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Pennsylvania Workers' Compensation Bulletin

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

HARRY W. ROSENSTEEL, Editor MARGARET M. HOCK, Associate Editor

DIEHL IS "NO DEAL" FOR PA EMPLOYERS AND INSURERS

The Commonwealth Court's recent decision in the case of Timothy Diehl v. Workers' Compensation Appeal Board (IA Construction and Liberty Mutual Insurance), No. 1507 C.D. 2007 (decided on April 28, 2008), dealt a serious blow to Pennsylvania employers and insurers.

Mr. Diehl suffered a work injury on May 24, 1999, which the employer acknowledged by issuing a Notice of Compensation Payable. On April 4, 2002 (long after the claimant had received 104 weeks of temporary total disability benefits), the employer filed a Request for Designation of a Physician to Perform an Impairment Rating Evaluation (IRE). The evaluation was subsequently performed on November 8, 2002, resulting in an impairment rating of 28%. Because the IRE was not requested within the 60-day period following claimant's receipt of 104 weeks of total disability, the employer was not able to take advantage of the automatic change in the claimant's disability status from total to partial. Rather, the employer was required to file a formal Modification Petition seeking the change in the claimant's benefit status.

Surprisingly, the Workers' Compensation Judge denied the petition because the employer "failed to show that there was suitable work available to claimant within his limitations." *What???* How could the WCJ think that the traditional Kachinski[1] rules apply when the employer is not seeking to change the claimant's benefit rate, but is seeking only to change the benefit status based on the results of an IRE?

The IRE provisions of the Act, found at Section 306(a.2), provide for an automatic change in disability status if the request for the IRE is made by the employer or insurer within the 60-day window. The case law interpreting those provisions (prior to Diehl), permitted a change in status if the IRE was requested outside the 60-day window upon the filing of a petition. Prior to Diehl, the employer needed only to prove that the claimant's impairment rating was less than 50%. The employer did not have the expensive burden of proving job availability or earning power.

Because the WCJ was placing the burden on the employer in Diehl to show job availability, the employer appealed to the Workers' Compensation Appeal Board. Noting the Supreme Court's decision in Gardner[2], the WCAB held that the "traditional administrative process" for a non-self-executing disability change meant that an employer need only file a Modification Petition. The WCAB held that Kachinski did not apply inasmuch as no actual modification of the claimant's benefit rate was being sought. As such, the WCAB reversed the WCJ's order and granted the employer's Modification Petition.

Mr. Diehl then sought review by the Commonwealth Court. In an unprecedented decision, the Court held that the "traditional administrative process" anticipated by the Supreme Court in Gardner requires that employers satisfy "either the traditional Kachinski work availability analysis and concomitant burden, or the

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COMMONWEALTH COURT CASE REVIEWS

Michael Romanowski v. Workers' Compensation Appeal Board (Precision Coil Processing), No. 1174 C.D. 2007, Filed March 12, 2008.

(Statute of Limitations—Reinstatement petition alleging a specific loss filed outside 500-week period following suspension of benefits is time barred by §413(a) of the Act.)

In 1978, claimant sustained a work injury that crushed his right ankle and injured multiple body parts. Employer accepted the injury and claimant received benefits at the rate of $213.00 per week.

On January 21, 1993, claimant began working at Pep Boys at wages equal to or greater than his time of injury wage of $296.40. The parties then executed a Supplemental Agreement. In June 1994, claimant began working at Bud's Auto. A second Supplemental Agreement was executed, again acknowledging that claimant returned to work on January 21, 1993 at wages equal to or greater than his time of injury wage.

The 500-week period following the suspension of claimant's benefits ended in July 2002. In October 2004, claimant filed a reinstatement petition alleging a specific loss of his right foot.

The Workers' Compensation Judge determined that claimant's specific loss claim was barred by §413(a) of the Act because he failed to file a modification or reinstatement petition during the 500-week period when his benefits were suspended. The WCJ noted, however, that claimant's average weekly wage may have been improperly calculated and that, therefore, claimant may be entitled to partial wage loss benefits during his return to work in the 1990's.

Claimant then appealed to the Workers' Compensation Appeal Board, arguing that the 1993 suspension was improper, that he should have received partial wage loss benefits, and that, therefore, his 2004 petition was timely filed. The WCAB rejected claimant's argument, holding that claimant's specific loss claim was properly dismissed as untimely. The WCAB noted that, if claimant returned to work in 1993 with a wage loss, he had three years from the end of the 500-week partial disability period to file a modification or review petition. Here, claimant failed to challenge the Supplemental Agreements or to petition for reinstatement based on a wage loss within the three year period.

Claimant filed a petition for review with the Commonwealth Court arguing that, under the first paragraph of §413(a), a WCJ may, *at any time*, review, modify or set aside a supplemental agreement. The Court was not persuaded, stating: "Legally, because claimant failed to challenge the supplemental agreements and failed to petition for reinstatement of partial disability benefits during the 500-week period following the suspension of his benefits, we agree that his review petition is barred by §413(a) of the Act….Further, we reject the implication of claimant's reference to the first paragraph of §413(a) that he can at any time seek review of the supplement agreements and seek new benefits. This Court recently reviewed the law in this area, holding that the limitations period in the second paragraph of §413(a) applies to new claims for specific loss arising where an employer's liability has been established."

Because claimant failed to timely challenge the supplemental agreements or seek reinstatement of partial disability benefits within the applicable 500-week limitation period, any claims made under §413(a) of the Act are barred. The decision of the WCAB was affirmed.

