TR&C

Pennsylvania Workers' Compensation Bulletin

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'TWAS TWO DAYS BEFORE CHRISTMAS...

'TWAS TWO DAYS BEFORE CHRISTMAS
AND IN THE WAREHOUSE,
THE WORKERS ALL PARTIED
AND TOOK PART IN A "JOUST."

THE PUNCH WAS FRUIT FLAVORED
WITH A TOUCH OF VERMOUTH;
THE FRUITCAKE HAD NUTS
ON WHICH JILL BROKE A TOOTH.

JOE AND TOM, BEST OF FRIENDS,
WITH FORKLIFTS AS STEEDS,
DROVE AT ONE ANOTHER
AT MAXIMUM SPEED.

EACH HELD A METAL ROD
POINTED AT HIS GOOD FRIEND,
WITH NO INTENT OF COLLIDING
OR CAUSING NEED TO DEFEND.

BUT FRUIT PUNCH BLURRED VISION
AND JOE HIT HIS MARK;
TOM FELL OFF HIS FORKLIFT
AND FOR HIM ALL WENT DARK.

HE AWOKE IN BRIGHTLY LIT
HOSPITAL ROOM,
WITH A BIG STITCH IN HIS SIDE
AND A FEELING OF DOOM.

HE HAD A FAMILY TO FEED
AND HAD BILLS TO PAY.
THE BOSS SAID, "YOU'RE
FIRED!
YOU CAN'T WORK ONE
MORE DAY!

I'LL NOT PAY YOU ONE CENT
FOR THE DAMAGE YOU'VE CAUSED.
IF YOU WANT SOME MONEY
GO SEE SANTA CLAUS!!"

SO TOM FILED A COMP CLAIM,
WHICH THE EMPLOYER DENIED
SAYING: "JOE IS AT FAULT
FOR THE HOLE IN TOM'S SIDE."

THE JUDGE HEARD THE EVIDENCE,
AGREED THAT TOM CANNOT WORK
AND ORDERED BENEFITS BE PAID,
(DESPITE TOM'S BEING A JERK).

Was the Judge right?

The employer argued that Tom's injury was caused by the act of a third party and, therefore, the personal animus exception applied. The general rule is that an injury caused by the act of a third person intending to injure an employee because of reasons personal to the third person and not directed against the employee because of the employment is excluded from the course of employment by §301(c)(1) of the Workers' Compensation Act. Here, Joe did not intend to cause harm, so the employer's argument must fail.

What about the fact that the injury occurred because of "horseplay?" Horseplay is almost never a defense, particularly when the injury occurs on the employer's premises. The question is whether the

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Inside This Issue...

COMMONWEALTH COURT CASE REVIEWS

Commonwealth of Pennsylvania, Department of Labor & Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (US Food Service), NO. 2011 C.D. 2006, Filed August 22, 2007.

(Supersedeas Fund Reimbursement—Compromise and Release Agreement resolving past, present and future liability, without reservation, nullifies employer's ability to obtain reimbursement from Supersedeas Fund.)

Claimant suffered a work injury in 2001. In November of 2004, employer filed a Termination Petition and requested supersedeas. On December 21, 2004, the Workers' Compensation Judge denied supersedeas.

In support of the Termination Petition, employer submitted the report of its expert, Dr. Michael Moncman. In response, claimant testified and submitted the report of his own expert, who opined that claimant had not fully recovered.

While the Termination Petition was pending, the parties entered into a Compromise and Release Agreement pursuant to which claimant was paid $65,000 to "fully and completely satisfy employer/carrier's liability." The C&R Agreement was approved by an order of the WCJ issued on April 15, 2005.

Two weeks later, the same WCJ circulated a decision and order granting employer's Termination Petition effective January 7, 2003. Employer then filed an Application requesting reimbursement from the Supersedeas Fund from the date that the Termination Petition was filed, November 20, 2004, through April 27, 2005, the date of the decision granting the Termination Petition.

A second WCJ granted employer's Application for reimbursement from the Supersedeas Fund. The WCJ opined that, because employer filed a Termination Petition and submitted evidence in support thereof before entering into the C&R Agreement, the WCJ's decision granting the termination was supported by evidence in the record. The decision was not based solely upon a stipulation of the parties. Accordingly, reimbursement was granted. The WCAB affirmed the WCJ's decision, noting that the Termination Petition was fully litigated and was not withdrawn with the execution of the C&R Agreement.

