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Pennsylvania Workers' Compensation Bulletin

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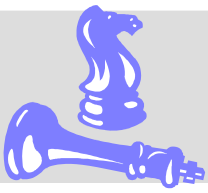

King Overruled:

Employer must now show change in condition from time of earlier proceeding in order to terminate benefits

In King v. Workers' Compensation Appeal Board (K-Mart Corp.), 700 A.2d 431 (Pa. 1997), the claimant was deemed totally disabled after a work-related back injury. The employer's petition to terminate benefits was denied. Three years later, the employer again petitioned to terminate benefits, based upon evidence that there was no objective physical basis for the claimant's alleged back pain. The petition was granted.

The Commonwealth Court reversed, finding that employer failed to meet its burden of proof under Kachinski v. Workers' Compensation Appeal Board (Vepco Construction Co.), 532 A.2d 374 (Pa. 1987). Kachinski outlines a four-part test that must be met in order for an employer to modify or terminate benefits. The first part of that test requires that an employer "produce medical evidence of a change in condition."

The Supreme Court reversed, holding that an employer need not show that the claimant's condition changed from the time of an earlier proceeding in order to terminate benefits. Rather, the King court held that: "the issue in each instance is whether the claimant's disability had changed or ceased as of the time specified in the proceeding." Since the Supreme Court issued its decision in King, employers and insurers have filed serial termination petitions, without regard to the status of the claimant's physical condition as determined by the Judge during the earlier rounds of litigation. They may no longer do so.

On April 18, 2007, the Supreme Court overruled its prior decision in King in the case of Lewis v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.), 919 A.2d 922 (Pa. 2007). Like the employer in King, the employer in Lewis filed a series of petitions seeking to terminate the claimant's benefits. After four petitions, the employer was successful before the Workers' Compensation Judge. The claimant appealed, arguing that the employer's petition was not cognizable because it was not premised upon a change of physical condition. The Board and the Commonwealth Court found no fault with the Judge's decision given the Supreme Court's instructions in King and, therefore, affirmed.

The Supreme Court, however, was persuaded by the claimant's arguments and granted review. The decision of the Court, authored by Chief Justice Cappy, sets forth a thorough analysis of the Court's decision in King, as well as the decision in Kachinski and its progeny.

Simply stated, Kachinski is the law of the land with regard to modification and termination petitions. The Court stated: "In order to meet its burden under the first prong of the Kachinski test, an employer need only adduce medical evidence that the claimant's current physical condition is different than it was at the time of the last disability adjudication."

Be aware of this change in the case law. When scheduling independent medical evaluations, make certain that the IME physician is aware of the claimant's condition as determined by the Judge during prior litigation. If a written decision was previously issued regarding the claimant, you will want to forward a copy of that decision to the IME physician along with the medical records for his or her review and comment. Otherwise, you may not have the medical opinion you need to sustain your burden of proof.

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Commonwealth Court Case Reviews

A-Jon Contractors v. Workers' Compensation Appeal Board (Gregory DiMarzio (dec'd), Margaret DiMarzio), No. 1520 C.D. 2006, Filed January 19, 2007.

(Death Benefits—Where claimant lived with decedent although she was not legally divorced from the father of her children, and where decedent assumed financial responsibility for children, decedent stood *in loco parentis* to the children and they were thus entitled to benefits.)

Claimant filed a fatal claim petition alleging that decedent was struck and killed by a truck during the course and scope of his employment with employer. Claimant alleged that she was decedent's common law spouse and that her two children were eligible dependents because decedent stood *in loco parentis* to them. The claimant also sought penalties, arguing that employer unreasonably failed to pay benefits.

The Workers' Compensation Judge granted the petition, awarding benefits to both claimant and her children. The WCJ failed to address the claimant's request for penalties. Both parties then appealed.

