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Pennsylvania Workers' Compensation Bulletin

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Weis:
The Retirement Myth

Employers and carriers have recently been asking the question: "Now that the claimant has retired, aren't we entitled to a suspension of his benefits?" The question is the result of much publicity received by a recent Commonwealth Court decision that was nothing more than a restatement of established case law. The answer to the question is almost always: "No."

In County of Allegheny (Department of Public Works) v. Workers' Compensation Appeal Board (Weis), 872 A.2d 263 (Pa.Cmwlth. 2005), the County of Allegheny filed a petition to suspend Mr. Weis' benefits because he retired or voluntarily removed himself from the workforce. The Workers' Compensation Judge found that Mr. Weis had retired because, due to the work injury, he was physically incapable of returning to his pre-injury employment. As a result, benefits were denied.

The Workers' Compensation Appeal Board affirmed the Judge's decision, concluding that Mr. Weis had met his burden of demonstrating that he was forced into retirement because of his work-related injury.

Consistent with prior case law, the Commonwealth Court reversed the Board's decision and entered an order suspending Mr. Weis' benefits. The Court noted that the claimant's burden was not merely to establish that he was forced out of his pre-injury job, but that he was forced out of the entire labor market. In order to meet that burden, the claimant need only testify that, although retired, he has sought alternate employment within his physical capabilities. Experienced claimant counsel will always have his or her client submit an application or two with prospective employers so that he is able to testify "appropriately" in response to a suspension petition.

This is not new. The same argument was made before the Commonwealth Court years ago in Dugan v. Workmen's Compensation Appeal Board (Fuller Co. of Catasauqua), 569 A.2d 1038 (Pa.Cmwlth. 1990). In Dugan, the claimant, who was totally disabled, had retired. He testified that he had "no intention to resume any type of employment and consider[ed] himself to be retired." Given that testimony, the Court stated: "Although a claimant may continue to suffer a work-related physical disability, if that physical disability does not occasion a loss of earnings, then payment of workmen's compensation must be suspended. Claimant's loss of earning was caused by his voluntary retirement and withdrawal from the labor market. Claimant's loss of earning was not occasioned by his injury. Therefore, we conclude that workmen's compensation benefits were properly suspended." The Court also noted that, had there been evidence showing that the claimant would seek future

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John Fratta and/or Kathleen Fratta, as the Administratrix and Personal Representative of the Estate of John Fratta, Deceased, v. Workers' Compensation Appeal Board (Austin Truck Rental), No. 1916 C.D. 2005, filed February 16, 2006.

(Compromise and Release Agreement - Section 449 of the Act, which governs C&R Agreements, does not violate the Equal Protection Clause of the Constitution.)

Pursuant to a Notice of Compensation Payable, claimant received benefits for a work-related injury suffered on November 11, 1990.

On July 26, 2002, employer filed a Petition to Seek Approval of a Compromise and Release Agreement. Claimant signed the C&R Agreement before a notary. On August 9, 2002, a hearing was set for August 30, 2002. In the interim, claimant passed away due to a condition unrelated to the work injury.

Employer's counsel then advised the Workers' Compensation Judge that it was withdrawing its petition. Claimant's widow, however, appeared at the hearing and requested that the C&R Agreement be approved. Employer objected. The WCJ issued a decision on June 29, 2004, in which he concluded that a valid C&R Agreement did not exist within the meaning of §449 of the Act. The claimant's widow appealed to the Workers' Compensation Appeal Board, which affirmed the decision of the WCJ. Her appeal to the Commonwealth Court followed.

The Court noted that §449 of the Act requires: "The workers' compensation judge shall not approve any compromise and release agreement unless he first determines that the claimant understands the full legal significance of the agreement." Stating the obvious, the Court noted that a deceased claimant cannot appear at a hearing so that the WCJ can determine whether he understands the legal significance of the agreement.

The claimant's widow then argued,that the right of her husband's estate to equal protection was violated. She argued that §449 of the Act violates the Equal Protection Clause because it treats two similarly situated groups differently without a rational basis by "giving a right and remedy to those whose claimant dies of a work-related injury and taking away a right and remedy from those whose claimant has died from a disease or condition different from his or her work injury prior to the hearing."

The Court disagreed. The two groups identified are not both "claimants" as suggested. Rather, in situations where there is a fatal claim petition that arises out of a death associated with a work injury, the "claimants" are dependents of the deceased employee. The deceased employee is never a "claimant." Thus, the two groups are more accurately described as: 1) dependents of employees who die as a result of a work injury, and 2) beneficiaries of a deceased claimant who was receiving life-time benefits but died from a non-work related condition, such that he or she was not able to appear at the compromise and release hearing.

The Court noted that §449 is "facially non-discriminatory" and makes no distinction between two different groups of "claimants." There is no evidence that the Legislature has purposefully discriminated against the beneficiaries of deceased claimants with regard to the compromise and release of workers' compensation claims. Therefore, the argument that §449 violates the Equal Protection Clause was rejected.

The order of the WCAB was, thus, affirmed.

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Orsam Sylvania v. Workers' Compensation Appeal Board (Wilson), No. 1220 C.D. 2005, filed February 17, 2006.

(Reinstatement - Following a suspension, claimant is entitled to reinstatement if the claimant's loss of earnings is the result of the work-related injury; the Workers' Compensation Act was not intended as a remedy where a claimant's loss of earnings is due to factors other than the work-related disability.)

Claimant suffered a work-related injury on April 30, 1998. She subsequently returned to work at wages less than her time of injury wage. On July 1, 2002, claimant filed a reinstatement petition alleging that employer would not have work available within her physical restrictions for the period of June 27, 2002 through July 7, 2002. Employer filed an answer denying the allegations of the petition inasmuch as the period in question represented a mandatory plant shutdown.