The Bureau then filed an appeal with the Commonwealth Court, arguing that the second WCJ and WCAB erred in granting reimbursement from the Fund because the C&R fully and finally resolved all past, present and future liability. Because the C&R was the final outcome, the Termination Petition should have been dismissed as moot.

The Commonwealth Court noted that the Supersedeas Fund is a "special fund" created to reimburse an employer who has been ordered to pay benefits that are later deemed not to be owed. There are 5 requirements that must be met before reimbursement may be had:

1) A supersedeas must have been requested;
2) The request for supersedeas must have been denied;
3) The request must have been made in a proceeding under §413 of the Act;
4) Payments were continued because of the order denying supersedeas; and,
5) *In the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable*.

Here, the fifth requirement was not met. The terms of the C&R do not provide that the Termination Petition remains open; but rather, the C&R contains very broad release language, resolving claims for all past, present and future benefits. Therefore, the C&R resolved all outstanding litigation, including the Termination Petition.

The order of the WCAB was reversed and the employer was not permitted reimbursement from the Supersedeas Fund.

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Hospital of the University of Pennsylvania v. Bureau of Workers' Compensation (Tyson Shared Services, Inc.), No. 508 C.D. 2007, Filed August 23, 2007.

(Fee Review Application—When an insurer does not deny payment based on an incomplete record and makes payment to a provider, with only the amount to be paid in dispute, the provider is required to file its petition for fee review within the time limits proscribed under §306(f.1)(5) of the Act.)

Claimant was seriously injured in a work-related automobile accident on March 31, 2004. On April 20, 2004, the hospital submitted a request for payment to the carrier in the amount of $260,704.86. The hospital did not provide claimant's medical records to the carrier until July 23, 2004. The carrier responded by sending a payment of $72,943.76 on July 28, 2004 and a payment of $44,856.05 on September 1, 2004. Each payment included the following notice:

> Unless otherwise noted, charges were reduced for exceeding the reimbursement guidelines as set forth in the Pennsylvania Workers' Compensation Act. Healthcare providers are prohibited from billing for or otherwise attempting to recover from the employee the difference between the provider's charge and the amount paid on the bill. To dispute the amount or the timeliness of this analysis, please contact the Bureau of

Workers' Compensation for a fee review at 1171 S. Cameron Street, Harrisburg, PA 17104.

The hospital did not, however, contact the Bureau. Instead, on December 10, 2004, the hospital sent a facsimile to the carrier alleging that $187,863.10 was still owed and that it was entitled to receive 100% reimbursement under the trauma center reimbursement guidelines.

On January 26, 2005, the hospital submitted a medical insurance claim appeal to the carrier, requesting reconsideration. Then, on September 27, 2005, the hospital sent a letter to the carrier stating that it had not properly billed the carrier, and then provided the carrier with medical records, reports and a LIBC-9 form.

Finally, on December 20, 2005, the hospital filed an application for fee review. The Bureau issued an administrative decision denying the hospital's application for fee review, finding that it was not timely under §306(f.1)(5) of the Act, which provides that an application for fee review must be filed within 30 days following notification of a disputed treatment or 90 days following the original billing date.

The hospital then requested a hearing *de novo* with the Bureau's fee review hearing office, which affirmed the administrative determination.

On appeal to the Commonwealth Court, the hospital argued that the time period for filing an application for fee review did not begin to run until it complied with the reporting requirements of §306 (f.1)(2) of the Act. (That section states that a provider must file the appropriate forms, records and reports before the carrier is obligated to pay.) The Court rejected the hospital's argument for two reasons.

First, here the carrier did not reject the hospital's bill based upon an incomplete record. To the contrary, the bill was paid to the extent that the carrier deemed itself to be liable.

Second, the hospital cannot delay the running of the statute of limitations by simply failing to provide its own paperwork. Nothing prevented the hospital from submitting the appropriate forms and reports in a timely fashion.

The original billing date was April 20, 2004. The carrier made payments, with the remaining balance disputed as exceeding the reimbursement guidelines. The hospital failed to challenge that determination until December 20, 2005. As such, the hospital failed to file the application for fee review within 90 days of the original billing date of 30 days of the notification that treatment was disputed.