The Workers' Compensation Appeal Board affirmed the WCJ's determination with regard to the children, but reversed the WCJ's determination that claimant was decedent's common law wife. Claimant had failed to divorce her first husband and, therefore, was incapable of entering into a common law marriage with decedent. The WCAB remanded the case to the WCJ for a determination with regard to claimant's request for penalties.

On remand, the WCJ denied claimant's request for penalties and reaffirmed his prior decision as amended by the WCAB. Employer again appealed, contending that the WCJ erred in finding that decedent stood *in loco paren*tis to claimant's children. The WCAB concluded that the WCJ did not err. As a result, employer filed a petition for review with the Commonwealth Court.

On appeal, employer argued that there was no evidence of record to show that decedent considered himself to have any dependents, took any steps to adopt the children, or assumed the role of their father. To the contrary, the evidence of record was that the biological father of the children visited them weekly and maintained health insurance coverage for them. The children called their biological father "Dan," and the decedent "Greg."

Claimant testified that she lived with decedent for 10 years and that they shared all household expenses, including the children's clothing expenses. Decedent was involved in the education of her children, made sure claimant's son's car was maintained properly, and drove claimant's daughter wherever she wanted to go.

After reviewing the evidence of record, the Court concluded that there was substantial evidence to support the WCJ's conclusion that decedent stood *in loco parentis* to claimant's children

Hence, the WCAB's order was affirmed.

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Bucks County Community College v. Workers' Compensation Appeal Board (Nemes, Jr.), No. 950 C.D. 2006, Filed February 12, 2007.

(Utilization Review—Utilization review of one physician's treatment does not include review of treatment by other physicians associated with the same medical practice unless they were identified in the UR request form.)

Claimant suffered work-related injuries to his neck, low back and right hip. Employer sought review of the reasonableness and necessity of the medical treatment provided to claimant by "Daniel Files, D.O., and all other providers under the same license and specialty."

Employer's request was assigned to a utilization review organization (URO). The URO reviewer then submitted a report noting that the records from Dr. Files included a narrative report transcribed on Bucks Family Medicine stationery and hand written notes from Dr. Files and Dr. Mercora.

The reviewer's report stated that Dr. Mercora conducted the claimant's initial examination, diagnosed his condition, and recommended a course of treatment. The records then reflected that claimant received the recommended treatment. The reviewer also noted that Dr. Mercora prescribed claimant's medications and referred claimant to other providers. Finally, the reviewer noted that he confirmed by telephone that Dr. Mercora provided all of claimant's care during the time period in question. The reviewer ultimately determined that claimant's treatment was reasonable and necessary, in part.

Claimant then filed a petition to review the utilization review determination. The Workers' Compensation Judge found that employer sought utilization review of Dr. Files' treatment of claimant and that no evidence was submitted regarding such treatment. Thus, the WCJ concluded that the URO Determination was invalid.

Employer appealed to the Workers' Compensation Appeal Board, arguing that Dr. Mercora's treatment was properly reviewed because he was a provider of the same license and specialty as Dr. Files. The WCAB rejected employer's argument, noting that employer's request was insufficient inasmuch as the UR Request form specifies that only an individual can be reviewed as opposed to a hospital, corporation or group.

Employer then sought review by the Commonwealth Court. Employer argued that it makes sense that utilization review of one doctor's treatment includes review of the treatment of other physicians associated with the same medical

practice.

The Court disagreed, noting that the Act is to be liberally construed in favor of injured workers. The Court also noted that the regulations provide that: "the provider under review shall be the provider who rendered the treatment or service which is the subject of the UR request." Employer identified Dr. Files as the provider under review. The UR reviewer's report discussed and focused upon the treatment of Dr. Mercora, not Dr. Files.

While the Court agreed that a health care provider may be a person, corporation, facility or institution, the regulations are clear. The burden is on employer to prove that the challenged treatment rendered by the provider it sought to review (Dr. Files) was unreasonable and unnecessary. Employer failed to meet its burden.

The decision of the WCAB was affirmed.