The Workers' Compensation Judge received evidence showing that the collective bargaining agreement required employees to apply the first 5 days of their earned vacation to the shutdown period or to take the time off without pay. Further, there were two shutdown periods in 2002: July 1st through July 5th, and December 23rd through December 25th. Claimant could have applied her vacation time to either shutdown.

The WCJ concluded that claimant was entitled to reinstatement of total disability benefits because her earning power was, once again, adversely affected through no fault of her own. The WCJ found this to be true even though

the adverse affect was due to a plant closing and was only temporary. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer then filed a Petition for Review with the Commonwealth Court. Employer argued that claimant's loss of earning power was not "through no fault of her own." To the contrary, claimant agreed under the collective bargaining agreement to take a portion of her vacation time with pay during the mandatory shutdown of its plant. As such, she was not entitled to the additional award of total compensation benefits for that same closed period of time. The Court agreed.

The record failed to demonstrate that claimant's loss of earnings during the 11-day period of time was due to her work-related injury. Rather, the record revealed that claimant's loss of earnings resulted from her voluntary decision, under the collective bargaining agreement, to take her vacation with pay.

The order of the WCAB was reversed.

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Samuel Edwards v. Workers' Compensation Appeal Board (Value-Plus, Inc.), No. 1035 C.D. 2005, Filed February 28, 2006.

(Personal Animus Defense - In order for personal animus defense to apply, employer must show that assailant intended to injure the employee.)

Claimant filed a petition alleging that he sustained a work-related injury on October 7, 2002.

The Workers' Compensation Judge found as fact that, during a lunch break in the employee lunchroom, claimant's assistant supervisor, Zachary Campbell, approached claimant and made a sexual comment. Campbell then rubbed claimant's head. When claimant gently pushed Campbell away, Campbell then grabbed claimant and slammed him on the table, grabbed his testicles and laid on top of him. After the incident, they went their separate ways. Claimant suffered injury to his lower back, right leg and head. He reported the incident to his supervisor and to Campbell.

At the hearing, claimant testified that Campbell began making sexual comments to him 2 or 3 weeks after he started working there. Claimant admitted that he was not arguing with Campbell about anything work related when the incident occurred.

The WCJ concluded that the incident had nothing to do with claimant's employment but rather was personal in nature. Any sexual harassment that claimant experienced was personal, not work-related or part of a proper employer/employee relationship, and any injury he suffered was not then work-related.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, concluding that the incident involved an act of sexual harassment that was personal rather than work-related, and therefore the injury was not compensable.

Claimant appealed to the Commonwealth Court, arguing that because the assault took place on employer's premises, he was entitled to a presumption of coverage under the Workers' Compensation Act. Claimant further argued that employer failed to rebut that presumption.

The Court agreed. In order to rebut the presumption of coverage where one employee injures another, the employer must prove "*the intention to injure* another employee for reasons personal to the assailant." Here, although Campbell obviously intended to be offensive, there was no evidence offered to show that he *intended to injure* claimant. In fact, claimant testified that the next day Campbell said to him: "Look man, I didn't mean to hurt you, man. I like you."

Because the WCJ and the WCAB overlooked the fact that employer had failed to establish a crucial element of the personal animus defense, i.e., an intent to injure, the order of the WCAB was reversed. The case was remanded for a determination of benefits due claimant along with his litigation costs.

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Howard W. Mark and Cincinnati Insurance Company v. Workers' Compensation Appeal Board (McCurdy), No. 2753 C.D. 2004, Filed March 10, 2006.

(Supersedeas Fund Reimbursement - In cases involving supersedeas fund requests under §430, reimbursement may be had for all payments actually made after supersedeas denial, including payment of benefits awarded retroactively for earlier periods of disability.)

Claimant, a dental assistant, filed a claim petition in 1993 alleging she became ill with contact dermatitis during the course and scope of her employment. Employer contested the claim on the basis of causation and further alleged that, if the condition was causally related to her employment, she had made a full recovery.

After years of proceedings, in 1997, the Workers' Compensation Judge granted claimant ongoing benefits retroactive to 1993. Employer appealed and filed a simultaneous request for supersedeas with the Workers' Compensation Appeal Board. Supersedeas was denied.

The WCAB ultimately affirmed the WCJ's decision as to the existence of a work-related injury, but reversed the WCJ's finding of ongoing disability. The case was thus remanded to the WCJ for a determination as to when claimant had fully recovered.

On remand, the WCJ found claimant was fully recovered as of August 1995. The WCJ's decision was effective August 1998. The WCAB affirmed that decision.

Given the second decision of the WCJ, benefits that had been initially awarded and paid from August 1995 through August 1998 were now deemed not to be payable. Those benefits were paid after supersedeas had been denied in June of 1997.

Employer filed an application for reimbursement from the Supersedeas Fund for benefits paid for disability from August 1995 through August 1998. The parties agreed that reimbursement was appropriate for periods after the June 1997 supersedeas request. The Fund disputed, however, employer's right to reimbursement for the funds paid for disability from the August 1995 recovery date through the June 1997 supersedeas request.

The Court noted that Section 443(a) of the Act allows reimbursement from the Fund if:

1) a supersedeas was requested;

2) the request for supersedeas was denied;

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

4) payments were made as a result of an order denying supersedeas; and,

5) it was ultimately determined that such compensation was not, in fact, payable.

Section 413 of the Act allows a WCJ to change a notice or agreement for compensation if materially incorrect. It also allows a WCJ to modify, reinstate, suspend or terminate benefits. Not all cases under §413 involve retroactive benefits.

In contrast, §430 involves an appeal from an adverse decision of a WCJ to the WCAB. Supersedeas under this section is requested of the WCAB, not the WCJ.