The order of the Bureau was affirmed.

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Blaine Boleratz v. Workers' Compensation Appeal Board (Airgas, Inc.), No. 147 C.D. 2007, Filed August 24, 2007.

(Medical Bills—Employer is not responsible for paying bills for prescribed treatment rendered by a massage therapist, who is a non-licensed health care provider.)

Claimant suffered a work-related low back strain for which he sought treatment from numerous doctors, including a chiropractor and a neurosurgeon. Because he was afforded no relief, claimant asked his primary care physician, Dr. Proy, about the possibility of starting a massage therapy program. Dr. Proy then wrote a prescription for treatment with Marilyn Bell, a massage therapist.

Employer refused to pay for the treatment rendered by Ms. Bell. Claimant then filed a review petition.

Before the Workers' Compensation Judge, claimant testified that Ms. Bell's treatment alleviated his pain, allowed him to become more functional, and made it easier for him to do his job.

Employer stipulated that the treatment is causally related to the work injury, but denied responsibility inasmuch as Ms. Bell is not a health care provider as defined by the Workers' Compensation Act. Employer further explained that it attempted to obtain a utilization review of the reasonableness and necessity of Ms. Bell's treatment and was unable to do so. The Utilization Review Organization had returned the request to employer noting that utilization review applies only to health care providers and does not include massage therapists.

The WCJ noted that, although Ms. Bell is not a health care provider as defined by the Act, Dr. Proy, who is a health care provider, wrote the prescriptions for Ms. Bell's treatment. Consequently, the WCJ concluded employer was responsible to pay for Ms. Bell's services.

Employer appealed and the Workers' Compensation Appeal Board reversed. The WCAB concluded that medical services must be rendered by a duly licensed medical practitioner in order to be reimbursable under the Act. The WCAB further noted that Ms. Bell was not performing her services under Dr. Proy's supervision.

Claimant then sought review by the Commonwealth Court and argued that the bills were payable because the treatment was provided pursuant to the referral of a health care provider. After an extensive review of the applicable case law, the Court disagreed, stating:

"We now hold that the services of a massage therapist, who is not licensed or otherwise authorized by the Commonwealth to provide health care services, are not reimbursable under the Act, even if the services are prescribed by a health care provider. Because Ms. Bell is not licensed and was not supervised, employer is not required to pay for her treatment."

The order of the WCAB was affirmed.

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Nathan Armstrong v. Workers' Compensation Appeal Board (Haines & Kibblehouse, Inc.), No. 680 C.D. 2007, Filed August 27, 2007.

(Notice of Temporary Compensation Payable/Notice of Compensation Denial—It is acceptable to issue a NTCP and then stop it with a NCD on the basis of extent of disability; when doing so, the injury is accepted for medical purposes and treatment may then be challenged under the UR process.)

In February of 2005, employer issued a Notice of Temporary Compensation Payable (NTCP) noting that claimant suffered injuries to his left arm and shoulder. As a result, claimant began to receive benefits.

One month later, employer issued a Notice Stopping Compensation and a Notice of Compensation Denial indicating that while an injury took place, claimant was not disabled within the meaning of the Workers' Compensation Act.

Claimant then filed a claim petition. While that petition was pending, employer sought Utilization Review of claimant's chiropractic treatment. The URO determined that the treatment was not reasonable or necessary. The chiropractor filed a petition for review of the UR Determination.

The Workers' Compensation Judge found that claimant sustained a disabling injury and granted the claim petition. The WCJ, however, denied the chiropractor's petition and affirmed the URO's Determination. Claimant then filed an appeal from that decision.

Claimant argued before the Workers' Compensation Appeal Board that employer was not legally permitted to seek utilization review of claimant's treatment while denying the compensability of the work injury. The WCAB determined that employer acted correctly in requesting utilization review because employer agreed that claimant sustained an injury and merely contested claimant's disability status.

Claimant then sought review by the Commonwealth Court. The Court noted that an employer may properly file an NCD when, although it acknowledges a work injury, there is a dispute regarding the claimant's disability status. On the NCD form, the employer is given the option of acknowledging the occurrence of a work injury but declining to pay compensation because the employee is not disabled within the meaning of the Act.