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Lori Newhart Costello & Joseph Costello (Dec'd) v. Workers' Compensation Appeal Board (Kinsley Construction, Inc.), No. 831 C.D. 2006, Filed February 13, 2007.

(Fatal Claim Petition—Common Law Marriage–All lawful common law marriages entered into prior to January 1, 2005 are valid for purposes of the Workers' Compensation Act.)

Claimant filed a fatal claim petition alleging that she was decedent's widow by a common law marriage entered into on November 26, 2003. Decedent died on June 28, 2004. Employer filed an answer, asserting that common law marriage does not exist for purposes of workers' compensation claims in Pennsylvania given the Commonwealth Court's decision in *PNC Bank Corp. v. WCAB (Stamos)*, 831 A.2d 1269 (Pa.Cmwlth. 2003).

The decision in *PNC Bank Corp.,* issued on September 17, 2003, held that common law marriage was abolished and that the decision would be applied prospectively to any common law marriages entered into after that date. Thereafter, the Legislature passed Act 144, which provided that no common law marriage contracted after January 1, 2005 is valid.

Here, even though the common law marriage did not occur until after the Commonwealth Court issued its decision in *PNC Bank Corp.*, the Workers' Compensation Judge determined that the marriage was valid and awarded claimant benefits. The WCJ reasoned that the Legislature overruled the Court's decision by enacting Act 144.

The Workers' Compensation Appeal Board reversed, stating that the decision in *PNC Bank Corp.* meant that claimant's marriage agreement of November 26, 2003 was invalid. As such, benefits were denied.

Claimant then appealed to the Commonwealth Court. The Court noted that the Legislature obviously intended that all common law marriages after January 1, 2005 are invalid and that all such otherwise lawful marriages before that date should be deemed valid. The Court therefore held that, in enacting Act 144, the Legislature intended to and did adopt legislation that rendered valid all "otherwise lawful" common law marriages entered into before January 1, 2005, thereby suspending the Court's decision in *PNC Bank Corp*.

As a result, the Court reversed the order of the WCAB and reinstated the WCJ's award.

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Brian Kelley v. Workers' Compensation Appeal Board (Standard Steel), No. 1434 C.D. 2006, Filed March 6, 2007.

(Statute of Limitations—Scar claim resulting from cervical surgery barred under §413(a), despite stipulation of parties amending NCP to include herniated disc at C6-C7.)

Claimant sustained a work-related injury on June 18, 1991, which was accepted by a Notice of Compensation Payable as a "right elbow strain." In August of 1997, claimant's benefits were suspended because he was then earning more than his time of injury wage. On March 19, 2004, claimant filed a review petition, alleging he sustained a serious, permanent and disfiguring scar as a direct result of surgery performed in 1993 relative to his 1991 work injury. On June 22, 2004, claimant filed a claim petition seeking to expand the description of his injury to include a neck injury.

The parties entered into a stipulation amending the NCP to included a herniated nucleus pulposus at C6-C7 relating to the injury of June 18, 1991. The parties further agreed that claimant's disfigurement was the result of cervical surgery, and that the scar became permanent as of August of 1993.

The Workers' Compensation Judge determined that the claim petition was resolved by the stipulation. The WCJ denied the review petition because it was not filed within 3 years from the date the scar became permanent. As such, the WCJ deemed the petition time barred under §315 of the Act.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, but analyzed the case under §413(a) of the Act. The WCAB noted that claimant's disfigurement did not occur at the time of his original work injury. Thus, the 3-year statute of limitations provision in §413(a) of the Act applied. Under that section, the WCJ may modify an NCP provided that a review petition is filed within 3 years from the date of the most recent payment of compensation. Here, claimant's benefits were suspended June 16, 1997. His review petition filed on March 19, 2004 was clearly out of time.

Claimant then sought review by the Commonwealth Court, arguing that employer's acceptance of the neck injury in the stipulation had the effect of tolling the statute of limitations.