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Barry Mason v. Workers' Compensation Appeal Board (Joy Mining Machinery and AIG Claim Services), No. 1906 C.D. 2007, Filed March 18, 2008.

(Suspension – Claimant who fails to apply for alternate employment after forced retirement has not necessarily removed himself from the workforce and may avoid a suspension of benefits by establishing that he is making a good faith effort to find employment.)

Claimant suffered work-related injuries to his knees, which resulted in knee replacement surgeries. Thereafter, claimant was released by employer's doctor to medium-duty work. Clamant wanted to return to his time of injury position, which was more rigorous than medium-duty. Employer decided not to reinstate claimant, or to offer him other positions. Claimant then filed for a disability pension through employer, which was granted effective July 31, 2005.

Prior to retiring, claimant met with a vocational counselor to discuss jobs within his physical capabilities. Claimant was then referred to positions as an auto glass installer, two janitorial positions, two telemarketing positions, and an operator at a call center.

Claimant met with the manager at Safelite Auto about the position as an auto glass installer and was told to re-contact her at a later date. Claimant never re-contacted her.

Claimant met with one of the other potential employers, but gave the manager the impression that he did not want the position because he talked at length about his disability and how it would not behoove him financially to return to work.

Clamant failed to take action with regard to any of the other

referrals, although he testified that he did submit applications for other positions that were more to his liking.

Employer then filed a petition to modify or suspend claimant's benefits, alleging that work was available to claimant but that he elected to remove himself from the workforce. The Workers' Compensation Judge found that claimant had an earning capacity and was capable of performing medium-duty work. Because claimant failed to respond in good faith to the job referrals provided to him, the WCJ modified claimant's benefits.

Employer appealed to the Workers' Compensation Appeal Board, arguing that the WCJ erred in not suspending claimant's benefits because he had retired and taken himself out of the workforce as evidenced by his failure to follow through on the job referrals. The WCAB agreed, stating that by failing to pursue the jobs referred to him, the burden shifted to claimant to show that he had not voluntarily withdrawn from the entire labor market and was open to employment within his physical capabilities. Because the WCJ found that claimant failed to respond in good faith to suitable employment, the WCAB concluded claimant was unable to meet his burden for continued benefits. The WCJ's decision was vacated, and the WCAB entered an order suspending claimant's benefits.

Claimant then appealed to the Commonwealth Court, arguing that he did not voluntarily remove himself from the workforce given that employer refused to reinstate him to his former position and he searched for employment on his own accord.

The Court noted that, under the Supreme Court's decision in *Southeastern Pennsylvania Transportation Authority v. WCAB (Henderson)*, 516 Pa. 74, 669 A.2d 911 (1995), a claimant who has voluntarily accepted a pension, is presumed to have left the workforce unless he establishes that (1) he is seeking employment or (2) the work-related injury forced him to retire. Once a claimant establishes either, the employer can only modify benefits by offering suitable employment.

Here, claimant attempted to show that he was seeking suitable alternative employment. The WCJ did not, however, make findings of fact as to whether claimant established that he was, in good faith, seeking employment following his retirement. As such, the Court vacated the WCAB's decision and remanded the case to the WCJ to make findings necessary to determine if claimant has left the workforce.

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Melmark Home v. Workers' Compensation Appeal Board (Rosenberg), No. 899 C.D. 2007, Filed April 2, 2008.

(Notice of Ability to Return to Work—To be "prompt" under §306(b)(3) of the Act, a Notice of Ability to Return to Work form need not be sent within 30 days, but must be sent within a reasonable time <u>after</u> receipt of medical evidence and <u>before</u> the evidence is used by employer.)

Claimant, a registered nurse, suffered a low back injury during an encounter with a combative patient on November 13, 2004.

On April 3, 2006, employer filed a modification petition alleging that work within claimant's restrictions was available to her as of July 15, 2005 based on a labor market survey. Claimant filed an answer denying the allegations of employer's petition and asserting that employer did not promptly send her a Notice of Ability to Return to Work.

The Workers' Compensation Judge found as fact that employer issued the Notice of Ability to Return to Work on November 29, 2005 based on a report of Dr. Levin dated June 16, 2005. The WCJ then dismissed employer's petition given §306(b)(3) of the Act, which requires the insurer to provide prompt written notice to the claimant when the claimant is able to return to work in any capacity. The WCJ decided that "prompt written notice" is notice issued within 30 days of receipt of the requisite medical evidence.

Employer appealed and the Workers' Compensation Appeal Board affirmed. The WCAB noted that claimants are required to complete forms within 30 days in certain situations—like the LIBC-750, "Employee Report of Wages and Physical Condition," and the LIBC-760, "Employee Verification of Employment, Self-Employment or Change in Physical Condition." Thus, the WCAB felt that it would be reasonable that, if a claimant has a 30-day period within which to respond, an employer should likewise have a 30-day period to provide claimant with notice of its receipt of medical evidence that claimant is capable of working.

Employer then filed a Petition for Review with the Commonwealth Court, arguing that nothing in the Act or the case law requires that a Notice of Ability to Return to Work form be issued within a prescribed time limit.

The Court agreed that while the Act requires "prompt written notice," the Act does not define "prompt." Further, neither the WCJ nor the WCAB had a basis to declare that any notice given more than 30 days after employer's receipt of the relevant medical evidence constituted a violation of §306(b)(3) of the Act.

The Court noted that the purpose of the Notice of Ability to Return to Work form is to provide notice to a claimant that there is medical evidence that he can perform work, that his benefits could be affected, and that he has an obligation to look for work. A claimant must have notice that his benefits could be affected *before*

the employer attempts to modify benefits.

