TR&C

Pennsylvania Workers' Compensation Bulletin

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NO NOTICE = NO SUSPENSION. NO EXCUSES!!

When is a "Notice of Ability to Return to Work" form required? ***Any time medical evidence is received indicating that the claimant is capable of returning to work in any capacity!***

Section 306(b)(3) of the Pennsylvania Workers' Compensation Act provides:

> If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then **the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant**, which states all of the following:
>
> (i) The nature of the employe's physical condition or change of condition.
>
> (ii) That the employe has an obligation to look for available employment.
>
> (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.
>
> (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions. *(Emphasis added.)*

The "form prescribed by the department" is LIBC-757, the "Notice of Ability to Return to Work" form. Please become familiar with it. A copy is reproduced on page 11, *infra*. The form may be downloaded from the Bureau's website, which is located at "www.dli.state.pa.us." There is NO EXCUSE for failing to provide this notice to the claimant at any time medical evidence is received indicating that the claimant is, in fact, physically capable of some form of gainful employment.

Form LIBC-757 must be served upon the claimant whether or not the claim is in litigation. Form LIBC-757 must be served upon the claimant regardless of the type of petition that may be pending. An LIBC-757 must be served upon the claimant even if the claim has not yet been acknowledged and a claim petition is pending.

The Commonwealth Court has repeatedly held that compliance with the provisions of Section 306(b)(3) is a threshold burden that must be met in order to obtain a modification or suspension of claimant's benefits.

For example, in the case of Summit Trailer Sales v. Workers' Compensation Appeal Board (Weikel),[1] the Court found that because the employer offered no evidence that the required written notice had been sent to the claimant, the employer could not meet its burden of proof and, therefore, the modification / suspension petition was denied.

Likewise, in Hoover v. Workers' Compensation Appeal Board (Harris Masonry, Inc.),[2] the Court stated that if an employer seeks to

(Continued on page 12)

Inside This Issue...

Commonwealth Court Case Reviews

William Mooney v. Workers' Compensation Appeal Board (County of Schuylkill), No. 844 C.D. 2005, filed September 2, 2005.

(Employer/Employee Relationship - Claimant injured while performing court-ordered community service is not County employee within meaning of WC Act.)

Claimant was ordered by the Schuylkill County Court of Common Pleas into the Accelerated Rehabilitation Disposition (ARD) Program as a result of criminal charges pending against him. Under the trial court's order, claimant was placed on 12 months probation, during which time he was to perform 21 hours of community service.

On January 23, 2003, while performing community service work at St. John the Baptist Church, claimant was directed by a county employee to paint a particular area of the church building. While he was painting, the ladder slipped and claimant injured his left arm. As a result, claimant was completely disabled from his regular job for one month, after which he returned to work with no loss of earnings.

Claimant than filed a claim petition against the county. The County filed a timely answer denying that claimant was a county employee at the time of his injury.

The Workers' Compensation Judge found that claimant suffered an injury while in the course of performing community service. The WCJ further found, however, that the county had no interest in the church and received no benefit from claimant's community service. Moreover, claimant did not receive wages, remuneration or other benefit from the county for his community service and, thus, was not performing services for the county for valuable consideration as required under §104 of the Act. The WCJ found that the county neither hired nor selected claimant for its community service program, the county could not terminate claimant from its community service program, and did not control the work to be performed or the manner in which the work was performed. Hence, the WCJ denied and dismissed the claim petition because he concluded that claimant was not a county employee.

The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that the county did maintain control because it provided the workers and, through its agents and employees, directed, supervised and coordinated the community service program. Claimant further asserted that the county had the authority to remove uncooperative participants from the program. Finally, claimant argued that he did receive valuable consideration inasmuch as he would have suffered jail time had he not complied with the terms of the ARD Program.

The Court was not persuaded. The county did not select claimant for its community service program; but rather, it was claimant who, with the trial court's permission, voluntarily chose to participate in the ARD Program. Further, by being accepted into the ARD Program, claimant had already promised to perform 21 hours of community service as a part of the deal. Because claimant was already legally bound to perform the community service at the time of his injury, his "services" were not performed for consideration. Consequently, because claimant did not perform services for the county for valuable consideration, he is not an "employee" within the meaning of the Act.

The decision of the WCAB was affirmed.

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Carol Taylor v. Workers' Compensation appeal Board (Servistar Corporation), No. 753 C.D. 2005, filed September 8, 2005.

(Collateral Estoppel - Claim for reinstatement based on recurrence of injury after termination of benefits is not barred by doctrine of collateral estoppel if the two proceedings involve different questions regarding the status of claimant's disability during two unrelated time periods.)

In June of 1993, claimant suffered a work-related injury acknowledged as "plantar fasciitis." Claimant's benefits were eventually terminated in July of 2000, when a workers' compensation judge granted employer's termination petition.

Claimant filed a reinstatement petition in April of 2003, alleging that her work-related disability recurred as of April 17, 2002. In support of her petition, claimant presented testimony from her treating physician, Dr. Pongia. Dr. Pongia opined that claimant's plantar fasciitis had never resolved despite the WCJ's find-

ings. Dr. Pongia opined that the condition never fully resolves, but instead continues through cycles of exacerbation and remission.

The WCJ rejected Dr. Pongia's testimony as incredible inasmuch as his testimony was inconsistent with the prior judicial determination that the claimant had fully recovered.