The Court disagreed. Here, the claimant attempted to add the scar arising as a direct result of a work

injury for which employer's liability had been established. The claim must therefore be decided under §413(a), which provides for a 3-year period within which to file a review petition. Claimant's review petition was not filed for over 10 years after the scar became permanent and almost 7 years after the last payment of compensation. The stipulation merely amended the description of the injury and established the date of permanency of the scar. At no time did employer indicate an intention to waive its statute of limitations defense.

The order of the WCAB was, therefore, affirmed.

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William Miller v. Workers' Compensation Appeal Board (Pavex, Inc.), No. 758 C.D. 2006, Filed March 7, 2007.

(Utilization Review—Due Process—Until it is established that medical treatment is reasonable and necessary, the continued receipt of medical benefits is not a protected property interest for purposes of due process.)

Employer requested that the Bureau assign a utilization review organization (URO) to review the reasonableness and necessity of all treatment provided to claimant by William A. Rolle, M.D. The Bureau assigned KVS Consulting Services as the URO, which determined that Dr. Rolle's care was not reasonable and necessary pursuant to 34 Pa. Code §127.464(a), based on Dr. Rolle's failure to supply the medical records.

Claimant filed a petition for review of the URO's determination. Relying upon the Commonwealth Court's decision in *County of Allegheny v. Workers' Compensation Appeal Board (Geisler)*, 875 A.2d 1222 (Pa.Cmwlth. 2005), the Workers' Compensation Judge denied and dismissed claimant's petition. In *Geisler*, the Court held that if a report by a peer physician is not prepared because the provider has failed to produce medical records to the reviewer, the WCJ lacks jurisdiction to determine the reasonableness and necessity of medical treatment.

Claimant's appealed, arguing that he had been denied due process. Claimant contended that the Workers' Compensation Act confers on him a protected property interest in the continued receipt of compensation medical benefits. The Court disagreed, noting that when an individual alleges a protected property interest in the receipt of state created benefits, the individual must establish more than a mere expectation to it. The individual must demonstrate an actual entitlement to it.

Here, claimant has not yet established that the treatment by Dr. Rolle was necessary and reasonable. The Act does not entitle him to payment of Dr. Rolle's bills until that determination is made. Consequently, claimant is not entitled to the continued receipt of workers' compensation medical benefits and they do not constitute property for purposes of his due process claim. Therefore, claimant's due process claim was dismissed.

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George Jordan v. Workers' Compensation Appeal Board (Philadelphia Newspapers, Inc.), No. 340 C.D. 2006, Filed March 28, 2007.

(Penalties—Unreasonable Contest Counsel Fees—Employer's failure to issue Notice of Compensation Payable resulted in the award of penalties and unreasonable contest counsel fees despite the fact that the injury did not result in a wage loss to the claimant.)

Claimant worked as a production supervisor when, on May 13, 2003, he sustained an injury to his head, neck and low back. On June 13, 2003, employer issued a temporary notice of compensation payable. On July 17, 2003, however, employer notified claimant that the temporary compensation payable would cease as of July 11, 2003. On that same date, employer issued a notice of denial which stated: "6. Other good cause...There was compensable time lost from 05/23/03 until return to work 07/11/03."

Claimant subsequently filed a Claim Petition, as well as a Petition for Penalties. At the hearings, the evidence showed that, although claimant was out of work from May 22, 2003 through July 11, 2003, he received his regular salary. He did, in fact, return to work on July 12, 2003, and worked through September 26, 2003. He stopped working due to headaches and weakness in his neck. He again received salary continuation until July 2004, at which time he again attempted to return to work. He was subsequently hospitalized from July 26, 2004 through July 31, 2004 due to the work injury.

Both parties presented medical testimony. The claimant's counsel submitted a quantum meruit fee statement in the amount of $8,525.00.

