The Commonwealth Court reversed the decision of the WCAB, holding that §443 of the Act specifically states that reimbursement is appropriate only where the request for supersedeas was made under §§413 or 430; §308(f.1)(8) itself does not allow for reimbursement.

Employer argued before the Supreme Court that the Commonwealth Court's decision is inconsistent with its own prior decisions which have held that petitions under §308(f.1)(8) have been equated with suspension petitions under §413.

The Supreme Court noted that all of the Commonwealth Court cases relied upon by employer deals with a petition for suspension. While each case turns on the claimant's refusal of reasonable treatment, none of the cases holds that a petition alleging the forfeiture of the right to compensation is the same as a petition seeking suspension of benefits. Forfeiture is based on the claimant's own unwillingness to receive treatment rather than a change in his or her condition. Because employer's petition was under the forfeiture section, it was not a suspension petition and could not fall under §413. Thus, employer is not entitled to reimbursement from the Supersedeas Fund.

Further, the WCAB erroneously concluded that a forfeiture petition falls under §430 of the Act. That section prohibits an employer from terminating, decreasing or refusing to make a payment after benefits have been awarded without first requesting and being granted a super-

sedeas. An employer seeking forfeiture, however, is not contesting liability but is merely alleging that a claimant has forfeited his right to benefits by refusing reasonable medical treatment.

The plain language of §443(a) of the Act requires that supersedeas must have been requested under §413 or §430 to warrant reimbursement. Reimbursement is not authorized for a claim under §306(f).

Therefore, the order of the Commonwealth Court was affirmed.

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Renee Snizaski, Widow of Randy Snizaski, Deceased, v. Workers' Compensation Appeal Board (Rox Coal Company), No. 36 WAP 2004, Decided February 22, 2006.

(Penalties - Where employer files timely request for supersedeas, it cannot be subject to penalty award for failing to pay the underlying benefit during the pendency of the supersedeas petition.)

Claimant filed a fatal claim petition after her husband died in a motor vehicle accident on his way to work. The Workers' Compensation Judge denied the petition. The Workers' Compensation Appeal Board reversed and remanded the case to the WCJ for a computation of the benefits payable. Employer petitioned for reconsideration. The WCAB denied employer's petition, calculated the benefits due, and ordered employer to pay a weekly benefit to claimant. Employer filed a timely appeal to the Commonwealth Court, and also filed an application for supersedeas with the WCAB. Thirty days after the WCAB awarded benefits, claimant's counsel demanded payment from employer. Employer maintained that it was not required to make payment while its supersedeas request was pending, but also made payment to claimant in full on the 42nd day after the WCAB's decision. Shortly thereafter, the WCAB denied employer's petition for supersedeas. Employer then filed an application for supersedeas with the Commonwealth Court, which was also denied.

Claimant then filed a penalty petition alleging that employer failed to tender payment within 30 days of the WCAB's order, and thus was in default under §428 of the Act. The WCJ granted claimant's petition, awarding a 10% penalty. The WCJ believed that filing an appeal and a request for supersedeas was not sufficient to suspend an employer's obligation to pay benefits under the Act.

Employer appealed to the WCAB, which reversed the award of penalties, holding that there was no violation of the Act because employer had no obligation to pay while its timely supersedeas request was pending. The Commonwealth Court agreed and affirmed the WCAB's decision.

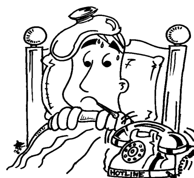
Claimant then sought review by the Supreme Court, arguing that the plain language of the Act establishes that employer was in default, which warrants a penalty. Claimant argued that only the grant of a supersedeas defers an employer's obligation to pay benefits. The Court disagreed.

Section 428 of the Act grants a claimant the right to secure judgment by default if the employer is in default of payments for 30 days or more, but does not specifically address what amounts to a "default." Section 428 does not set forth the 30-day, penalty free supersedeas construct advanced by claimant.