Hence, the Court held that: "[P]rompt written notice" requires an employer to give a claimant notice of the medical evidence it has received a reasonable time *after* its receipt lest the report itself becomes stale. It also requires an employer to give notice to the claimant a reasonable time *before* the employer acts upon the information. This necessarily requires an examination of the facts and timeline in each case to determine if the claimant has been prejudiced by the timing of the notice."

Here, the Notice of Ability to Return to Work form was untimely because it was not issued until many months *after* the date on which employer learned that claimant was able to work.

The case was remanded, however, for the WCJ to make findings of fact with regard to two other Notices of Ability to Return to Work forms sent to the claimant which the WCJ did not address in his original decision. Both were based upon a report issued by Dr. Maranzini on January 28, 2005. One Notice was date stamped March 9, 2005 and the other was date stamped April 4, 2005. If either notice was received by claimant, such notice was provided within a reasonable time after Dr. Maranzini's report. Additionally, notice given in March or April was given reasonably in advance of the date employer sought to modify claimant's benefits, i.e., July 15, 2005. Thus, the case was remanded for further findings of fact as to whether either the March or April notices were provided to and received by claimant or her counsel.

(Editor's Note: While the Court found that a Notice of Ability to Return to Work form sent 2 or 3 months after the IME *may* be considered "prompt," there is always the possibility that the WCJ will determine that, under the circumstances of your case, notice given 2 or 3 months later does not provide the claimant with adequate notice. To avoid that possibility, it would be best to send such notices to the claimant and his or her counsel as soon as possible after receipt of the IME report or, at the latest, within 30 days after receipt of the report.)

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Peters Township School District v. Workers' Compensation Appeal Board (Anthony), No. 2084 C.D. 2007, Filed April 2, 2008.

(Physical Examination—In order to compel claimant to undergo diagnostic testing, employer must demonstrate that the test is necessary, involves no more than minimal risk and is not unreasonably intrusive.)

Employer acknowledged claimant's work injury as a "concussion/right shoulder sprain." Employer subsequently sought to have claimant undergo a "diagnostic test 72-amubulatory EEG" by an independent medical examiner. Claimant refused the testing upon the advice of his treating physician.

In support of its Petition for Physical Examination, employer presented reports from the IME physician who recommended the testing "to discern whether claimant is having legitimate seizures versus pseudoseizures (or a combination of both) because of a high prevalence of pseudoseizures in patients with legitimate seizure disorders." The IME physician noted that, without the test, he could not determine whether claimant's seizure disorder was under control nor could he state whether claimant was capable of returning to work and/or operating a motor vehicle. According to the IME physician, the test involved essentially no risk and was not unreasonably intrusive.

In response, claimant presented reports of his treating physician, Dr. Cotugno, who opined that the test was not necessary and would be of no value. He also opined that he did not believe that claimant suffered from pseudoseizures, but rather had clinical epileptic convulsions. Dr. Cotugno agreed that the test involved minimal risk.

Claimant testified that he did not want to undergo the test, indicating that he underwent testing during a hospital stay which corroborated his seizure activity.

The Workers' Compensation Judge denied employer's petition, finding claimant's treating physician more credible and convincing than the IME physician. Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

Employer argued before the Commonwealth Court that the WCJ applied an improper legal standard. The Court noted that §314(a) of the Act provides that claimants may be required to submit to such physical examination as the WCJ shall deem reasonable and necessary. A "physical examination" includes all reasonable medical procedures and tests necessary to permit a provider to determine the extent of the employee's disability. It is the employer's burden to demonstrate that the test is "necessary, involves no more than minimal risk and is not unreasonably intrusive."

Here, the WCJ applied the relevant legal standard. Employer did not show that the test would yield useful information or allow the IME physician to render a final opinion regarding the current level of claimant's seizure disorder. Therefore, the WCJ did not err when he found that employer failed to meet its burden to prove that the test was "reasonable and necessary."

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

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John Mullen v. Workers' Compensation Appeal Board (Mullen's Truck & Auto Repair), No. 1461 C.D. 2007, Filed April 3, 2008.

(Average Weekly Wage—The AWW of a sole partner of Subchapter S corporation is the net of his salary minus expenses passed through to his personal tax return.)

Employer, a truck and auto repair business, became a Subchapter S corporation for federal income tax purposes in 1991. Claimant and his wife are employer's sole shareholders. Claimant is employer's president and director. He determined his own salary as an employee.

In 1994, claimant sustained a work injury. A Notice of Compensation Payable was issued, and claimant began receiving weekly compensation benefits of $493.00 based on a pre-injury average weekly wage (AWW) of $1,846.15.

In 1995, employer, through its carrier, filed a review petition challenging claimant's AWW. Employer alleged claimant's individual 1993 net business income was $32,000. Divided by 52, this would yield an AWW of $615.38, with a weekly benefit rate of $410.25. Employer's 1993 corporate return showed gross profits of $137,476, but a net loss of $66,417.

The Workers' Compensation Judge found claimant paid himself a salary of $96,000 raising doubts as to whether the AWW of $1,846.15 was not excessive when compared to the income generated by employer. The review petition was granted and the NCP amended to reflect an AWW of $615.38, with a weekly benefit rate of $410.25.

Claimant appealed arguing that the decision was unsupported by the evidence. Unable to determine what evidence the WCJ credited, the Workers' Compensation Appeal Board remanded for additional findings.