Where an employer is uncertain whether a claim is compensable, the employer may comply with the Act by initiating compensation payments without prejudice and without admitting liability pursuant to an NTCP. The employer then has 90 days to controvert the claim.

Here, after issuing an NTCP, employer issued a NCD disputing the length and extent of disability, not the actual injury. The Court thus concluded that the WCAB did not err in determining that the injury itself was acknowledged and accepted by employer. A UR request was, therefore, appropriate.

Claimant also argued that the WCJ erred in permitting employer to seek Utilization Review without first issuing a "medical only" NCP. The Court disagreed. This case is distinguishable from the Waldameer Park line of cases, where the nature of the injury was never established and, therefore, the issuance of a "medical only" NCP was necessary before the employer could seek utilization review. Here, employer issued a NTCP, which fully described the injury. The NCD put claimant on notice of the parameters of employer's acceptance of the work injury.

Having recognized the existence of an injury, the nature of which was fully described on the NTCP, employer was entitled to seek UR review without filing a medical only NCP. The order of the WCAB was affirmed.

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Cinram Manufacturing, Inc. and PMA Group v. Workers' Compensation Appeal Board (Hill), No. 158 C.D. 2007, Filed September 7, 2007.

(Amendment of Notice of Compensation Payable—An NCP may be amended in a termination proceeding to add injuries not listed in the NCP even if a Petition for Review pursuant to §413(a) of the Act is not filed.)

Claimant suffered a work injury on March 24, 2004, which employer recognized by a Notice of Compensation Payable as a lumbar strain/sprain.

On August 13, 2004, employer filed a termination petition alleging that claimant had fully recovered as of July 12, 2004. In support of its petition, employer presented testimony from Dr. Robert Smith, an orthopedic surgeon, and Dr. Kevin Madden, a neurologist. Both testified that claimant had fully recovered from the lumbar strain/sprain.

In response, claimant presented his own testimony, as well as testimony from his treating physician, Dr. Alan Gillick, an orthopedic surgeon. Dr. Gillick testified that claimant suffered a herniated lumbar disc as a result of the work injury and was not capable of returning to work.

The Workers' Compensation Judge credited the testimony of Dr. Gillick and amended the NCP to include a herniated lumbar disc. The WCJ also concluded that employer failed to meet its burden to establish that claimant had recovered from the work injury. The termination petition was thus denied. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, employer argued that the WCJ exceeded his authority by *sua sponte* expanding the accepted work injury to include a herniated disc, which claimant never peti-

tioned to have recognized as a work injury.

The Court noted that, in a termination petition, the employer bears the burden of proving that the claimant's work injury has ceased. The Court also noted that, under §413(a) of the Act, the WCJ may amend the description of the injury by modifying the NCP if it is proved to be materially incorrect or if the claimant's disability status has changed. An NCP is materially incorrect if the accepted injury fails to include all of the injuries that the claimant suffered in the work incident.

Here, Dr. Gillick's testimony provided sufficient evidence to support the WCJ's finding that claimant sustained a herniated lumbar disc. The WCJ specifically rejected the contrary medical opinions advanced by employer. Because the credibility of witnesses is within the province of the WCJ, the WCJ did not err in expanding the description of the injury and in denying employer's termination petition.

The order of the WCAB was affirmed.

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Craig Stafford v. Workers' Compensation Appeal Board (Advanced Placement Services), No. 542 C.D. 2007, Filed September 21, 2007.

(Utilization Review—Where provider fails to provide medical records to URO, but a report is nevertheless prepared by peer review physician, the WCJ lacks jurisdiction to hear appeal of UR Determination.)

Claimant sustained a work-related injury when he fell from a scaffold. Employer issued a Notice of Compensation accepting multiple injuries. The NCP was eventually expanded to include an injury to his cervical spine.

Several months later, employer filed a request for utilization review of the medical treatment provided to treat claimant's cervical spine by Dr. Heberle. The Bureau assigned employer's request to a Utilization Review Organization (URO). Although the URO was unable to obtain Dr. Heberle's medical records, the URO assigned employer's request to a reviewing physician, Dr. Miller.