The Workers' Compensation Appeal Board affirmed, stating that Dr. Pongia's testimony was an attempt to relitigate a determinative fact, i.e., that claimant had fully recovered from her plantar fasciitis, which relitigation is barred by the doctrine of collateral estoppel.

On appeal to the Commonwealth Court, claimant argued that the doctrine of collateral estoppel does not apply in the case. The Court agreed.

Generally speaking, where an expert's opinion is based on an assumption that is contrary to established facts of record, that opinion is worthless. The Court stated that here, however, Dr. Pongia's testimony was not based on an assumption that is inconsistent with the prior adjudication that she had fully recovered. Here, Dr. Pongia testified that he did not see claimant from April 1997 through September of 2000, then not again until April 17, 2002. His opinion that claimant experiences exacerbations and remissions of plantar fasciitis is entirely consistent with the termination decision, as a remission is characterized by an abatement or cessation of symptoms.

The issue before the WCJ in the prior termination proceeding was whether claimant had fully recovered, and he determined that she had as of July 2000. The issue in this case is whether claimant's work injury recurred as of April 17, 2002. The issues are not identical. The two proceedings involve different questions relating to the status of claimant's disability during two unrelated time periods.

Accordingly, the order of the WCAB was reversed and the matter remanded for the calculation of benefits.

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Sylvio M. Facchine, Deceased, Barbara Spinda, Legal Representative v. Workers' Compensation Appeal Board (Pure Carbon Co. and PMA Group), No. 1022 C.D. 2005, filed September 23, 2005.

(Compromise and Release Agreement - Section 449 of the Act requires that a Compromise and Release Agreement be memorialized in a writing signed by the claimant before witnesses.)

Sylvio Facchine was awarded workers' compensation benefits for a 1991 injury in the nature of chronic obstructive pulmonary disease arising from his employment. In December of 2003, his attorney reached an agreement with employer's attorney to seek approval of a proposed Compromise and Release Agreement. Employer's attorney confirmed the agreement in two letters and a petition was filed.

Shortly thereafter, on January 16, 2004, Mr. Facchine died. Due to the timing of his death, he neither executed the C&R Agreement nor testified at an approval hearing. Nevertheless, the executrix of his estate sought approval of the proposed Agreement and a hearing was held.

The Workers' Compensation Judge determined that the parties had entered into an agreement to resolve the claim, in its entirety, for a lump sum payment of $105,000. Based upon the testimony of decedent's nieces, the WCJ determined that the deceased intended to proceed with the C&R, and that he understood the full meaning and significance of the proposed Agreement.

Despite these findings, the WCJ denied approval of the C&R Agreement, concluding that the decedent failed to sustain his burden of proof under §449 of the Act. The Workers' Compensation Appeal Board affirmed, and the executrix appealed to the Commonwealth Court.

She argued that the proposed C&R Agreement should have been approved because the WCJ determined that the decedent understood the factual and legal significance of the Agreement, and the parties confirmed the agreement in writing through the employer's counsel's letters.

The Court disagreed. Section 449 of the Act clearly requires that the Agreement be memorialized in a writing signed by the claimant before witnesses. Here, the decedent signed no such document. Consequently, the decision of the WCAB was affirmed.

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Secco, Inc. and The PMA Insurance Group v. Workers' Compensation Appeal Board (Work), No. 1048 C.D. 2005, filed November 19, 2005.

(Suspension/Modification - In order to obtain a suspension or modification of benefits, employer must show that a timely Notice of Ability to Return to Work form has been served upon claimant.)

Claimant suffered a work injury on December 18, 2001. As a result, employer issued a Notice of Compensation Payable. Claimant's benefits were suspended by stipulation effective November 6, 2002. The stipulation also reserved claimant's right to seek reinstatement of his benefits effective November 9, 2002.

Claimant testified before the Workers' Compensation Judge that he attempted to return to work in November of 2002, but that he again ceased working on November 15, 2002 as a result of his work injury. Claimant also presented testimony from his treating physician, who removed claimant from work effective November 18, 2002.

Employer presented contrary medical testimony to show that claimant had fully recovered from the work injury as of February 6, 2003 and was fully capable of returning to his pre-injury position. Employer also presented testimony from its controller, who stated that after receiving the IME report of February 6, 2003, she sent a letter to claimant on February 14, 2003 offering him his pre-injury position effective February 19, 2003. On February 18, 2003, employer also mailed claimant a notice of ability to return to work form based upon the IME report.

The WCJ found that claimant had not fully recovered, but was capable of returning to his pre-injury position as of February 14, 2003. As such, the WCJ determined that claimant was entitled to reinstatement of his benefits from November 15, 2002 through February 13, 2003, with claimant's benefits being suspended effective February 14, 2003.

Claimant appealed to the Workers' Compensation Appeal Board. He argued that because employer failed to issue a notice of ability to return to work *prior* to sending out the job offer letter February 14, 2003, employer failed to meet its burden of proof and was, thus, not entitled to a suspension of benefits. The WCAB agreed.

Employer then sought review by the Commonwealth Court. The Court noted that there was no dispute that employer had, in fact, sent a notice of ability to return to work form to the claimant. The problem, however, centered around the fact that the notice was not mailed to the claimant until February 18, 2003, one day prior to the day claimant received notice of employer's job offer. The offer also expired on that date. The Court stated that, under the specific circumstances of this case, the notice of ability to return to work sent after the job offer letter was insufficient.