On remand, both parties presented expert testimony as to claimant's pre-injury wage. The WCJ credited employer's expert, a certified public accountant, and agreed that claimant's AWW should be calculated based upon his net business profits rather than his W-2 wages. The WCJ noted that, as president and sole owner, claimant possessed complete authority to set his own wages. Thus, the WCJ concluded that it was reasonable to reduce claimant's reported 1993 wages by his reported losses to determine that claimant's income for 1993 was $32,000, resulting in an AWW of $615.38 and a compensation rate of $410.25.

Claimant again appealed. Recognizing that claimant was self-employed, the WCAB determined that the critical issue was whether his gross income or net income more accurately reflected his earnings. Noting that the WCJ accepted as credible employer's evidence that claimant's 1993 wages were more accurately reflected by his net business income than by his W-2, the WCAB affirmed.

Claimant then sought review by the Commonwealth Court. In essence, claimant argued that where a W-2 is issued, only the reported compensation can be considered in calculating the AWW. The Court did not agree.

The Court noted that, with respect to calculating a claimant's AWW, the Act was designed with an eye toward the "economic reality of a claimant's pre-injury earning experience." Here, substantial evidence supported the WCJ's findings regarding the claimant's AWW. Claimant had the ability to manipulate his wage statements and tax returns. The employer's 1993 corporate return showed a shareholder's loss of $66,417. That loss was passed through to claimant. An S corporation does not pay income tax; but rather, its shareholders are taxed. As such, claimant's $96,000 salary was paid out of the S corporation so that all income from employer passed through to claimant's personal tax return. At the same time, employer reported a $66,472 net loss, which passed through to claimant's 1040 for 1993. The net of those two numbers represents claimant's earnings from the business.

The decision of the WCAB was affirmed.

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City of Philadelphia v. Workers' Compensation Appeal Board (Smith), No. 768 C.D. 2007, Reported April 25, 2008.

(Amendment—Injury Description—A claim or review petition is <u>not</u> required for a WCJ to amend a Notice of Compensation Payable; it can be done in connection with a termination proceeding.)

Claimant suffered a work injury to his back on February 28, 1998. On October 12, 1998, employer filed a termination petition alleging claimant had fully recovered as of September 17, 1998. Thereafter, employer issued an Amended Notice of Compensation Payable on February 12, 1999, describing the claimant's injury as a "lower back strain."

In support of its petition, employer presented testimony of its panel physician, Dr. Bonner, who opined that, as of September 2, 1998, claimant's lumbar strain had resolved and that claimant needed no restrictions due to his work injury. Dr. Bonner also testified that, although claimant has spondylolysis and spondylolisthesis, these conditions are unrelated to the work injury. Employer also presented testimony from Dr. Levin, who performed an IME on September 17, 1998. Dr. Levin found no objective evidence to substantiate claimant's subjective complaints. He opined claimant was fully recovered and capable of returning to his pre-injury position without restrictions.

In addition to his own testimony, claimant presented testimony from Dr. Avart, who, after conducting a physical examination and reviewing diagnostic studies, diagnosed claimant with herniated lumbar discs at L5, S1 and S2, as well as lumbar radiculopathy. Dr. Avart further testified that claimant had not recovered and was not capable of returning to his pre-injury job. Dr. Avart referred claimant to an orthopedic surgeon, Dr. O'Brien, who testified that he agreed with Dr. Avart's diagnosis of herniated disc at L5-S1 and lumbar radiculopathy. Dr. O'Brien also testified that, in his opinion, the work incident caused unstable spondylolisthesis with bilateral pars defects and intractable back pain.

The Workers' Compensation Judge credited the testimony of claimant, Dr. Avart and Dr. O'Brien, and rejected the testimony of Dr. Bonner and Dr. Levin. The WCJ thus found that employer failed to meet its burden of proof that claimant had fully recovered from the work injury. Employer appealed and the Workers' Compensation Appeal Board affirmed. The Commonwealth Court vacated the decision and remanded the matter to the WCJ to explain the reasons for his credibility determinations. Also, the Commonwealth Court noted that the only petition pending was employer's termination petition. The Court also noted that claimant had not filed a review or claim petition. Further, the WCJ made no specific conclusion that claimant met his burden of proving that his herniated discs and lumbar radiculopathy were related to the work injury; but rather, the WCJ simply concluded employer failed to meet its burden of proof.

No new evidence was submitted on remand. The WCJ set forth his reasons for crediting Dr. Avart and Dr. O'Brien. The WCJ also found that, based on Dr. Avart's credible testimony, claimant established that the NCP was materially incorrect at the time it was issued. As such, the WCJ amended the NCP to include "post traumatic lumbar radiculopathy and two herniated discs at L5-S1" as part of the work injury. Again, employer appealed. Again, the WCAB affirmed.

Employer then sought review by the Commonwealth Court. The Court noted that, under §413(a) of the Act, a WCJ is empowered to amend the description of the work injury if it is proved that the NCP is materially incorrect. Here, claimant proved through the credited testimony of Dr. Avart that he sustained herniated discs and lumbar radiculopathy as a result of the work injury. Dr. Avart's testimony was corroborated by claimant's credited testimony that his back "popped" in the incident, as well as by the diagnostic studies. As such, the Court found that the NCP was materially incorrect when it was issued. Contrary to employer's argument, claimant was not required to file a review petition and the WCJ did not err in considering evidence that claimant's work incident caused more than a lumbar strain.

The order of the WCAB was affirmed.

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PA Department of Corrections/ SCI-Greensburg v. Workers' Compensation Appeal Board (Zvara), No. 1614 C.D. 2007, Filed May 12, 2008.