Section 443(a) of the Act focuses on payments made rather than on periods of disability. Thus, the statute clearly speaks to payments of compensation made as a result of a denied supersedeas request. There is no language precluding reimbursement of retroactive benefits. Therefore, the plain language of the statute supports employer's position that the right to reimbursement relates to any and all payments made after denial of a supersedeas request.

Previously, in cases under §430, the Court had held that an order granting a supersedeas request may not be applied retroactively. See, e.g., Wausau Ins. Co. v. WCAB (Comm. of PA), 826 A.2d 21 (Pa.Cmwlth. 2003); Cunningham v. WCAB (Inglis House), 627 A.2d 218 (Pa.Cmwlth. 1993). These decisions are now overruled.

Unlike the §413 cases involving retroactive benefits accruing from an employer's improper cessation of compensation, there is no evidence here that employer wrongfully stopped benefits. There was no existing determination of liability until the WCJ made an award. It was this award that, for the first time, included liability for retroactive benefits. Employer paid these benefits after supersedeas was denied. Hence, the statutory requirement was satisfied.

The order of the WCAB was modified so as to allow reimbursement of the full amount to employer of $43,768.60, which includes retroactive benefits.

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Meadow Lakes Apartments v. Workers' Compensation Appeal Board (Spencer), No. 350 C.D. 2005, Filed March 10, 2006.

(Injury - A workers' compensation injury need not carry a professional diagnosis or descriptive tag; pain itself, if causally related to employment, may be compensable as an injury.)

In November of 1997, claimant sustained a severe right knee injury in the course of his employment. Employer issued a Notice of Compensation Payable describing the injury as a medial meniscal tear. A Supplemental Agreement further described the injury as "Grade II chondromalacia."

In February of 2001, claimant filed a review petition seeking to expand the description of injury to include: medial meniscal tear right knee, right foot, right him, low back and left knee. Employer filed an answer denying the allegations of claimant's petition.

In support of his petition, claimant offered his own testimony concerning his complaints of pain. In addition, he offered testimony from one of his orthopedic surgeons who explained that, due to the work injury to his right knee, claimant placed more stress on his left knee. The physician also confirmed that

claimant complained of low back and hip pain related to his abnormal gait.

The Workers' Compensation Judge found claimant's evidence credible, but noted that while claimant's physician's testimony supported claimant's symptoms of pain from the initial injury, his testimony did not establish new injuries. Hence, the petition was denied.

On appeal, the Workers' Compensation Appeal Board determined that the WCJ erred in concluding that claimant failed to prove additional injuries. Therefore, the WCAB amended the NCP to include claimant's overuse injuries. Employer then sought review by the Commonwealth Court.

The Court noted that the term "injury" is not defined in the Workers' Compensation Act beyond the emphasis that the condition must be related to employment. The appellate courts have declined to define the term in more detail. The Court then looked to the dictionary, which defined injury as: a) an act that damages or hurts; b) violation of another's rights for which the law allows an action to recover damages; or c) hurt, damage or loss sustained.

Considering all of the foregoing, the Court noted that there is no authority requiring a workers' compensation injury to carry a professional diagnosis or descriptive tag. Pain itself, if causally related to employment, may be compensable under the Act as an injury. The WCJ erred in concluding otherwise. Where the factfinder accepts the claimant's testimony about pain, expansion of the injury is permitted even though no medical diagnosis for the pain is offered.

The WCAB did not err in reversing the WCJ's decision; however, the WCAB did err in amending the NCP to include "overuse syndrome." The evidence presented does not support such a diagnosis, but does support an expansion of the description of the work injury to include "pain in the left knee, low back and hip area." Consequently, the decision of the WCAB was affirmed and modified.

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Borough of Heidelberg and Inservco Insurance Services, Inc. v. Workers' Compensation Appeal Board (Selva), No. 1627 C.D. 2005, Filed March 15, 2006.

(Volunteer - Section 601 of the Act permits an injured volunteer to receive compensation despite fact that volunteer had not worked or considered working in decades.)

As a volunteer emergency medical technician, claimant was an employee of the Borough of Heidelberg pursuant to §601 of the Workers' Compensation Act.

On October 17, 2003, claimant sustained a disabling injury in the form of a right heel fracture while actively engaged in her duties as an EMT. Claimant was unemployed at the time of her injury. In fact, it had been 32 years since she held a job that paid her wages. Claimant received old-age Social Security benefits and was, in fact, receiving those benefits at the time of her injury. Claimant did not, however, consider herself removed from the workforce.

The Workers' Compensation Judge found claimant to be entitled to the presumption in §601(b) of the Act that her wages were at least equal to the statewide average weekly wage. Accordingly, the WCJ granted claimant's Claim Petition seeking wage loss benefits. Employer appealed to the Workers' Compensation Appeal Board, which affirmed the decision of the WCJ. Employer's appeal to the Commonwealth Court followed.

Section 601 previously provided that: "In all cases where an injury compensable under the provisions of this act is received by a member of a volunteer ambulance corps...*whether employed, self-employed or unemployed,* there is an irrebuttable presumption that his wages shall be at least equal to the statewide average weekly wage..." Employer argued that the fact that the Legislature deleted the words "whether employed, self-employed or unemployed" from §601 evidences its intent to restrict coverage to those who held paid employment. The Court disagreed, stating that, to the contrary, §601(b) applies to all "employees" without limitation and that the term "employee" is defined in §601(a)(2) as "all members of volunteer ambulance corps of the various municipalities." The Court stated that, clearly, the claimant here was covered by §601(b).