The Workers' Compensation Judge granted claimant's Claim Petition, in part, awarding claimant total disability benefits from May 22, 2003 through July 11, 2003, and from September 26, 2003 through July 18, 2004. The WCJ suspended claimant's benefits as of July 19, 2004. The WCJ also granted claimant's Petition for Penalties, and ordered employer to pay a penalty in the amount of 50% of claimant's wage loss benefits, without deduction or credit for amounts paid. The WCJ also ordered employer to pay an unreasonable contest fee in the amount of $3,000, as well as all litigation costs. The WCJ reasoned that employer's contest of the claim petition was reasonable, whereas employer's contest of the penalty petition was not. Therefore, the claimant's counsel's fees were reduced.

Both parties appealed. The Workers' Compensation Appeal Board concluded that the WCJ erred in assessing a penalty in the amount of 50% inasmuch as the employer's violation in failing to issue a Notice of Compensation Payable did not cause unreason-

able or excessive delay in payments to the claimant. The WCAB also concluded that the WCJ did not err in failing to reinstate total disability benefits as of July 26, 2004, when claimant again became totally disabled due to his work injuries. The WCAB noted that the WCJ accepted the testimony of employer's medical expert as credible on the issue of claimant's disability at that time.

On appeal to the Commonwealth Court, claimant argued that the WCAB erred in failing to reinstate total disability benefits as of July 26, 2004. The Court disagreed. Claimant had the burden to prove that he was entitled to full disability benefits, but claimant failed to provide any credible evidence that his disability recurred at that time.

Claimant next argued that the WCJ properly awarded a 50% penalty, which the WCAB erroneously reduced to 20%. The Court agreed. Employer violated the Act when it failed to issue a notice of compensation payable within 21 days of claimant's injury, especially when employer admitted in the notice of compensation denial that claimant suffered a work injury. Once an employer admits a work-related disability, it is obligated to file a Notice of Compensation Payable. Claimant's receipt of salary continuation does not alter the fact that claimant suffered a work injury. Consequently, penalties were properly awarded. The amount of penalties to be awarded is within the WCJ's discretion. Thus, the Court held that the WCAB erred in reducing the penalty awarded.

Finally, the Court held that the WCJ and the WCAB erred in failing to award the full amount of the fees claimed by claimant's counsel for his services rendered to litigate the petitions. Here, a notice of compensation payable was not properly filed. This required additional litigation on the part of claimant. As a result, the WCJ erred in determining that employer's contest of the claim petition was reasonable. The Court directed employer to pay all of claimant's counsel's fees of $8,525.00.

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Frank Bryan, Inc. and Zurich North America Insurance Company v. Workers' Compensation Appeal Board (Bryan, Dec'd.), No. 984 C.D. 2006, Filed April 5, 2007.

(Social Security Old Age Benefit Offset—Credits for receipt of social security old age benefits are not available against fatal claim benefits received pursuant to §307 of the Act.)

Thomas Bryan was killed in the course of his employment in 1998. He was 68 years of age and survived by his wife, who was over 65 at the time of her husband's death. Neither the decedent nor Mrs. Bryan received social security old age benefits at the time of the fatal accident.

As a result of her husband's death, Mrs. Bryan was paid weekly compensation benefits pursuant to an agreement of compensation for death dated July 20, 1998. In addition, in October of 2002, Mrs. Bryan began receiving social security old age benefits based on her status as a surviving widow.

Employer filed a Review Petition seeking an offset against her workers' compensation fatal claim benefits due to her receipt of social security old age benefits. The Workers' Compensation Judge dismissed the petition, determined that a reasonable contest did not exist and directed employer to pay Mrs. Bryan's counsel's fee of $1,700. The Workers' Compensation Appeal Board affirmed.

Employer then sought review by the Commonwealth Court. The Court noted that §204(a) of the Act plainly provides that social security old age benefits shall be credited "against the amount of payments made under Sections 108 and 306, except for benefits under Section 306(c)…" There is absolutely no mention of fatal claim benefits received pursuant to §307 of the Act. Accordingly, §204(a) of the Act does not apply to the receipt of fatal claim benefits received pursuant to §307 of the Act.