(Modification—Employer's burden under Kachinski includes showing a job is geographically available; WCJ may raise this issue *sua sponte*.)

Claimant suffered a work-related injury on September 25, 1988. Following an examination by Dr. Bookwalter on September 17, 2004, claimant was released to sedentary or light duty work.

Between November of 2004 and February of 2005, employer notified claimant of five jobs for which he had been medically cleared, including a secretary for Villi Electric, telemarketer for Reese Teleservices, crew member for McDonald's, greeter for Wal-Mart and front desk clerk for the Sheraton Four Points. All of the jobs could involve evening and weekend hours and most were located in or near Westmoreland Mall. Claimant lives alone, does not drive and relies on the goodwill of his daughter-in-law for transportation. Claimant did not apply for any of the jobs.

Employer subsequently filed a modification petition seeking to reduce claimant's benefits because he failed to apply in good faith for available jobs within his physical, vocational and geographic capabilities. The Workers' Compensation Judge found that none of the jobs were available to claimant because bus service to the Mall would not enable claimant to work evenings and employer failed to provide information to establish that the available bus transportation was compatible with the hours required or that any of the prospective employers were willing to modify the hours to coincide with the bus schedule.

In affirming the WCJ's decision, the Workers' Compensation Appeal Board rejected employer's argument that it met its burden under Kachinski v. WCAB (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987), and that claimant never raised a lack of transportation as his reason for failing to apply. The WCAB concluded that, because claimant does not drive, the only positions actually available were those that were reasonably accessible to him by public transportation. Because employer did not establish that the positions were reasonably accessibly by public transportation based on claimant's place of residence, employer did not meet its burden. Because employer never met its burden, the burden never shifted to claimant to show that he followed through in good faith.

On appeal to the Commonwealth Court, employer argued that the WCJ erred in failing to find that it met its burden of proof under Kachinski and by introducing *sua sponte* the transportation availability issue. The Court disagreed. The employer's burden under Kachinski was to show that the referred jobs were actually available to claimant. Employer failed to show that claimant had access to some form of transportation to allow him to commute to and from work. Consequently, employer did not meet its burden. Further, employer submitted the bus schedule into evidence to prove that claimant could commute by public transportation. The Court noted that the WCJ merely examined the evidence in her fact-finding role and, thus, the WCJ did not raise the issue *sua sponte*. Rather, the Court found the WCJ's interpretation represented a common sense review of the evidence consistent with Kachinski.

The order denying the modification was affirmed.

(Editor's Note: The Court did not state that the WCJ was precluded from raising the transportation issue sua sponte. Therefore, one must assume that the Court would agree that the WCJ is free to raise the issue even if the claimant fails to do so.)

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Brockway Pressed Metals and ACE USA v. Workers' Compensation Appeal Board (Holben), No. 43 C.D. 2008, Filed May 12, 2008.

(Fatal Claim—Occupational Disease—If awarded a lifetime claim under §301(c)(1) for an occupational disease, then death due to the disease must occur within 300 weeks of injury for widow to receive benefits.)

In a decision issued in July of 2000, a Workers' Compensation Judge found that decedent contracted non-Hodgkin's lymphoma as a result of exposure to solvents at work and that decedent was disabled by that disease on October 13, 1997. The WCJ concluded that the occupational disease provisions of §301(c)(2) of the Act were inapplicable because non-Hodgkin's lymphoma is not an "occupational disease" as defined by §108 of the Act. Consequently, the WCJ granted decedent benefits under the general injury provisions of §301(c)(1).

Decedent died on April 4, 2005 from his work-related non-Hodgkin's lymphoma. On August 1, 2005, decedent's widow filed a fatal claim petition. Employer filed a motion to dismiss, asserting that because decedent's death occurred more than 300 weeks after the injury date, his death was not compensable under the express language of §301(c)(1).

The WCJ denied employer's motion. Although the WCJ acknowledged that decedent's lifetime benefits were awarded under §301(c)(1), the WCJ applied §301(c)(2), reasoning that it is "disability," not "death," which must occur within 300 weeks. The WCJ granted the widow benefits.

Employer appealed to the Workers' Compensation Appeal Board, again arguing that claimant's petition was barred by §301(c)(1). The WCAB disagreed, noting that a claimant can establish an occupational disease for the purposes of §301(c)(2) even where the disease is not set forth in §108. Hence, the WCAB held that decedent had established an "occupational disease" and that §301(c)(2) therefore applied. Because decedent had a compensable disability within 300 weeks of October 13, 1997, his death was compensable under §301(c)(2).

Employer then sought review by the Commonwealth Court, arguing that the WCAB erred in relying on §301(c)(2) to grant the widow benefits based on decedent's §301(c)(1) injury. The Court agreed. The Court noted that there is a difference between an "occupational disease" as defined by §108, which is compensable under §301(c)(2), and a work-related injury, which, although disease-like, is outside the scope of §108 and, thus, compensable under §301(c)(1). The fact that a work-related disease may be an injury under §301(c)(1) does not necessarily mean that all work-related diseases are "occupational diseases" under §§108 or 301(c)(2).

The plain language of §301(c)(2) precludes an award of benefits here because its time limitations apply to disability and death resulting from an occupational disease as defined by §108 of the Act. Here, decedent failed to prove that his work-related non-Hodgkin's lymphoma was an occupational disease and, thus, §301(c)(2) does not apply. Because decedent's death occurred more than 300 weeks after his injury, the petition is barred under §301(c)(1).

Accordingly, the order granting benefits was reversed.