Employer next argued that the WCJ erred in awarding a volunteer benefits when the evidence reflected that the volunteer had withdrawn from the workforce, i.e., she had not worked or considered working for decades. Again, the Court disagreed. There is no requirement that an actual wage loss be sustained before benefits are payable under §601. To the contrary, the Legislature meant to grant volunteer emergency workers wage loss benefits without regard to their actual earnings, if any.

The Court concluded that the WCJ and the WCAB had correctly applied §601(b), thus finding that claimant was entitled to an irrebuttable presumption that her wages were at least equal to the statewide average weekly wage. Accordingly, the order of the WCAB was affirmed.

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Keystone Coal Mining Corporation v. Workers' Compensation Appeal Board (Fink), No. 1487 C.D. 2005, Filed April 13, 2006.

(Medical Expenses - Employer is responsible for payment of medical expenses even though employer's liability for payment of partial disability benefits has ceased.)

Claimant suffered a work injury on January 8, 1987. The parties subsequently entered into a Supplemental Agreement, in which it was agreed that claimant had an earning

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capacity of $148 per week as of February 20, 1989. As such, claimant became entitled to partial disability benefits of $361 for a maximum period of 500 weeks. The 500 week period of partial disability benefits expired on September 28, 1998.

In July of 2004, claimant filed a petition to review medical treatment and/or billing, alleging that employer refused to pay reasonable and necessary medical expenses incurred to treat his work injury. Employer responded that claimant's 500 weeks of partial disability benefits had ceased and that, as such, his claim was in a "termination status."

The Workers' Compensation Judge rejected employer's argument, noting that §306(f.1)(1)(i) of the Act provides that an employer shall pay compensable medical expenses "as and when needed." There is no time limit unless a termination has been granted. Here, no termination had been granted, so employer remained liable for payment of claimant's work-related medical expenses. In addition, the WCJ awarded interest and unreasonable contest attorney's fees.

The Workers' Compensation Appeal Board affirmed.

Employer then sought review by the Commonwealth Court. Relying upon the case of Diffenderfer v. WCAB (Rabestos Manhattan, Inc.), 651 A.2d 1178 (Pa.Cmwlth. 1994), employer argued that the expiration of the 500 week period extinguished not only its liability to pay partial wage loss benefits under §306(b)(1) of the Act, but its obligation to pay medical expenses under §306(f.1)(1)(i) as well. Employer argued that the Legislature did not intend to hold an employer responsible for medical benefits *ad infinitum* after the exhaustion of partial disability benefits.

The Court noted that the argument presented by employer is supported neither by statutory nor by case law authority. There is no legal basis for categorizing claimant's status as a "termination" simply because he has exhausted his 500 weeks of partial disability benefits. It is universally recognized that to secure the termination of a claimant's benefits, the employer must prove, in a termination proceeding, and a WCJ must find that the claimant's work injury has ceased. Mere expiration of the 500 week period for partial disability benefits does not establish that the work injury has ceased.

The order of the WCAB was, thus, affirmed.

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Paul Linton v. Workers' Compensation Appeal Board (Amcast Industrial Corporation), No. 1915 C.D. 2005, Filed March 28, 2006.

(Expert Interview - The Act and regulations permit an employer to request a claimant to submit to multiple interviews by a vocational expert.)

Claimant participated in a vocational interview on March 15, 2001. Based on that interview, employer filed a modification petition, which was denied on January 30, 2003.

By letter dated July 26, 2004, employer requested claimant to participate in a second vocational interview. Claimant did not do so and, on August 27, 2004, employer filed a petition seeking an order to compel claimant to attend a vocational interview. Claimant filed an answer, alleging that §306(b)(2) of the Act does not require a claimant to submit to more than one vocational interview and that neither the Act nor the applicable regulations permit multiple vocational interviews.

The Workers' Compensation Judge directed claimant to submit to the interview, concluding that:

(1) Section 306(b)(2) of the Act provides that an insurer may require an employee to submit to a vocational interview for purposes of determining the employee's earning power;

(2) Section 314(a) authorizes a WCJ to order a claimant to attend "such further...expert interviews as the [WCJ] shall deem reasonable and necessary;" and,

(3) The applicable regulations do not address the number of vocational interviews permitted or prohibited.

Claimant appealed to the Workers' Compensation Appeal Board. The WCAB affirmed the WCJ's decision.

Claimant then sought review by the Commonwealth Court. The Court noted that, as the WCJ noted, the statute specifically contemplates an interview by an expert other than a health care provider, and specifically authorizes "further physical examinations or expert interviews" at any time after the first such examination and interview.

Based on the plain language of §§ 306(b) and 314(a) of the Act, as supported by the Bureau regulations and practices, the Court concluded that multiple interviews by a vocational expert are permitted.

The determination as to whether an employer's request to compel an

expert interview is within the sound discretion of the WCJ. Absent an abuse of discretion, the WCJ's determination will not be disturbed.

Here, because employer's request for the second interview was made three years after the first interview, the WCJ did not abuse his discretion in granting employer's petition and ordering claimant to submit to a second vocational interview.

The order of the WCAB was, therefore, affirmed.

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Burkhart Refractory Installation v. Workers' Compensation Appeal Board (Christ), No. 2275 C.D. 2005, filed March 30, 2006.

(Average Weekly Wage - Where injured employee was employed for 16 weeks, but only earned wages during 12 of those 16 weeks, AWW is calculated by dividing gross wages by 12, the number of weeks he actually earned wages.)

Claimant first worked for employer on March 8, 2002. He was hired in a laboring position, with no specific number of work hours. Most of the time, the workers were on-call.

Claimant suffered a work injury on June 24, 2002. Although he was employed for 16 weeks, due to the sporadic nature of his employment, he only actually worked 12 weeks.