The purpose of the notice required by the Act is to share new medical information about a claimant's physical capacity to work and the possible impact on existing benefits. Here, because the notice was not sent until after claimant was offered a job, claimant was not put on notice that there was a physical change in his condition which obligated him to look for available work. The employer had, therefore, failed to meet its burden of proof.

The WCAB's decision was affirmed.

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Rebecca Teter v. Workers' Compensation Appeal Board (Pinnacle Health System), No. 1387 C.D. 2005, filed November 17, 2005.

(Remand Order - The WCJ is not required to produce the same result as the initial deci-

4 CATS

Four men were bragging about how smart their cats were.

The first man was an Engineer. The second man was an Accountant. The third man was a Chemist. The fourth man was a Claimant's Attorney.

To show off, the Engineer called to his cat: "T-Square, do your stuff!" T-Square pranced over to the desk, took out some paper and pen, and promptly drew a circle, a square, and a triangle. Everyone agreed that was pretty smart.

But the Accountant said his cat could do better. He called his cat and said: "Spreadsheet, do your stuff!" Spreadsheet went out to the kitchen and returned with a dozen cookies. He divided them into 4 equal piles of 3 cookies. Everyone agreed that was pretty good.

But the Chemist said his cat could do better. He called his cat and said: "Measure, do your stuff!" Measure got up, walked to the fridge, took out a quart of milk, got a 10-ounce grass from the cupboard and poured exactly 8 ounces into the glass without spilling a drop. Everyone agreed that was pretty impressive.

Then the 3 men turned to the Claimant's Attorney and said: "What can your cat do?" The Claimant's Attorney called his cat and said: "Free Ride, do your stuff!" Free Ride jumped to his feet, ate the cookies, drank the milk, used the paper as a litter box, engaged the other 3 cats in a fight, claimed he injured his back while doing so, filed a grievance report for unsafe working conditions, put in for workers' compensation, and went home for the rest of the day on sick leave.

All agreed. No contest!!

sion; he is only required to remain within the boundaries of the remand order.)

Claimant filed a claim petition alleging that she suffered a work-related back injury. Employer denied the allegations of the petition.

On February 3, 2003, the Workers' Compensation Judge granted claimant's petition and ordered employer to pay claimant's compensation for 3 days lost wages, health care liens, litigation costs and future medical expenses.

Employer appealed to the Workers' Compensation Appeal Board, which remanded the decision to the WCJ, directing as follows: "On remand, the Judge is instructed to summarize Dr. Schmidt's testimony and explain the basis for his credibility determinations with regard to the medical expert testimony, based on the existing record."

On August 18, 2004, the WCJ confirmed his prior decision and further found that claimant had recovered from her work injury as of June 21, 2001. Thus, his order terminated claimant's benefits effective that date.

Claimant then filed an appeal with the WCAB, which found that the WCJ did not exceed the scope of the remand order inasmuch as his findings were supported by substantial evidence in the record. As such, the WCAB affirmed the WCJ's decision terminating claimant's benefits.

Claimant sought review by the Commonwealth Court, contending that the WCJ erred in accepting the testimony of employer's medical expert on remand when he had rejected that testimony in his initial decision.

The Court stated that, upon remand from the WCAB, the WCJ must confine his decision to the instructions within the remand order. The Court further noted, however, that the WCJ is not required to produce the same result as the initial decision. He is only required to remain within the boundaries of the remand order.

Here, the case was remanded to the WCJ to review and summarize the testimony of Dr. Schmidt. When he did so, he made new credibility determinations and explained the basis for such determinations in his opinion. All of this was within the boundaries of the remand order.

Accordingly, the decision of the WCAB was affirmed.

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Safety National Casualty Corporation and Penn State University v. Workers' Compensation Appeal Board (Draper and PMA Insurance Group), No. 780 C.D. 2005, filed November 30, 2005.

(Apportionment of Benefits - Where a second work injury aggravates the condition in which the claimant was left by the first work injury, benefits are allocated based upon the impact each injury has upon the claimant's earning power.)

Claimant sustained a work injury on March 18, 1990. Thereafter, he began receiving partial disability benefits for an injury to his spine. He returned to work for employer on light duty while continuing to receive his partial disability benefits from employer's insurer at that time, PMA.

On November 1, 1999, claimant was involved in a motor vehicle accident within the course and scope of his employment for employer. At that time, Safety was employer's insurer. Safety denied claimant's allegation that he had suffered multiple injuries in the accident. Consequently, a claim petition was filed on December 9, 1999.

On January 18, 2000, claimant filed a reinstatement petition alleging total disability related to his 1990 injury after he could no longer perform light duty due to his 1999 injuries. PMA filed an answer denying the allegations of that petition.

Claimant's petitions were consolidated and hearings were held before a Workers' Compensation Judge. The WCJ concluded that claimant had met his burden of proving that he suffered disabling injuries in the 1999 accident, some of which related to his 1990 injury, but which also included new injuries. The WCJ then concluded that PMA was entitled to a suspension of claimant's partial disability benefits relative to the 1990 injury, and directed Safety to pay claimant total disability benefits.

Safety appealed to the Workers' Compensation Appeal Board, which reversed the WCJ's suspension of PMA's liability, and remanded the case to the WCJ for apportionment of the award between PMA and Safety.