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The Pennsylvania State University/The PMA Insurance Group v. Workers' Compensation Appeal Board (Hensal), No. 1942 C.D. 2007, Filed May 19, 2008.

(Good Faith—To show that he has engaged in a good faith effort to seek employment, a claimant must present evidence that he has actively applied for employment; searching the internet and newspaper ads, without more, is insufficient.)

(Suspension—Employer is entitled to suspension of benefits where claimant has failed to engage in good faith job search and, instead, has voluntarily withdrawn himself from the entire workforce.)

Claimant suffered a work-related left shoulder injury on February 21, 2002. As a result, claim-

ant began receiving weekly compensation benefits. In January of 2004, claimant applied for a disability pension.

Employer subsequently filed a modification petition claiming that work was available to claimant within his restrictions. Following a hearing in which employer demonstrated that work was generally available for claimant, the Workers' Compensation Judge granted employer's petition, and modified claimant's benefits based on an average weekly wage of the available jobs. Thereafter, claimant remained unemployed. Employer then filed a petition to suspend his benefits, claiming that, by retiring, claimant had voluntarily withdrawn from the workforce.

Employer offered testimony from a vocational rehabilitation specialist, who stated that claimant was able to drive, surf the Internet and hunt. Claimant had worked as a gas station attendant, a hardware store assistant manager trainee and a delivery person. The vocational expert identified several positions within claimant's work restriction, including a laundry worker, a parking lot attendant, an operator for Verizon and an assembler,

Employer also offered the WCJ's decision modifying claimant's benefits in which the WCJ found that work was available to claimant within his restrictions and that claimant could have been hired if he had been motivated to seek employment.

In response, claimant testified that he applied for a disability pension in order to maintain his health insurance coverage. Claimant also stated that he was registered with CareerLink and periodically checked the CareerLink website for job openings. He also checked other websites and newspaper ads, but had not found work. Claimant had no documentation to confirm that he was searching for employment such as copies of the newspaper want ads or job applications he had submitted.

The WCJ found that claimant established he was not voluntarily removed from the workforce because he was seeking employment. Consequently, employer's suspension petition was denied.

Employer argued to the Workers' Compensation Appeal Board that the WCJ erred because claimant had not met his burden of showing that he had made a good faith effort to seek employment. The WCAB rejected employer's argument and affirmed the WCJ's decision.

On appeal to the Commonwealth Court, employer contended that claimant's efforts to find work did not establish a good faith job search because the evidence showed that claimant only began to actively seek work once employer filed its suspension petition.

The Court noted that, in the case of Southeastern Pennsylvania Transit Authority v. WCAB (Henderson), 543 Pa. 74, 669 A.2d 911 (1995), the Supreme Court held that a claimant who has accepted a pension is presumed to have left the workforce entitling an employer to a suspension of benefits unless he establishes that (1) he is seeking employment or (2) the work-related injury forced him to retire. Because the claimant here did not contend that his work injury forced him to retire, the only question is whether claimant sustained his burden of showing he was actively seeking employment. The Court held that he did not.

To show that he was actively seeking employment, claimant had to show that he was engaged in a good faith job search. To show good faith, a claimant has to show that he has honestly undertaken efforts where an employer knows that he is seeking employment. Searching the Internet and newspaper ads, without more, does not constitute a job search. Claimant has to show that he applied or sent applications for employment or some other indicia that he was actively applying for employment. Because claimant did not satisfy his burden of proof, employer was entitled to a suspension of benefits.

The order of the WCAB was reversed.

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City of Philadelphia v. Workers' Compensation Appeal Board (Andrews), No. 1915 C.D. 2007, Filed May 12, 2008.

(Pension Offset—Employer's right to pension offset no longer turns on whether pension constitutes payment in lieu of compensation or if pension is a service-connected disability pension; rather, employer's right to pension offset is limited to the extent employer funded the pension plan in question.)

(Penalties—Employer may not unilaterally cease payment of benefits without risking the imposition of penalties.)

Claimant suffered a work related injury to her right knee on May 30, 2000. In January of 2002, claimant began receiving a service-related disability pension. On July 13, 2002, employer unilaterally ceased paying claimant's workers' compensation benefits absent a judge's decision, supplemental agreement, or a Notice of Workers' Compensation Benefits Offset.

Claimant filed a petition seeking reinstatement of her benefits. She also filed a petition for penalties alleging employer violated the Act by failing to pay benefits when due.

In March of 2005, a stipulation was approved providing for claimant to receive the benefits due her from July 13, 2002 through March 23, 2005. The stipulation also provided that the parties would continue to litigate the issue as to what percentage of the pension benefits were funded by employer.

To that end, employer presented testimony from its adjuster, who explained that claimant received a service-connected disability pension. The adjuster also stated that, when an employee's monthly pension payments are greater than the workers' compensation benefits that would normally be due, no wage loss benefits are paid. The adjuster conceded that a Notice of Workers' Compensation Benefit Offset was not provided to claimant and that the last controlling legal document was the Notice of Compensation Payable. Finally, the adjuster conceded that claimant was not paid compensation between 2002 and 2005.

Employer presented no other testimony.

The Workers' Compensation Judge concluded that employer failed to present sufficient evidence to establish that it was entitled to a pension offset. An order was entered reinstating claimant's benefits beginning July 14, 2002 and ongoing. The WCJ further determined that employer violated the Act by unilaterally suspending benefits and awarded a 50% penalty on all compensation due. The Workers' Compensation Appeal Board affirmed.