The wording of the statute is clear and unambiguous. Furthermore, the Department's regulations clearly indicate that the offset does not apply to survivor benefits. Because there was no statutory basis for employer's petition, the contest was unreasonable.

The decision dismissing the employer's petition and awarding unreasonable contest counsel fees was affirmed.

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Wyoming Valley Health Care Systems v. Workers' Compensation Appeal Board (Kalwaytis), No. 2109 C.D. 2006, Filed April 9, 2007.

(Fatal Claim—Dependent Parents—Where the claimant mother's monthly expenses exceeded her income she was dependent on decedent daughter. A large credit card bill could be included in monthly expense as it was a financial reality at decedent's death regardless of how it was accumulated.)

On December 2, 2003, decedent was fatally injured in a work-related automobile accident. Decedent had been residing with her mother, who filed a fatal claim petition alleging she was partially dependent on her daughter at the time of her death.

Claimant testified that, at the time of her death, decedent had been contributing toward their household expenses. Decedent paid for cable television, the costs of home and auto maintenance and repair, and groceries on a bi-weekly basis. She also paid for non-household items such as a newspaper subscription, vacations, prescriptions, dining-out and movies. Claimant submitted a document showing that her expenses in 2003 totaled $33,082.14 and that her income was only $25,977.46. Claimant acknowledged that a $33,000 balance had accrued on her credit cards; however, she stated that the debt had accumu-

lated prior to her daughter's death. Claimant also admitted that decedent neither claimed her mother as a dependent on her tax returns, nor did she maintain any receipts documenting her contributions to claimant's expenses.

The Workers' Compensation Judge concluded claimant was a partial dependent of decedent at the time of death, granted claimant's fatal claim petition, and directed employer to pay $185.40 per week plus $3,000 in funeral costs. Employer appealed to the Workers' Compensation Appeal Board, which affirmed.

Employer appealed to the Commonwealth Court, arguing that claimant failed to meet her burden of proving dependency and that decedent's contributions were no more than for her room and board. Additionally, employer argued that claimant's credit card debt should not have been included in her computation of annual expenses because it did not represent an "ordinary necessity of life" for the purpose of determining dependency.

The Court noted that the test of dependency is whether or not the child's earnings were needed to provide the parents with some of the ordinary necessities of life suitable for persons in their class and position, and that the parents were, consequently, dependent to some extent on the child at the time of the accident causing his or her death. Here, while claimant had a sizeable credit card debt, the debt was a financial reality existing at the time of decedent's death. The WCJ did not err in considering the debt when calculating claimant's expenses.

The Court further noted that decedent's contributions to her mother were not merely to compensate her mother for her own room and board. Rather, decedent paid for the maintenance of her mothers' automobile, her mother's prescriptions, and for certain entertainment costs that were ordinary to her mother's lifestyle, all of which constitutes substantial evidence demonstrating that the contributions given to claimant were more than room and board. Claimant's past work history and ability to work in the future hand no bearing on her dependency status at the time of her daughter's death.

The decision of the WCAB was, thus, affirmed.

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Marvin Risius v. Workers' Compensation Appeal Board (Penn State University), No. 791 C.D. 2006, Barbara Pennypacker v. Workers' Compensation Appeal Board (Penn State University), No. 792 C.D. 2006, Filed April 18, 2007.

(Subrogation—Employer/carrier can assign its subrogation interest to another carrier.)

Claimants sustained work-related injuries on October 12, 1999 when their vehicle was struck by a train. Notices of compensation payable were issued. Employer, who was self-insured, commenced payment of benefits.

On September 26, 2000, employer entered into a Self-Insurance Loss Portfolio Transfer Assumption Agreement with Safety National Casualty Company, whereby Safety assumed liability for employer's workers' compensation claims, which included those filed by claimants.