The claimant thereafter filed a timely appeal from the WCAB's decision with the Commonwealth Court. The Court noted that the WCJ failed to address whether the 1990 injury materially contributed to claimant's total disability given the 1999 injuries. Accordingly, the matter was remanded to the WCJ for further findings of fact and for appropriate apportionment of benefits between the insurers.

On remand, the WCJ concluded that the 1990 injury substantially, materially and equally contributed to claimant's disability in the wake of the 1999 injuries. He further concluded that claimant was entitled to continue receiving partial disability benefits from PMA regarding the 1990 injury, and that both PMA and Safety were equally liable for

claimant's total disability benefits from 1999 and into the future.

PMA then appealed to the WCAB, which agreed with PMA's argument that it should only be responsible for the ongoing payment of claimant's partial disability resulting from the 1990 injury. PMA was thus directed to pay partial disability benefits and Safety was directed to pay total disability benefits based upon the claimant's average weekly wage in 1999. Safety then appealed to the Commonwealth Court.

Applying the rationale set forth in Trenton China Pottery v. WCAB (Mensch), 773 A.2d 1265 (Pa.Cmwlth. 2001), the Court held that benefits were to have been awarded against Safety as the insurer on the risk as of the second injury based on claimant's average weekly wage as of the date of the second injury.

In the case of an aggravation of a prior injury, such as occurred here, the second employer bears the entire responsibility for the claimant's recent loss of earning power despite the fact that both injuries materially contributed to his current condition. This is true for two reasons. First, it is often impossible to determine what share each injury played in the ultimate medical impairment. Second, employers take claimants as they were at the time of injury.

Therefore, where a second workplace injury aggravates the condition in which a claimant was left by the first, we allocate responsibility for payment of benefits based upon the impact each injury has upon earning power, not upon the relative causal contribution of each to the ultimate physical disability.

While this results in the claimant's concurrent receipt of partial and total disability benefits, the total amount he is to receive will be limited by the maximum allowable rate under the Act.

The decision and order of the WCAB were, therefore, affirmed.

SUPREME COURT CASE REVIEWS

Jeffrey Reifsnyder, Dennis Remp and Richard Hoffa v. Workers' Compensation Appeal Board (Dana Corporation), Nos. 4,5 & 6 EAP 2004, decided September 28, 2005.

(Average Weekly Wage - Where there is a long-standing employment relationship, the average weekly wage (AWW) is calculated by including periods of periodic layoffs and averaging the weekly wages earned in the highest three of the four quarters immediately preceding the work injury).

In three consolidated appeals, the Supreme Court was faced with the following issue: what constitutes the proper calculation of a claimant's AWW in the situation where the injured employee was periodically laid off for economic reasons during the year immediately prior to the work injury.

Each claimant maintained a continuing employment relationship with employer under the terms of a collective bargaining agreement, but were subject to periodic layoffs during downturns in employer's production cycle, including layoffs in each of the four quarters immediately preceding the work injury at issue. Consequently, none of the claimants had continuous wage earnings for a complete 13-week period in the year preceding injury. Despite that fact, each claimant maintained his or her plant seniority. Employer continued to provide them with healthcare benefits and contributions to their retirement accounts. Because employer considered each claimant to be "in its employ" for four consecutive periods of 13 weeks in the 52 weeks prior to injury, employer calculated the AWW pursuant to §309(d) of the Act.

Each claimant filed a petition for review, arguing that the AWW should have been calculated under the prospective, hourly multiplier set forth in subsection 309(d.2).

In each case, the Workers' Compensation Judge and the Workers' Compensation Appeal Board construed the Act as requiring that the periods of time when claimants earned no wages due to layoffs be included in the AWW calculation pursuant to §309(d).

The claimants then appealed to the Commonwealth Court, which consolidated the appeals and reversed, concluding that the layoffs resulted in claimant working less than a single completed 13 week period in the previous year. The Court stated that the controlling issue was whether the claimants actually "worked" during the relevant time periods, not whether the claimants maintained an employment relationship with employer. Thus, because none of the claimants actually worked a complete 13-week period due to layoffs, the Commonwealth Court found that the AWW was to be calculated pursuant to subsection 309(d.2), which provides for a prospective calculation of AWW measured by multiplying the worker's hourly wage rate by his expected weekly work hours.

Employer then sought review by the Supreme Court. The Court noted that the Act does not address the specific work scenario presented. Nevertheless, the plain meaning of the Act clearly indicates that §309(d), not subsection 309(d.2), is controlling.

The Court conducted an extensive review of its prior decisions concerning the AWW calculation. In Hannaberry HVAC v. WCAB (Snyder, Jr.), 834 A.2d 524 (Pa. 2003), it was held that the diminished wages earned as a part-time student worker were not to be included in calculating his AWW. where he had been working full-time for three months prior to the injury.

In Colpetzer v. WCAB (Standard Steel), 870 A.2d 875 (Pa. 2005), the Court held that where injured claimants had received no wages during the year prior to injury because they were on disability as a result of a prior work injury, the periods of prior disability are not to be treated as if the claimants had no earnings. Instead, the AWW already established for the prior work injury is the measure of the AWW for the relevant period of disability.

In Triangle Building Center v. WCAB (Linch), 746 A.2d 1108 (Pa. 2000), it was noted that the Act seeks to compensate claimants for the ongoing loss in earning capacity resulting from their injuries. Therefore, some reasonable assessment must be made of claimant's pre-injury ability to generate further earnings.

Overall, the Court noted that its prior decisions stand for the proposition that the purpose of §309(d) is to "accurately capture economic reality."