Employer appealed to the Commonwealth Court arguing that the WCJ erred in reinstating claimant's benefits in light of her receipt of a service-connected disability pension. Employer relied upon prior decisions issued by the Commonwealth Court which held that an employer may offset a claimant's workers' compensation benefits in light of his or her receipt of a service-connected disability pension as the payments made under the pension plan constitute payments made "in lieu of compensation."

The Court was not persuaded by employer's argument. The cases upon which employer relied related to injuries which occurred prior to the passage of Act 57 in 1996. Under Act 57, benefits from a pension plan may only be credited against a workers' compensation award to the extent that the pension plan was funded by the employer directly liable for the payment of workers' compensation received by an employee. The employer bears the burden of proving the extent it funded the pension plan in question. Thus, in order to take advantage of the offset, employer needed to present evidence as to the extent it funded the pension plan. Here, no testimony was offered concerning the extent employer funded claimant's pension in order to determine the appropriate amount of the offset. Because employer failed to establish its right to an offset, the WCJ did not err in reinstating claimant's benefits.

Employer also argued that the WCJ erred in awarding penalties. Again, the Court disagreed. Employer unilaterally stopped paying claimant's benefits in 2002 and did not resume making any payments until the stipulation was entered in 2005. Employer's own witness acknowledged that claimant's benefits were stopped based upon claimant's receipt of pension benefits and that no Notice of Workers' Compensation Benefit Offset was completed. She further recognized that the last controlling document was the NCP. Therefore, employer violated the Act and exposed itself to an award of penalties. The WCJ did not abuse his discretion in awarding a 50% penalty given the circumstances of this case.

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

Supreme Court Case Reviews

Daniel McElheney v. Workers' Compensation Appeal Board (Kvaerner Philadelphia Shipyard), No. 15 EAP 2007, Decided February 19, 2008.

(Longshore and Harbor Workers' Compensation Act—Claimant injured while performing a traditional maritime activity in a graven dry dock is entitled to concurrent compensation under both the federal Longshore and Harbor Workers' Compensation Act and the Pennsylvania Workers' Compensation Act.)

Claimant was employed as a pipe fitter welder when he tripped and fell on an electric wire while working on a ship in a "graven dry dock." He sustained injuries to his shoulder and ankle as a result of the fall.

Employer issued a "Payment of Compensation without Award" and claimant received benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA). The LHWCA is a federal statute, providing compensation to maritime workers for injuries occurring upon the "navigable waters of the United States."

Upon receiving information that claimant had fully recovered and was capable of returning to work, employer's carrier stopped payments. Because claimant believed that his injuries continued to prevent him from returning to work, claimant filed a claim petition under the Pennsylvania Workers' Compensation Act.

Employer argued before the Workers' Compensation Judge that claimant's injury occurred over the "navigable waters of the United States, therefore precluding application of Pennsylvania workers' compensation law. In response, claimant argued that the LHWCA does not preempt state

workers' compensation laws, and claimed that there is concurrent state and federal jurisdiction when a worker's injury occurs on land while performing traditional maritime duties.

The WCJ found claimant's work not to be "land based" and found exclusive jurisdiction in the LHWCA. The Workers' Compensation Appeal Board affirmed.

The Commonwealth Court reversed, holding that concurrent state and federal recovery was available under the facts of this case. The Court noted that the LHWCA supplements, but does not supplant, the state workers' compensation law.

The Supreme Court granted employer's petition for allowance of appeal to consider the question of concurrent versus exclusive jurisdiction. The parties agreed that claimant was engaged in a traditionally maritime function, such that the only issue before the Court was whether a graven dry dock is within the "navigable waters of the U.S." and thus within the exclusive purview of the LHWCA, or whether it is land-based and within the judicially recognized zone of concurrent state and federal workers' compensation jurisdiction.

After discussing the history of the LHWCA, the Court noted that Congress extended the LHWCA's jurisdictional reach landward in 1972, and amended the Act to include various land-based sites along with dry docks as within the applicable scope of the "navigable waters of the U.S." Specifically included were "*any adjoining pier, wharf, terminal, building way, marine railway, or other adjoining area customarily used in loading, unloading, repairing, dismantling, or building a vessel*."

The Court held that a "graven dry dock" is a land-based site within the scope of the 1972 amendments to the LHWCA. A graven dry dock is cut and dug out of the land. The periodic and artificial flooding of the graven dry dock is insufficient to divorce the site from land and render it exclusively within the limits of the "navigable waters of the U.S." Therefore, the LHWCA and the Pennsylvania Workers' Compensation Act share concurrent jurisdiction over graven dry docks.

The decision of the Commonwealth Court was affirmed.

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David Griffiths v. Workers' Compensation Appeal Board (Seven Stars Farm, Inc.), No. 148 MAP 2005, Decided March 19, 2008.

(Orthopedic Appliance—A van modified to make it wheelchair accessible for quadriplegic may be an orthopedic appliance under the Act; however, the cost containment regulations do not apply.)

In August of 2000, claimant sustained a devastating work-related injury which left him a C-5 quadriplegic and confined to a wheelchair. In order to travel to and from medical appointments, as well as "to get out a little bit and enjoy life," claimant and his wife purchased a van, a 2000 Ford Windstar. The van had no mechanical lifts, but entry was made simple by opening the back door, folding out a ramp by hand, and driving the wheelchair straight in. The van cost $28,500—$18,000 in base costs, $10,000 in conversion costs, and $500 for shipping and handling. Claimant and his wife considered other vans which would have cost $40,000 or more and were more complicated.

Employer reimbursed claimant for the cost of the van conversion, but refused to pay anything for the base costs of the van itself. Claimant filed a penalty petition alleging that employer violated the Act by failing to pay for the entirety of the van purchase.