Both parties sought review as to the accurate calculation of the claimant's average weekly wage (AWW). The Workers' Compensation Judge determined that claimant's AWW was $311.82. Claimant appealed to the Workers' Compensation Appeal Board, which determined that the AWW should be $454.17. The WCAB determined that because a strict application of §309(d.2) would not accurately reflect the "economic reality," a permissible alternative must be used to calculate claimant's AWW. Accordingly, the WCAB arrived at the AWW by dividing claimant's gross wages by 12, the actual number of weeks worked.

Employer appealed to the Commonwealth Court, contending that because claimant was employed for at least one complete 13-week period, §309(d.1) should be used to calculate the claimant's AWW. Under that section, the AWW is calculated by dividing by 13 the total wages earned during any completed period of 13 calendar weeks.

The Court disagreed. Subsections (d) and (d.1) apply to long-term employees because they "look back" to the previous 52 weeks of employment. In contrast, (d.2) applies to recently hired employees because it "looks forward."

Here, claimant was not a long-term employee. Therefore, employer's argument that subsection (d.1) would apply was rejected. At the same time, however, subsection (d.2) cannot apply because claimant's laboring position had no specific number of work hours. The WCAB's solution was to divide claimant's gross wages by 12, the actual number of weeks that he worked. The Court found this to be a fair compromise in this situation. It fairly assesses claimant's earnings when he was actually working and advances the humanitarian purpose of the Act. Furthermore, it advances the purpose of §309(d), which is to accurately capture economic reality when calculating the AWW.

The order of the WCAB was, thus, affirmed.

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Charles Young, Deceased, Arlene Young, Widow, v. Workers' Compensation Appeal Board (Zinc Corporation of America), No. 1753 C.D. 2005, filed April 5, 2006.

(Occupational Disease - The last employer with one year or more exposure is liable even if evidence shows that with 30 year latency it could not have caused the mesothelioma.)

Charles Young worked as a bricklayer for 45 years for various employers. He was last employed by employer (ZCA) from 1991 until February of 2001, when he retired. In June of 2001, he was diagnosed with mesothelioma. Young died in April of 2002, and his widow then filed a fatal claim petition.

The parties agreed that Young encountered exposure to asbestos and that his exposure to asbestos caused the fatal cancer. Although the parties presented conflicting medical testimony, the experts generally agreed that the type of cancer that afflicted Young develops after a typical latency period of 20 to 40 years. Nevertheless, the claimant's experts also opined that Young's exposure to asbestos at ZCA contributed to his disease. ZCA's experts testified that, given the latency period, only exposure prior to his employment by ZCA caused Young's cancer.

The Workers' Compensation Judge deemed ZCA's experts to be more credible, and concluded that claimant failed to sustain her burden to prove ZCA liable for benefits.

Claimant appealed to the Workers' Compensation Appeal Board. The WCAB noted that, under §301(e) of the Workers' Compensation Act, Young's asbestos-related cancer was an "occupational disease" entitling claimant to a rebuttable presumption that his occupational disease was work-related. However, the WCAB also noted that the evidence relied upon by the WCJ rebutted that presumption. Consequently, the decision of the WCJ was affirmed.

Claimant then sought review by the Commonwealth Court. The Court concluded that, for specified occupational diseases, such as asbestos-related cancer, §301(c)(2) attaches liability to the employer where the last exposure occurred of at least one year duration during the 300-week period pre-dating the manifestation of the disease. If a one year exposure did not occur with any employer during the 300-week prior to disability or death, liability is assigned to the employer

giving the longest period of workplace exposure during the 300-weeks prior to disability or death.

Here, the statute renders ZCA the only employer that can be found liable because ZCA was the only site of workplace exposure during the 300-week manifestation period.

The decision of the WCAB was reversed and the case remanded for the calculation and award of benefits.

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City of Philadelphia v. Workers' Compensation Appeal Board (Fluek), No. 1250 C.D. 2005, Filed April 6, 2006.

(Termination - Absent an obvious causal connection between the acknowledged work injury and a subsequent condition alleged by claimant, employer's burden of proof in a termination petition is simply to show that all disability relative to the acknowledged work injury has ceased.)

Claimant twisted his left knee while changing a tire on employer's vehicle. Employer issued a Notice of Compensation Payable recognizing claimant's knee injury.

Employer subsequently filed a modification/suspension petition, alleging that claimant acted in bad faith by failing to respond to job referrals within his physical capabilities. Employer then amended its petition to include a request for termination, alleging that claimant had fully recovered from the work injury. Claimant then filed a review petition, seeking to amend the NCP to include a low back injury.

The Workers' Compensation Judge granted the termination petition, dismissed the modification/ suspension petition as moot, and denied claimant's review petition.

The Workers' Compensation Appeal Board determined that the WCJ erred with regard to the burden of proof. The WCJ had found that employer only had the burden to prove that claimant had fully recovered from the work injury listed on the NCP. The WCAB noted the Supreme Court's decision in Gumro v. WCAB (Emerald Mines Corp.) 533 Pa. 461, 626 A.2d 94 (1993), and concluded that it was employer's burden to prove a lack of causal connection between any averred injury and the work-related incident. Because employer did not show that claimant did not suffer a low back injury or had now fully recovered from a low back injury, the employer failed to meet its burden of proof.

The Commonwealth Court held that the WCAB's reliance upon Gumro was misplaced. In Commercial Credit Claims v. WCAB (Lancaster). 556 Pa. 325, 728 A.2d 902 (1999), the Supreme Court further explained its holding in Gumro. Commercial Credit stands for the proposition that the claimant, not the employer, bears the burden of establishing a causal connection between a work-related physical injury and a subsequently alleged psychiatric injury for purposes of a termination petition where the employer accepted liability on the NCP for the physical injuries only. In Gumro, the recognized injury was a twisted knee. The claimant subsequently developed a blood clot after surgery to his knee. The injuries in Gumro were of a very similar *physical* nature. In Commercial Credit, the claimant alleged an entirely different *kind of injury*.