Here, the claimants each had a long-term employment relationship by which their actual earn-

(Continued on page 8)

EMPLOYER'S CORNER

HANG UP AND DRIVE: EMPLOYER ON HOOK FOR CELL PHONE RELATED ACCIDENTS

In early 2005, a Virginia jury ordered an employee of a large private firm to pay over 2 million dollars to the family of a 15-year-old girl whom the employee struck and killed while driving and doing business on her cell phone. Cell phone records before the jury showed that she used her phone 32 times between noon and 11:00 p.m. on the day of the accident; all but 8 of those calls were work related. A few weeks before the trial, the employer settled the case against it for an undisclosed sum. The employer settled because it recognized the risk that it could be found vicariously liable for the employee's conduct.

As part of the evidence used in the Virginia litigation, plaintiffs' attorney had a 1997 study from the New England Journal of Medicine concluding that the risk of a collision while using a cellular phone is 4 times higher than the risk when a cellular telephone is not being used.

The above-described case is one of the latest in a string of similar cases involving employer liability for employee cell phone use. Among other examples is a case involving the investment firm of Smith Barney, which paid $500,000 to the family of a Pennsylvania motorcyclist who was hit by a Smith Barney broker while he was telephoning a prospective client. Ironically, the broker had gone to pick up a carry out meal for his family at the time but decided to make a cold call as he drove. He dropped the phone on the passenger side of the car and, as he fumbled for it, ran a red light.

In another case, Dykes Industries made a 16.2 million dollar settlement after a 78-year-old woman was struck and disabled by a Dykes salesman who was talking on his cell phone to a customer.

Employer Tips

- Establish and enforce a policy prohibiting using a cell phone while driving a vehicle for work-related purposes.
- Require employees to park the car before making work-related calls.
- If employer requires, encourages, or allows work-related calls while driving, employer should require employees to make those calls as "safely" as possible. For example, use hands-free speakers and voice-activated dialing. The employer should be willing to pay for these accessories.
- Prohibit or discourage calls in bad weather and under other hazardous driving conditions.
- Check your insurance policies to determine whether you have coverage for cell phone-related accidents.
- Be aware that under certain circumstances, there may be criminal as well as civil liability for cell phone-related accidents.
- If significant telephone work must be done while en route, consider alternatives to driving such as: flying; having someone else drive; or utilizing a shuttle or taxi service.
- Be sure you are in compliance with all federal and state legislation relating to cell phone use while driving. As of October 2005, there were 4 bills pending before the Pennsylvania Transportation Committee.

(Continued from page 7)

ings and earning capacity could be measured fairly. Although subject to periodic layoffs, the claimants maintained continuous employment relationships with employer. Notably, the general rule set forth in §309(d) does not speak in terms of continuity of "work," but rather, the continuity of the "employment relationship."

Because the Act concerns itself with compensable work injuries and the effect upon earning capacity, a decline in a worker's earnings that results from economic or business forces is not the same as a decline in that worker's earnings due to a job-related impairment. Thus, unemployment compensation benefits paid out during a layoff are not to be included in calculating the AWW.

The Court held that §309 controls the computation of AWW in this case. The order of the Commonwealth Court was reversed.

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Denise Kramer v. Workers' Compensation Appeal Board (Rite Aid Corporation), Nos. 51 & 52 MAP 2003, decided September 28, 2005.

(Offsets - Pension offset is available to both self-insured and fully insured employers.)

(Offsets - Section 204(a) of the Act does not violate equal protection because: a) no classification is created for unequal distribution of benefits, and b) under the rational basis test, the statute is constitutional inasmuch as it achieves the legislative goal of reducing workers' compensation costs.)

Claimant sustained a work-related neck injury on February 20, 1998. She returned to work with restrictions on June 28, 1998. Thereafter, in March of 1999, claimant was laid off because employer relocated its facility to Maryland. As a result, claimant's total disability benefits were reinstated. In addition, claimant received severance pay of $3,355.02 under the collective bargaining agreement. Nothing in the collective bargaining agreement addressed the prospect of offsetting severance payments against workers' compensation benefits.

On May 14, 1999, employer sent claimant a Notice of Compensation Benefits Offset, informing her that, under §204(a) of the Act, the severance payment would act as a credit against her workers' compensation benefits. Thus, claimant received no workers' compensation benefits from June 5, 1999 through August 9, 1999, after which her total disability benefits resumed.

On May 20, 1999, claimant filed an Offset Review Petition alleging that the offset was unconstitutional and contrary to the Act. The Workers' Compensation Judge denied the petition, finding that the $3,355.02 paid was, in fact, a severance payment as defined by the Regulations and that employer properly took the offset under §204(a) of the Act. The WCJ did not address the constitutional issue inasmuch as he lacked jurisdiction to do so.

The Workers' Compensation Appeal Board affirmed the

THE "MCARE" ACT - WILL IT EFFECT YOU?

Under Section 319 of the Workers' Compensation Act, when an individual is injured, in whole or in part, by the act or omission of a third party, the employer/insurer *shall* be subrogated to the extent of the compensation it paid under the Act, with appropriate deductions for reasonable attorneys' fees and other costs of litigation. The employer/insurer's right to subrogation is "*absolute*." This right to subrogation extends to various tort recoveries, including those involving medical malpractice in the course of treatment for work-related injuries.