Before the Workers' Compensation Judge, the parties stipulated that the issues were whether claimant was entitled to reimbursement for the base purchase price of the van and whether claimant was entitled to reimbursement for 100% or only 80% of the relevant costs.

The WCJ granted the penalty petition, concluding that the employer was responsible to pay the full cost of modifying the van, not just 80%. Additionally, the WCJ concluded that a reasonable cost to purchase the van was recoverable under the circumstances of this case. Claimant had no other vehicles to enable him to get to medical appointments, and transportation was not provided by employer.

Employer appealed to the Workers' Compensation Appeal Board, arguing that it was responsible for making the van accessible by wheelchair, but not for its original purchase price, and that, in any event, its liability was capped at 80% of the cost. The WCAB held that the van itself is not an orthopedic appliance within the meaning of the Act and, thus, employer is not obligated to pay for it. To that extent, the WCJ's decision was reversed. The WCAB affirmed the WCJ's conclusion that employer is liable for 100% of the conversion costs. The WCAB noted that because no "health care provider" was involved here, the cost containment provisions simply do not apply.

The parties cross-appealed the two issues. The Commonwealth Court ruled in favor of employer on both issues. First, that Court held that a vehicle is not an orthopedic appliance, such that employer is not liable for its purchase. Second, the Commonwealth Court held that, under the cost containment provisions of the Act, liability for products and services that are not calculated under the Medicare program is capped at 80%. Because there is no Medicare calculation applicable here, employer was found to be obligated to pay only 80% of the cost to retrofit the van.

Claimant then sought review by the Supreme Court on the same

two issues that were litigated below, i.e., whether the van is an orthopedic appliance and whether the cost containment provisions apply.

Claimant argued that the van is an indispensable part of the wheelchair lift that is necessary for his mobility. Absent the van, the wheelchair lift (a conceded orthopedic appliance) is useless to him. Claimant argued that the Commonwealth's interpretation of the term orthopedic appliance leads to an arbitrary result, as only those quadriplegic claimants wealthy enough to purchase a van on their own will be able to avail themselves of the Act's provision for reimbursement for the conversion costs of the van to make it wheelchair accessible.

After an extensive review of cases in other jurisdictions, the Court agreed with claimant and concluded that a modified van may qualify as an orthopedic appliance. The Court also noted, however, that the Act does not authorize windfalls. The extent of an employer's liability may and should vary depending on the particular circumstances affecting the claimant. For example, nothing requires that the van be brand new. The circumstances of a claimant who already owned a van will be different from the circumstances of a claimant who owned a smaller vehicle not suitable for wheelchair-accessible modification, or a claimant who owned no car at all, but relied upon walking, public transportation or other means of travel.

Here, although the record reflects that claimant did not have access to a vehicle that was adequate to transport him and his wheelchair, the WCJ did not make findings of fact as to whether claimant owned and regularly operated a vehicle, the age and type of his vehicle, its value, etc. The case was, therefore, remanded to the WCJ for a determination of employer's liability toward the purchase of the van, taking into consideration the factors outlined by the Court.

As to the applicability of the cost containment regulations, claimant argued that those provisions apply only to "medical providers" and not to car dealers. The Court agreed. Because claimant acquired his orthopedic appliance (i.e., the van) from an entity that is not a health care provider, the const containment provision of §306(f.1)(3)(i) does not apply. Accordingly, employer is liable for the entirety of all relevant costs in this instance.

The order was reversed and the case remanded to the WCJ for proceedings consistent with the Court's opinion.

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traditional analysis and burden required under a Labor Market Survey approach." Although the employer in Diehl has requested that the Court reconsider its decision, as of the date of this publication, the Court has not ruled on that request. Therefore, at the moment, the decision in Diehl is the controlling law on the subject.

The bottom line is that if you do not request an IRE within 60 days after the claimant's receipt of 104 weeks of total disability benefits, you are now out of luck. It cannot be emphasized strongly enough that, when adjusting claims, the IRE request must be filed in a timely fashion. If you fail to do so, you are missing an opportunity to cut costs and limit claims. Every adjuster should now mark each of his or her files so as to be reminded one hundred and four weeks into the life of the claim to determine if an IRE is appropriate. If so, the IRE request should be immediately filed. Don't wait until near the end of 60 days to make the request. Other matters come up and you might forget. You do not want to miss the 60-day window of opportunity. This advice will remain valid even if the Diehl decision is vacated or reversed and the "traditional administrative process" is once again interpreted as requiring the mere filing of a Modification Petition. Even that will require attendance at hearings, the deposition of the IRE physician and possibly the deposition of the claimant's medical expert. There is no reason to incur these legal expenses when you can take advantage of the automatic change in benefit status simply by making a timely IRE Request.

In sum, "Diehl or No Diehl," make the request within the 60-day time frame!!!

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[1] Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987) (*The employer who seeks to modify a claimant's benefits must prove 1) a change in the claimant's medical condition, and 2) that the claimant has been referred to a job for which he or she has medical clearance.*) While Kachinski is still good law, Act 57 provided employers with alternate means of modifying a claimant's benefits, such as through an earning power assessment or an IRE.

[2] Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 585 Pa. 366, 888 A.2d 758 (2005) (*Employer has 60 days from date claimant receives 104 weeks of total disability benefits to request an IRE for the purposes of obtaining the automatic relief set forth in 306(a.2). Employer may request an IRE at a later date, not for the purpose of obtaining the automatic relief, but for purposes applicable to "traditional administrative process."*)

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

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