Dr. Miller then issued a report in which he noted that no records were submitted by Dr. Heberle for review, such that there was no way for Dr. Miller to effectively evaluate the treatment at issue. Hence, Dr. Miller found Dr. Heberle's treatment to be not reasonable and unnecessary.

Claimant petitioned for review of the URO's Determination. The Workers' Compensation Judge concluded that the URO's assignment to Dr. Miller was improper because the Regulations preclude a substantive review if the provider fails to provide medical records to the URO. The WCJ held that notwithstanding Dr. Miller's report, under the case of County of Allegheny (John J. Kane Center-Ross) v. WCAB (Geisler), 875 A.2d 1222 (Pa.Cmwlth. 2005), he lacked jurisdiction to hear claimant's petition. The Workers' Compensation Appeal Board affirmed.

Claimant then sought review by the Commonwealth Court. Claimant argued that Geisler is inapplicable because a report was filed by the reviewing doctor. In the alternative, he argued that Geisler was wrongly decided and violated his due process right to a hearing on his petition.

The Court disagreed. In Geisler, a URO determined that the provider's treatment was neither reasonable nor necessary because the provider failed to provide the requested medical records. Nevertheless, the WCJ concluded that the treatment at issue was reasonable and necessary. Employer appealed, and the Court reversed, holding 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."

Here, claimant contended that his case was different because the UR Reviewer actually prepared a report, the existence of which allows for a *de novo* review by a WCJ. The Court disagreed. As in Geisler, the failure to provide records precluded a substantive review of the treatment at issue. Because the treatment was not addressed substantively, the WCJ lacked jurisdiction to review the URO Determination.

The Court also rejected claimant's argument that Geisler was wrongly decided. The Regulations direct the URO to find treatment not reasonable and not necessary whenever the provider fails to supply the records within 30 days of the URO's request.

Finally, the Court rejected claimant's due process argument, noting that procedural due process requires that one have an identifiable property right or liberty interest. There is no right to medical treatment that has been found unreasonable and unnecessary. Consequently, claimant's due process rights were not violated.

The order of the WCAB was affirmed.

(Editor's Note: The Court made a somewhat troubling observation: "Claimant is not without recourse. He may seek treatment with another physician who will be more forthcoming should Employer challenge this course of medical treatment in the future." In other words, once a finding is made that treatment is neither reasonable nor necessary, a claimant may be able to simply circumvent that finding by seeking that same treatment from a different physician.)

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John A. Galizia v. Workers' Compensation Appeal Board (Woodloch Pines, Inc.), No. 96 C.D. 2007, Filed September 24, 2007.

(Notice of Temporary Compensation Payable—The 90-day pe-

riod for payment of temporary compensation begins the first day of disability, not the date that the NTCP was issued.)

Claimant alleged that he suffered a knee injury on November 30, 2002. He continued working until January 6, 2003. On February 6, 2003, employer issued a notice of temporary compensation payable (NTCP), and payments commenced January 31, 2003. The NTCP noted that "[m]edical documentation supports disability effective 01/31/03."

On April 28, 2003, employer filed a notice stopping temporary compensation and a notice of denial.

On June 11, 2003, claimant petitioned for penalties alleging that employer violated the Act by unilaterally suspending benefits without an authorized triggering event. Claimant also sought reinstatement of benefits effective April 28, 2003. Finally, claimant filed a review petition seeking a judicial determination that the NTCP converted to a Notice of Compensation Payable by operation of law on April 6, 2003.

Before the Workers' Compensation Judge, claimant's counsel argued that the 90-day period began to run on January 6, 2003, the date claimant first retroactively received benefits. Employer maintained that the 90-day period only began when the NTCP was issued, on February 6, 2003.

The WCJ concluded that the NTCP stated that payment began on January 31, 2003 and that, therefore, the 90-day period ended on April 30, 2003. Claimant appealed that decision to the Workers' Compensation Appeal Board, which affirmed.

Claimant then sought review by the Commonwealth Court. Claimant argued that the WCJ and the WCAB erred when they determined that, under §406.1(d)(6) of the Act, the 90-day period within which employer had to file notices to avoid automatic conversion of the NTCP to a notice of compensation payable began on the date of issuance of the NTCP and/or first check rather than the date of disability. The Court vacated and remanded to the WCAB with instructions to remand to the WCJ to establish the trigger date when temporary compensation is paid or payable, either January 6, 2003 or January 31, 2003.