In 2002, the General Assembly passed the Medical Care Availability and Reduction of Error (MCARE) Act. Section 508(a) of the MCARE Act provides:

> General Rule – Except as set forth in subsection (d), a claimant in a medical professional liability action is precluded from recovering damages for past medical expenses or past lost earnings incurred to the time of trial to the extent that the loss is covered by a private or public benefits or gratuity that the claimant has received prior to trial. *(e.g., workers' compensation coverage, life insurance coverage, Social Security benefits, etc.)*

Contrary to Section 319 of the Workers' Compensation Act, Subsection (c) of Section 508 of the MCARE Act further provides:

> No subrogation – Except as set forth in subsection (d), there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to a public or private benefits covered in subsection (a).

Workers' compensation coverage is not one of the exceptions provided for in subsection (d). As a result, the ultimate liability for negligent medical care may now be shifted away from the medical profession and placed upon the employer and/or its workers' compensation insurance carrier.

This problem will not arise often, but employers and insurance representatives should be aware of it. For more information, contact us at: wc@trc-law.com

WCJ's decision.

The Commonwealth Court reversed, concluding that employer was not entitled to the severance benefit offset because employer was not "directly liable" for the payment of workers' compensation benefits. Employer was fully insured. The Court held that the offset provision is intended to be afforded to the employer, not its private insurer.

Employer then sought review by the Supreme Court. The Court first addressed the issue as to whether the offset provisions of §204(a) apply to privately insured employers. Noting that the language of the statute is ambiguous, the Court looked to prior decisions that interpreted the Act which equated "insurer" with "employer." In addition, the Court noted that the Regulations issued by the Department of Labor and Industry draw no distinction between self-insured and privately insured employers for purposes of the severance offset. Consequently, the Court held that all employers, whether self-insured or privately insured, may seek an offset of severance payments against workers' compensation benefits under §204(a).

The Court next addressed the constitutional challenge raised by the claimant, i.e., whether §204(a) violates equal protection considerations under the Pennsylvania and/or United States Constitutions. Claimant argued that an unconstitutional differentiation has been made between injured and non-injured employees, as the Act only permits non-injured employees to retain a severance benefit upon layoff.

The Court noted that, by definition, the Act deals only with injured workers and does not address non-injured workers. Thus, on its face, the statute applies equally to all individuals receiving workers' compensation benefits. Because there is no classification made by the statute for the unequal distribution of benefits, there can be no equal protection violation.

Further, applying the rational basis test to the statute confirms that there is no constitutional violation. The Act seeks to promote a legitimate state or public interest - to control workers' compensation costs. Additionally, the severance pay offset bears a rational relationship to controlling those costs. There is nothing irrational or arbitrary in offsetting severance benefits, irrespective of whether the employer is self-insured or privately insured.

The decision of the Commonwealth Court was thus reversed. The WCJ's decision was reinstated.

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Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Korach), No. 73 WAP 2003, decided September 29, 2005.

(Equitable Estoppel - The doctrine of equitable estoppel does not toll the limitations period for claimant to file claim petition for payment of psychiatric bills where there is no evidence that employer attempted to lure claimant into thinking psychiatric treatment was included in sphere of its responsibility for payment of ongoing medical expenses.)

(Limitation of Actions - Three year period of limitations for filing petition to amend NCP is not tolled by employer's payment of expenses incurred in connection with treatment of condition which was not recognized on the NCP.)

Claimant suffered an injury in the form of a back sprain on November 14, 1984, which was accepted by employer as compensable pursuant to a Notice of Compensation Payable.

On September 28, 1998, claimant filed a Claim Petition alleging that he suffered a psychiatric injury in the nature of depression that was precipitated by his 1984 back injury. In response, employer filed an answer, admit-

"BURNING" POWER ASSESSMENT

ting only that claimant suffered a low back strain in 1984, for which compensation was commuted in early 1990. Further, employer asserted that claimant's claim of psychiatric injury was barred by the statute of limitations.

The Workers' Compensation Judge granted the claimant's petition, concluding that employer's payment of claimant's psychiatric bills constituted payments in lieu of compensation that tolled the statute of limitations, thereby rendering the claim petition timely. The Workers' Compensation Appeal Board and the Commonwealth Court both affirmed that decision.

The Supreme Court granted employer's petition for allowance of appeal, which challenged the Commonwealth Court's conclusion that employer was estopped from raising the statute of limitations as a defense inasmuch as employer had tendered payment of claimant's psychiatric bills.

The Supreme Court noted that equitable estoppel arises in a workers' compensation proceeding where an employer, "by its acts, representations or admissions, or by its silence when it ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

Here, claimant never testified that he was lulled into believing that employer had accepted responsibility for his psychiatric treatment. Further, there was no documentation offered to show that employer had been notified of a causal relationship between his work injury and the psychiatric treatment. Overall, there was no evidence to suggest that employer paid the psychiatric bills in an attempt to induce claimant to omit filing a petition to add his psychiatric condition to the description of the injury on the NCP.

Consequently, the Commonwealth Court erred in finding that the doctrine of equitable estoppel served to toll the limitations period.

Here, the statute of limitations expired on February 27, 1993, three years after the parties were granted a commutation. Although the employer paid medical expenses after the commutation order was entered, such payments after the statute of limitations expired do not act to reopen or revive the right to compensation. Because claimant failed to file a petition until September of 1998, his petition was not timely.

Accordingly, the Commonwealth Court's order was reversed.