The Act does, however, recognize an employer's right to seek supersedeas. The Regulations governing supersedeas contemplate that it will take 50-60 days between the time supersedeas is requested and there is a ruling or deemed denial. When the Act is read in conjunction with the Regulations, the logical conclusion is that an employer can be deemed in default only if it fails to seek supersedeas while pursuing an appeal or refuses to make payment after its supersedeas request is denied.

The decision of the Commonwealth Court was affirmed.

EMPLOYER'S CORNER



THIRD CIRCUIT RULES THAT "…THERE IS NO RIGHT IN THE FMLA TO BE 'LEFT ALONE.' "

Q: Does an employer violate the FMLA if it requires an employee who is on FMLA leave to call the employer's hotline whenever the employee leaves home during working hours as a means of controlling sick leave abuse?

A: No. The Third Circuit has ruled that such a call-in policy does not diminish the protections guaranteed by the Family Medical Leave Act and therefore does not violate the FMLA.

In the case of David W. Callison v. City of Philadelphia, 2005 WL 900029 (3rd Cir., April 19, 2005) (unpublished), the Circuit held that (1) the city's sick leave policy requiring an employee on leave to call the employer's hotline when leaving home during regular working hours did not interfere with employee's substantive FMLA rights, and (2) the FMLA's anti-abuse provisions did not preempt the city's call in policy.

A word of caution: Where an employer's internal policies conflict with the FMLA, the FMLA controls. The FMLA provides that "the rights established for employees under this Act…shall not be diminished by any collective bargaining agreement, or any employment benefit program or plan." 29 U.S.C.S. 2652(b).

(For information about seminars concerning the FMLA offered by TR&C, contact Jerry Hogenmiller, Esquire at 412-316-8689.)

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> subjective reaction to normal working conditions or caused by abnormal working conditions….In contrast, a claimant seeking benefits for any other type of injury only had to show that: (1) he suffered from such an injury; and (2) the injury arose in the course of employment and was related thereto."

The Court distinguished its holding in Davis by stating that Davis' injuries were psychic in nature, with simply related physical symptoms. As such, Davis was required to meet the abnormal working conditions test. The Court held that, "given the facts of Davis, that case only stands for the proposition that where a claimant suffers a psychic injury with attendant physical symptoms, the claimant must meet the abnormal working relations test." The Court then "refuse[d] to take this case as an opportunity to expand the abnormal working conditions test to situations where a claimant suffers a purely physical injury due to a psychic reaction to a working condition."

We submit that this is a distinction without a difference. The Court has effectively held that, in order to establish an injury in the form of post-traumatic stress disorder, anxiety, stress, and/or depression, a claimant needs to establish abnormal working conditions. If, however, the claimant is seeking benefits for chronic fatigue syndrome, gastrointestinal disorders, cardiovascular disorders, neurological disorders, migraines, headaches, backaches, high blood pressure, nausea, diarrhea, eczema, constipation, irritable bowel syndrome, or any one of an endless number of stress related physical conditions, the claimant need not establish an abnormal working condition. In other words, a claimant may now receive benefits for nothing more than his or her own overreaction to normal working conditions – and the employer will have no real defense to the claim.

This decision by the Supreme Court is contrary to the established case law and will open the floodgates of litigation. If permitted to stand, this case may impose unlimited liability on Pennsylvania employers. We strongly suggest that the state legislature be contacted and that legislation be enacted to reverse the Supreme Court's decision. If a stress-related claim is to be allowed, it must be the result of more than just a claimant's subjective reaction to the normal conditions of his or her employment.

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[1] Davis v. WCAB (Swarthmore Borough), 561 Pa. 462, 751 A.2d 168 (2000).
[2] Martin v. Ketchum, Inc., 523 Pa. 509, 568 A.2d 159 (1990).
[3] Erie Bolt Corp. v. WCAB (Elderkin), 562 Pa. 175, 753 A.2d 1289 (2000).
[4] Panyko v. WCAB (U.S. Airways), No. 37 WAP 2004.

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

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