Thereafter, claimants filed a third party action against Norfolk Southern Corporation, alleging that Norfolk was responsible for their injuries. The parties agreed to settle all claims for the sum of $243,000.

Safety then filed review petitions requesting subrogation of its payments to claimants under the Workers' Compensation Act. The Workers' Compensation Judge granted the petitions, and the Workers' Compensation Appeal Board affirmed.

Claimant appealed to the Commonwealth Court, arguing that the Act only provides that subrogation rights may be claimed by a self-insured employer or insurance carrier which has paid benefits under the Act. Claimant argued further that an employer may not transfer its liability and subrogation rights to a third party.

The Court disagreed. While the Act does not expressly authorize the sale or transfer of subrogation rights, neither the Act nor the regulations prohibit the sale and transfer of a subrogation interest. Given the fact that the regulations provide that an employer may transfer liability to a carrier, as was done here, it necessarily follows that the right of subrogation also transfers.

The decision of the WCAB was, therefore, affirmed.

SUPREME COURT CASE REVIEWS

Paul Dowhower v. Workers' Compensation Appeal Board (Capco Contracting), No. 94 MAP 2006, Decided April 17, 2007.

(Impairment Rating Evaluation—Where employer seeks to obtain an automatic reduction of benefits from total to partial, an IRE must be requested during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits. An IRE may only be requested after the expiration of the 104-week period.)

Claimant suffered a work injury on September 13, 1996. He subsequently received total disability benefits. On May 20, 1999, employer's insurer filed a petition requesting that a physician be appointed to perform an impairment rating evaluation. The Bureau appointed an IRE physician, who found claimant to have a whole body impairment rating of 10%.

Employer then filed a Notice of Change of Workers' Compensation Disability, seeking to reduce claimant's disability benefits from total to partial. In response, claimant argued that employer did not

request the IRE in a timely manner. Claimant asserted that the IRE was requested *before* the expiration of 104 weeks and was thus invalid.

The Workers' Compensation Judge agreed that the IRE was untimely and that the results were, therefore, invalid. Employer appealed to the Workers' Compensation Appeal Board.

At the same time, employer requested a second IRE. The Bureau, however, denied employer's request. Employer then filed a Modification Petition asserting that the Bureau improperly denied its request for a second IRE. The WCJ granted employer's Modification Petition and ordered the Bureau to designate an IRE physician. Claimant appealed, asserting that employer was precluded from obtaining a second IRE.

The WCAB concluded that claimant waived his right to challenge the timeliness of the first IRE inasmuch as he attended the IRE. The WCAB, however, also vacated the WCJ's grant of the Modification Petition and the order requiring claimant to appear for a second IRE.

The Commonwealth Court determined that claimant did not waive the issue of timeliness by attending the IRE. The Court also determined that the Act did not preclude employer from filing its IRE request *prior* to the expiration of 104 weeks. Because the Court found the first IRE to be valid, the court did not address employer's request for a second IRE.

The Supreme Court reversed the order of the Commonwealth Court based on its decision in *Gardner v. WCAB (Genesis Health Ventures)*, 888 A.2d 758 (2005). In *Gardner,* the Court determined that the Act provides that where an employer seeks an automatic reduction of a claimant's benefits, the request must be made during the 60-day period subsequent to the expiration of claimant's receipt of 104 weeks of total disability benefits. Employer then filed an Application for Reconsideration, which was granted.

Upon reconsideration, the Supreme Court noted that the Commonwealth Court erred in finding the initial IRE request timely. An employer or insurer may only require an IRE once a claimant has come into possession of disability benefits. Employer's initial request was premature.

Employer's second IRE request, however, was not untimely. An IRE may be requested after the 60-day period following 104 weeks of total disability benefits; however, such an IRE will not generate the self-executing, automatic reduction in claimant's benefits. Under these circumstances, an adjudication or agreement is required before benefits may be modified.

The case was remanded to the Commonwealth Court for consideration of the issues surrounding employer's second IRE request.

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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