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Judith Wachs, Widow of James Wachs, Deceased, v. Workers' Compensation Appeal Board (American Office Systems and Donegal Mutual Insurance Company), No. 77 MAP 2004, decided October 21, 2005.

(Course and Scope of Employment - The employment contract exception to the "going and coming rule" is still applicable if transportation to and from work was a negotiated term of employment contract,)

The general rule is that an employer is not liable to an employee for compensation for injuries received off the employer's premises when the employee is travelling to or from work.

Here, decedent was an office equipment technician who had worked for employer, but left for approximately three years to work for a competitor. Employer recruited him back to its employ in 1991. At that time, decedent stated that he would return to work for employer only if employer provided him with a company car. Decedent then drove the provided vehicle to and from work each day until the day of his death. On that date, he was killed in an automobile accident that occurred while he was travelling to the employer's home office.

After his death, his widow filed a fatal claim petition. The Workers' Compensation Judge denied the petition, finding that decedent was not acting within the course and scope of his employment at the time of his death.

The Workers' Compensation Appeal Board remanded the case for additional findings of fact and conclusions of law. The WCAB opined that the agreement to provide the decedent with the automobile was an agreement in furtherance of the employer's business or affairs.

On remand, the WCJ reiterated and reaffirmed his prior findings of fact, stating that it was clear that decedent was on his way to work at the time of his death and, therefore, not acting in the scope of his employment at the time of the fatal accident. The WCAB then affirmed the WCJ's decision.

The Commonwealth Court reversed, concluding that the WCJ and WCAB overlooked the fact that the decedent had obtained the car as part of his employment contract. Thus, the Commonwealth Court held that, regardless of whether decedent was traveling to and from work or to a client location, he was acting within the scope of his employment because the employment contract itself created an exception to the "going and coming rule."

The Supreme Court granted review to determine whether the contract exception to the "going

and coming rule" is still viable in light of the 1993 amendment to §301(c)(1) of the Act.

Generally, the "going and coming rule" holds that an injury or death sustained by an employee traveling to or from a place of employment does not occur in the course of employment and is, thus, not compensable under the Act.

However, such an injury is considered to have been sustained in the course of employment if one of the following exceptions applies:

1) claimant's employment contract includes transportation to and from work;

2) claimant has no fixed place of work;

3) claimant is on a special mission for employer; or

4) special circumstances are such that claimant was furthering the business of the employer.

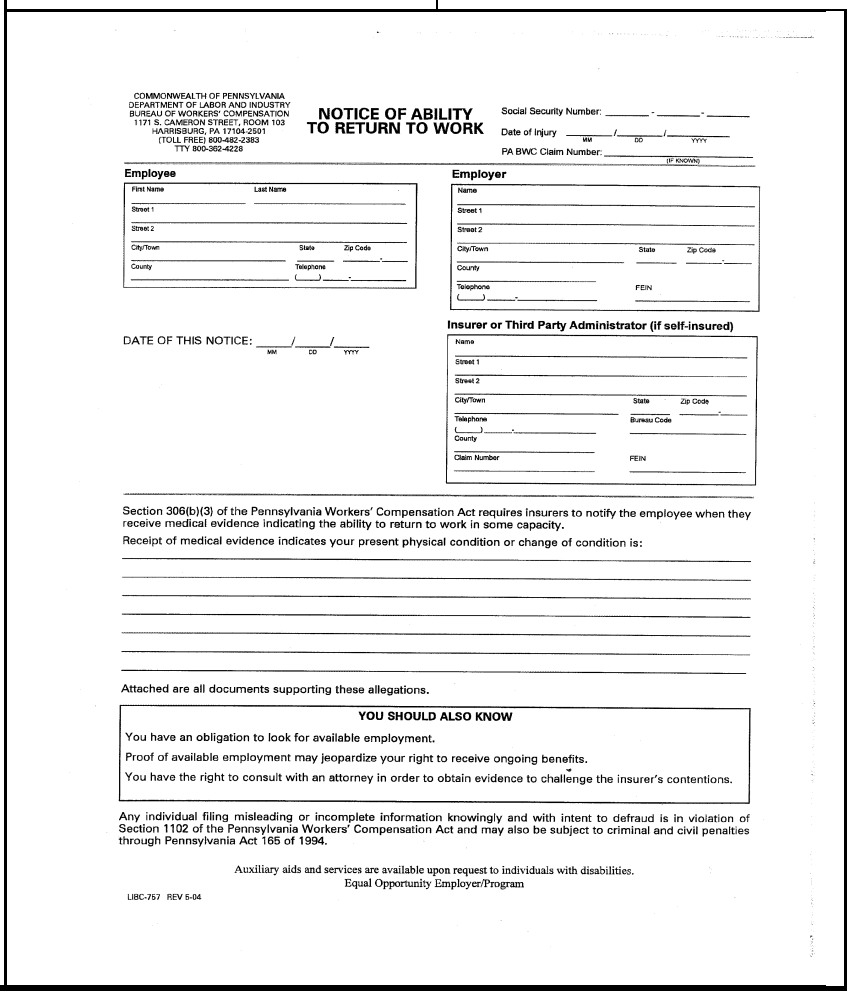
Here, there was no written contract in place that provided for decedent's transportation to and from work. The Court, however, looked at the totality of the circumstances. The decedent conditioned his re-employment with employer upon provision of a company car. Decedent was issued the vehicle the first day of his re-employment, and drove it continuously until the day of his death seven years later. The decedent did not drive the vehicle while on vacation or when the vehicle was being repaired, at employer's expense. The Court thus concluded that the decedent's use of the company vehicle was pursuant to his employment contract, thereby satisfying the contract exception to the "going and coming rule."