Similarly, in this case, the claimant sought to include a different type of injury (a low back injury), distinct in kind from the injury described in the NCP (a knee injury). The Court held that, even though the instant case does not involve a psychiatric claim, the Supreme Court's reasoning in Commercial Credit applies. As such, the WCAB erred in applying Gumro.

The Court cautioned, however, that an employer is not insulated from liability solely based upon the language of an NCP. In a significant number of cases, the employer will continue to bear the burden of proof when considering whether a claimant suffers a disability. However, where no reasonable nexus or obvious relationship exists between the injury described in the NCP and a subsequently claimed physical condition, the claimant must still bear the burden of establishing the work-relatedness of a condition before an employer will bear the burden of disproving any continuing disability related to that subsequently alleged condition.

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Wayne Taylor v. Workers' Compensation Appeal Board (Bethlehem Area School District), No. 1651 C.D. 2005, Filed May 2, 2006)

(Vocational Expert - Claimant is not entitled to reimbursement for payment of a vocational expert under §306(f.1)(1) of the Act.)

Claimant suffered a work-related injury which ultimately resulted in partial paralysis. Claimant's physician, Dr. Mauthe, opined that the services of a vocational expert would greatly aid claimant's assimilation back into the workforce. He specifically testified that "the ongoing expertise of a vocational expert is continuously needed for Mr. Taylor's special needs."

After employer offered a position to claimant, claimant hired Daniel Rappucci to serve as his vocational expert. Dr. Mauthe wrote a prescription for a vocational expert several weeks after claimant hired Rappucci, merely to aid claimant's reimbursement efforts. Throughout employer's attempt to return claimant to gainful employment, a counsel of the Office of Vocational Rehabilitation had been assigned to claimant.

Rappucci is not a licensed medical professional. As such, both the Workers' Compensation Judge and the Workers' Compensation Appeal Board concluded that, under §306(f.1)(1) of the Act, claimant was precluded from recovering from employer the payments he made to Rappucci.

Claimant then sought review by the Commonwealth Court, arguing that the cost was reimbursable because: 1) a licensed medical professional authorized Rappucci's services, and 2) the policy goals of the Act provide grounds for reimbursing services incidental to a claimant's medical treatment.

The Court did not agree. Section 306(f.1)(1) of the Act requires employers to provide payment for services rendered by "physicians or other healthcare providers." A vocational expert is not a healthcare provider unless he or she is a licensed medical practitioner.

Further, although Dr. Mauthe is a licensed practitioner, he did not supervise Rappucci. Dr. Mauthe's prescription for Rappucci's services alone does not bring Rappucci's services within the definition of a medical service. Services incidental to medical services are reimbursable only when they fall within a specific subcategory of §306(f.1)(1)(ii), such as orthopedic appliances.

Accordingly, the order of the WCAB was affirmed.

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Rita Carroll v. Workers' Compensation Appeal Board (US Airways), No. 2279 C.D. 2005, Filed May 9, 2006.

(Penalties - Where employer challenges claimant's receipt of massage therapy by filing a UR Request and Bureau advises employer that it could cease payment of massage therapy bills, WCJ's determination to deny penalties is not an abuse of discretion.)

Employer acknowledged that claimant suffered a work-related lumbar spine injury in September of 1994. As a result of her injury, claimant's treating physician prescribed massage therapy that was performed by a massage therapist.

Employer sought utilization review challenging the appropriateness of the massage therapy. The URO determined that the therapy was not reasonable or necessary after May 18, 1999. Claimant appealed and the Workers' Compensation Judge reversed the URO's determination. Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

In July of 2001, employer attempted to file a new UR Request regarding the reasonableness and necessity of massage therapy due to claimant having been hospitalized and missing treatment. The Bureau returned the UR Request to employer, indicating that a massage therapist was not a defined "health care provider" and advised employer that it did not have to pay for that type of treatment. Based upon that information, employer denied the bills.

Claimant filed a penalty petition alleging that employer failed to pay for massage therapy as ordered by the WCJ and WCAB. Employer argued that it had not violated the Act and alleged that it was advised by the Bureau that payment for unauthorized providers was not required.

The WCJ denied claimant's penalty petition, finding that employer relied upon the information provided to it by the Bureau, although the WCJ did note that the information provided by the Bureau was erroneous. Claimant appealed to the WCAB, which affirmed, stating that the WCJ did not abuse his discretion in denying penalties.

Claimant then sought review by the Commonwealth Court. The Court noted that while penalties may be assessed where an employer fails to pay compensation when due, it is within the WCJ's discretion as to whether to impose a penalty and the amount of of any penalty. Because the assessment of penalties is discretionary, a WCJ's penalty determination will not be overturned absent an abuse of discretion.

Here, because employer attempted to properly be relieved of payments for massage therapy by filing the second UR Request, and because employer's effort in that regard was frustrated by the Bureau, and because employer relied on the Bureau's advice that it could cease payment of massage therapy bills, the WCJ's decision to deny penalties was not an abuse of discretion.

The order of the WCAB affirming the WCJ's decision was, thus, affirmed.

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Phillip Marks v. Workers' Compensation Appeal Board (Dana Corporation), No. 1863 C.D. 2005, Filed May 8, 2006.

(Termination - Burden of Proof - In termination proceedings, the employer must establish within a reasonable degree of medical certainty not only that the claimant has fully recovered from the work injury, but also that no objective medical findings support the claimant's ongoing complaints of pain.)

(Termination - Burden of Proof - In termination proceedings, the employer has the burden of disproving the causation of conditions that are similar to and involve the same body parts as those conditions accepted under an NCP.)

Claimant, a fork-lift operator, suffered a work related injury on May 30, 2001. As a result, employer and claimant entered into an agreement for compensation, which described claimant's injury as a lumbosacral strain and sprain.

In July of 2002, employer filed a termination petition alleging that claimant had fully recovered as of April 10, 2002. During the litigation of that petition, claimant filed a review petition seeking to expand the description of his injury to include herniated disc at L5-S1 and L3-L4 and grade 1 spondylolisthesis at L3-L4 and L4-L5.

After hearing testimony from expert witnesses presented by both parties, the Workers' Compensation Judge concluded that claimant

failed to prove that his work injury included additional injuries other than the lumbar sprain and strain. The WCJ also found that employer met its burden to prove that claimant had fully recovered from the work injury as of April 10, 2002.

The Workers' Compensation Appeal Board subsequently affirmed the WCJ's denial of claimant's review petition and grant of employer's termination petition.

On appeal before the Commonwealth Court, claimant argued that the burden of proof should have been on employer to prove that no objective medical findings supported his complaints and that his continued disability was not related to the work injury. Claimant argued that the WCJ and WCAB erred in placing the burden of proof on him regarding the relationship between his continuing lumbar symptoms and the acknowledged work injury.

Employer argued that because the parties executed an agreement for compensation, there was a rebuttable presumption that the injury was correctly described. Therefore, the burden was correctly placed on claimant to prove that the additional conditions were related to the work injury.

The Court concluded that the WCJ and WCAB did, in fact, err in placing the burden upon claimant. The Court noted that, in a termination petition, the employer has the burden of proof, and that burden never shifts.

The Court stated that, here, the WCAB imposed a new burden upon claimant based upon distinctions it perceived between the situation where an employer accepts a work injury as it is described in an agreement for compensation signed by the claimant, as opposed to the situation where the injury is accepted as described in a Notice of Compensation Payable, which is unilaterally issued by the employer. This was error.

The Court vacated the WCAB's order and remanded the matter for a review of the evidence based upon a proper assignment of the burden of proof.

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Pascaria Varghese v. Workers' Compensation Appeal board (Ridge Crest Nursing Home, Consolidated Risk Services), No. 28 C.D. 2006, Filed May 12, 2006.

(Penalties - Where supersedeas has been denied by the Board in connection with appeal to Commonwealth Court, penalties may be awarded for failure to make payment in accordance with the Board's order within 30 days, even if an application for supersedeas is pending before Commonwealth Court.)

Claimant sustained a work-related injury in January of 1999. Thereafter, employer filed a termination petition. Claimant filed a contemporaneous penalty petition. Both petitions were granted. Both parties appealed to the Workers' Compensation Appeal Board. The WCAB affirmed the imposition of penalties, but reversed the termination petition.

Employer filed an application for supersedeas, which was denied by the WCAB on February 18, 2004. After an appeal was taken to the Commonwealth Court, employer filed an application with the Court, which was denied on March 26, 2004. On April 23, 2004, 28 days after the denial of its application for supersedeas by the Court, employer paid $31,478.64 to claimant given the WCAB's reversal of the termination order.

Following the WCAB's reversal of the termination order, employer had sent claimant an LIBC-760 form, "Employee Verification of Employment, Self-Employment, or Change in Physical Condition." The form was returned to employer on January 2, 2004. Claimant verified that she was employed and working, but did not indicate the amount of wages she earned. Employer then filed a "Notice of Suspension for Failure to Return LIBC-760" for failure to return a completed form. After receiving copies of claimant's pay slips, employer resumed payment of claimant's benefits.

Claimant then filed a petition seeking penalties and unreasonable contest attorneys' fees alleging employer violated the Act by: (1) failing to pay benefits within 30 days after the WCAB reversed the termination order, and (2) illegally suspending her benefits because her failure to fill in the "wage" block on the LIBC-760 form was insufficient to invoke an automatic suspension of benefits.

The Workers' Compensation Judge denied claimant's penalty petition on both grounds. The WCAB affirmed. Claimant then appealed to the Commonwealth Court.

The Court noted that as a result of Snizaski v. WCAB (Rox Coal Co.), 847 A.2d 139 (Pa.Cmwlth. 2004), *aff'd*, 891 A.2d 1267 (2006), an employer now has a "safe harbor" from penalties while a supersedeas request is pending before the WCAB. The Court also noted that under the ruling in Candito v. WCAB (City of Philadelphia), 785 A.2d 1106 (Pa.Cmwlth. 2001), penalties may be imposed if payment is not made within 30 days of the WCAB's order denying supersedeas. Finally, the Court noted that in Crucible, Inc. v. WCAB (Vinovich), 713 A.2d 749 (Pa.Cmwlth. 1998), it was held that a supersedeas request to the Commonwealth Court did not stay the obligation to pay and, when a request was denied, the employer may be liable for penalties for the entire period of non-payment.

Under Candito and Crucible then, employer is not sheltered by a "safe harbor" from the imposition of penalties while a supersedeas request is pending before the Commonwealth or Supreme Courts.

By failing to make payment, employer has placed itself in a position of peril, betting that if the supersedeas is granted, it will not have to

pay benefits ordered and penalties will not be assessed. If, however, supersedeas is denied, it risks the imposition of penalties for failure to pay within 30 days of the WCAB's order. The Court felt that "[n]ot to place employers at risk of penalties would make it commonplace for employers to file supersedeas requests with no chance of success just to delay payment and earn interest on benefits due and owing to claimants."

Because employer's application for supersedeas here was denied, penalties may be appropriate. For that reason, the matter was remanded to the WCJ for a determination as to the amount of penalties to be assessed, if any.