Employer argued that the contract exception was eliminated as an exception to the rule when the General Assembly amended the Act so as to exclude "injuries sustained while the employee is operating a motor vehicle provided by the employer if the employee is not otherwise engaged in the course of employment at the time of injury."

The Court, however, rejected that argument, reasoning that the General Assembly meant only to affirm what the Courts had already held, i.e., that employees injured while driving a company vehicle are not entitled to benefits unless they are acting within the scope of their employment at the time of injury or can prove an exception to the "going and coming rule." The intent was to dispel the notion that an injury sustained while driving to or from work in the employer's vehicle does not automatically support a conclusion of law that the injury occurred in the course of employment.

Here, because the decedent's negotiated employment contract included transportation to and from work via a company car, and decedent was killed on his way to work in that car, fatal death benefits are to be awarded. The employment contract exception to the "going and coming rule" is still viable.

The order of the Commonwealth Court was affirmed. Justice Saylor filed a dissenting opinion inasmuch as he views the employment contract exception to the "going and coming rule" as irreconcilable with the 1993 amendment to the Act. He would require evidence that the employee was acting within the course of employment at the time of injury in some capacity beyond merely driving a vehicle provided in accordance with an employment contract.



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION
1171 S. CAMERON STREET, ROOM 103
HARRISBURG, PA 17104-2501
(TOLL FREE) 800-482-2383
TTY 800-362-4228

NOTICE OF ABILITY TO RETURN TO WORK

Social Security Number: ___ - ___ - ___
Date of Injury ___/___/___ (MM/DD/YYYY)
PA BWC Claim Number: ___ (IF KNOWN)

Employee

First Name | Last Name
Street 1
Street 2
City/Town | State | Zip Code
County | Telephone

Employer

Name
Street 1
Street 2
City/Town | State | Zip Code
County
Telephone | FEIN

DATE OF THIS NOTICE: ___/___/___ (MM/DD/YYYY)

Insurer or Third Party Administrator (if self-insured)

Name
Street 1
Street 2
City/Town | State | Zip Code
Telephone | Bureau Code
County
Claim Number | FEIN

Section 306(b)(3) of the Pennsylvania Workers' Compensation Act requires insurers to notify the employee when they receive medical evidence indicating the ability to return to work in some capacity.

Receipt of medical evidence indicates your present physical condition or change of condition is:

Attached are all documents supporting these allegations.

YOU SHOULD ALSO KNOW

You have an obligation to look for available employment.

Proof of available employment may jeopardize your right to receive ongoing benefits.

You have the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

Any individual filing misleading or incomplete information knowingly and with intent to defraud is in violation of Section 1102 of the Pennsylvania Workers' Compensation Act and may also be subject to criminal and civil penalties through Pennsylvania Act 165 of 1994.

Auxiliary aids and services are available upon request to individuals with disabilities.
Equal Opportunity Employer/Program

LIBC-757 REV 5-04

(Continued from page 1)

limit its liability by making a job offer to a claimant during the litigation of a claim petition, the employer must establish that it issued a Notice of Ability to Return to Work as required by Section 306(b)(3) in order to obtain a modification or suspension of benefits. See also, Allegis Group (Onsite) and ITT Hartford v. Workers' Compensation Appeal Board (Henry).[3] The Court's message is clear: **NO NOTICE** means **NO SUSPENSION!!! NO EXCUSES!!!**

Immediately upon receipt of medical evidence that the claimant is capable of returning to work, *in any capacity*, an LIBC-757 form must be prepared and sent to the claimant. If notice is not sent to the claimant immediately upon learning of a change in the claimant's condition, service of the form may be forgotten and overlooked. That would be a very unfortunate and costly mistake. The Act requires that the notice be sent within a "reasonable" period of time after receiving medical evidence of an ability to work. Although the term "reasonable" has not been defined in the context of service of an LIBC-757, other forms of notice under the Act are required to be served within 30 days. Therefore, it would not be surprising to have a Court determine at a later date that "reasonable" in this context also means within 30 days of receipt of the relevant medical evidence. A notice sent more than 30 days after receipt of medical evidence of a claimant's ability to return to work may be deemed to be inadequate.

The prudent claims adjuster will thus mail an LIBC-757 form to the claimant *immediately* (or at least within 30 days) by *certified mail, return receipt requested.* It is the employer's burden to prove that the notice has been provided to the claimant and, without proof of mailing and service of the notice, a claimant need only testify that he or she did not receive it in order to defeat a modification or suspension petition.

The Court will entertain no excuses for the failure to serve the Notice of Ability to Return to Work form on the claimant. If evidence cannot be produced to establish that the form was appropriately served, the claimant's benefit status will not be changed and you will incur unnecessary liability.

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[1] 795 A.2d 1082 (Pa.Cmwlth. 2002), *overruled on other grounds by* Caso v. WCAB (Sch. Dist. of Phila.), 576 Pa. 287, 839 A.2d 219 (2003).

[2] 783 A.2d 886 (Pa.Cmwlth. 2001), *petition for allowance of appeal denied*, 569 Pa. 725, 806 A.2d 864 (2002).

[3] 882 A.2d 1 (Pa.Cmwlth. 2005).

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

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