With regard to claimant's second argument that the WCJ erred in failing to award penalties due to employer's suspension of her benefits for failure to completely fill in the LIBC-760 form, the Court disagreed. Suspension of benefits is appropriate if the form lacks information concerning the claimant's employment, self-employment or physical condition. Because claimant's benefits were legally suspended, the WCJ properly decided that there was no basis on which to award penalties.

The order of the WCAB was, thus, reversed insofar as the WCAB found that penalties could not be awarded for the period of time when the supersedeas request was pending before the Court. The remainder of the WCAB's order was affirmed.

Judge Simpson wrote a concurring and dissenting opinion. He concurred with the majority's opinion as to the suspension issue. He dissented from the rest of the majority opinion. He primarily disagreed with the majority's conclusion that a remand was necessary for further factual findings.

The WCJ found that employer had timely filed its requests for supersedeas, did not delay, maintained requests for supersedeas at all times, and relied upon those pending requests. Under these facts, it was well within the WCJ's discretion to deny a penalty.

In Judge Simpson's opinion, good faith reliance on general supersedeas procedures should not expose employers to penalties. The employer did not act in bad faith. Under the facts as found by the WCJ, penalties were inappropriate.

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EMPLOYER'S CORNER

FEDERAL COURT IMPLEMENTS MANDATORY ADR PROGRAM

Effective June 1, 2006, all employment law cases and most other civil cases filed in the U.S. Federal Court, Western District of PA assigned to Judges Ambrose, Cercone, Schwab, and Hardiman only, will be subject to one of three forms of Alternative Dispute Resolution (ADR).

As stated in the new Local Rule 16.2: "The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The Court also recognizes that an Alternative Dispute Resolution (ADR) procedure can improve the quality of justice by improving the parties' understanding of their case and their satisfaction with the process and the results. The Court adopts LR16.2 to make available to litigants a broad range of court-sponsored ADR processes to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice and the right to trial."

The three options which will be available to litigants are: (1) mediation; (2) early neutral evaluations; and (3) arbitration.

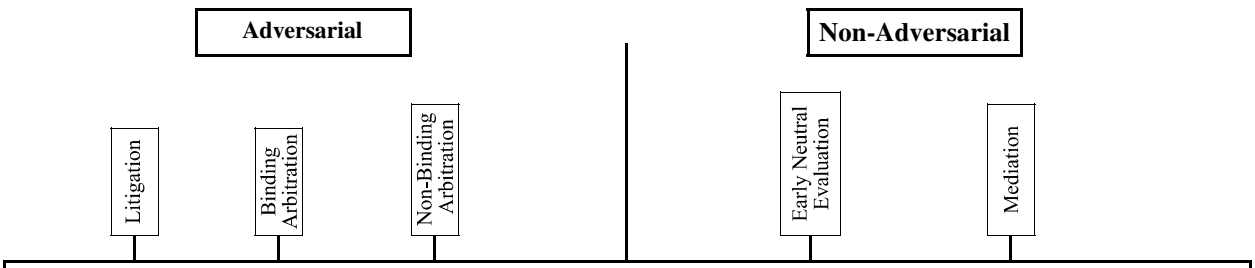
If the parties can't agree on the ADR form, a judicial officer will choose the one he/she thinks is best.

Some of the ADR potential benefits identified by the court include:

- Making justice more accessible to parties;
- Giving litigants more dispute resolution process options;
- Allowing a broader range of outcomes;
- Increasing litigant satisfaction with the litigation process;
- Resolving issues that might otherwise bring parties back to court;
- Allowing litigants more control over disputes and solutions to their disputes;
- Shortening the time from filing to disposition of a case; and,
- Saving time and money for the courts and the parties.

For more information about the court's new ADR program, see www.pawd.uscourts.gov. Click on "Alternative Dispute Resolution" tab on the left.

A CONTINUUM OF DISPUTE RESOLUTION PROCESSES



ADR: Alternative and Appropriate Dispute Resolution...matching procedures to parties' goals.

(Continued from page 1)

employment, a contrary decision would have been reached.

Following the Dugan decision, there was a flurry of litigation raising the retirement of the claimant as a basis to suspend benefits. In most cases, the claimant merely presented evidence of an intention to seek future employment despite being retired. For example:

- An employee who testifies that he intends to pursue another job in order to supplement his social security payments is entitled to a reinstatement of benefits. Patterson-Kelly Co. v. Workmen's Compensation Appeal Board (Woodrow), 586 A.2d 1043 (Pa.Cmwlth. 1991).

- An employee has not withdrawn from the work force if, after retiring, he spends time preparing and relocating to another area where he intends to begin searching for alternate employment. Nabisco v. Workmen's' Compensation Appeal Board (Kelly), 611 A.2d 352 (Pa.Cmwlth. 1992).

- An employee who indicates an intention to retire prior to a work injury is still entitled to receive benefits where the employee had no intention of withdrawing from the labor market subsequent to her retirement from the time-of-injury employer. Bryn Mawr Hospital v. Workers' Compensation Appeal Board (O'Connor), 701 A.2d 805 (Pa.Cmwlth. 1997).

In short, testimony from the claimant indicating his intent to seek employment will often suffice to defeat an employer's attempt to suspend benefits under Dugan and Weis. Of course, the Judge may reject the claimant's testimony in that regard, particularly if the employer produces a statement signed by the claimant at the time of his retirement confirming that he is withdrawing from the work force and has no intention of seeking subsequent employment. If the employer cannot rebut the claimant's testimony as to his "intent," however, the employer's chances of success are minimal. In those rare instances where the claimant is not represented or is represented by an inexperienced attorney, a suspension of benefits may be achieved. For the most part, however, the Weis decision has resulted in "much ado about nothing."

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, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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