On remand before the WCJ, the parties stipulated that the first check was issued on February 10, 2003, to cover the period from January 31, 2003 through February 13, 2003, but that another check was issued on March 19, 2003 to cover the period from January 5, 2003 through January 30, 2003.

The WCJ concluded that the actual trigger date when temporary compensation was paid or payable was January 31, 2003 as provided in the NTCP. The WCJ reasoned that, if the triggering date were the date of disability, it is conceivable that at the time the NTCP was issued, the employer would have already missed their window to file the Notice Stopping Temporary Compensation. The WCJ felt that would be inconsistent with the purpose of the Act. The WCAB agreed and again affirmed.

Claimant again appealed to the Commonwealth Court. Claimant argued that the words "paid" and "payable" in §406.1(d)(6) of the Act clearly refer to the claimant's first day of disability as the triggering date of the 90-day period. The Court agreed. The first day for which claimant received compensation was his first day of disability, January 6, 2003. While he did not actually receive payment on that date, he was entitled to it, such that benefits were "payable" and paid to him commencing that day. Under §406.1(d)(6), if an employer does not file the NSTC within the 90-day period allowed for temporary compensation, the NTCP converts to a Notice of Compensation Payable.

Here, claimant received benefits effective January 6, 2003. Employer did not attempt to controvert the NTCP until April 29, 2003, well beyond the 90-day period. Claimant was, thus, entitled to reinstatement of his compensation from April 29, 2003 forward because employer was deemed to have admitted liability and the NTCP converted to a notice of compensation payable.

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Enterprise Rent-A-Car v. Workers' Compensation Appeal Board (Clabaugh), No. 863 C.D. 2007, Filed September 27, 2007.

(Fee Review—Contractor is required to file fee review to resolve dispute with employer over unpaid amount for remodeling.)

Claimant suffered work-related injuries which rendered him a quadriplegic on July 31, 2002.

In 2004, claimant filed a Utilization Review Request seeking prospective review of the reasonableness and necessity of home modifications. A URO was assigned and a report was issued by Dr. Gever, who found that the proposed modifications to claimant's home were reasonable and necessary, since without the modifications, claimant would need to be placed in a nursing home or other supervised living facility. Employer did not appeal the UR Determination.

On November 28, 2005, claimant filed a Penalty Petition alleging that employer violated the Act by failing to timely pay for the home accommodations. The evidence presented to the Workers' Compensation Judge established that the estimate for the home remodeling was $108,226.00. The final cost, however, was $200,626.71, such that the expected reimbursement after repricing was $160,501.31. Employer paid only $114,149.67, leaving a balance due of $46,891.20.

The WCJ determined that it was foreseeable that there would be costs over and above the original estimate and, thus, concluded that employer violated the Act by

failing to pay the entire amount due. A 10% penalty was awarded. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer appealed to the Commonwealth Court, arguing that the URO could only consider the reasonableness and necessity of *medical treatment* and could not decide the reasonableness of the *fees* charged by a provider. Employer further argued that if the contractor was not satisfied with the payment made, it should have filed for fee review.

The Court agreed noting that, under §306(f.1)(5) of the Act, a provider who disputes the amount or timeliness of payment from an employer or insurer shall file an application for fee review within 30 days following notification of a disputed treatment or within 90 days following the original billing date. Here, the contractor never filed an application for fee review, and the time period within which an application could have been filed had expired.

Hence, the Order of the WCAB was reversed.

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Lahr Mechanical and State Workers' Insurance Fund v. Workers' Compensation Appeal Board (Floyd), No. 844 C.D. 2007, Filed October 9, 2007.

(Average Weekly Wage—A claimant's hourly wage is a question of fact for the Workers' Compensation Judge.)

Claimant earned two different hourly wages in the same workweek while working for the same employer. He earned $18.00/hour for local jobs and travel time, as well as $27.54/hour for non-local work. Additionally, he received $41.31/hour for overtime work, or one and one-half times the non-local rate of $27.54/hour.

For the first two days of his employment, claimant completed an "endurance test" and earned the local rate. Thereafter, he reported to employer's job site in Maryland, where he earned $27.54/hour, plus overtime. Claimant did not perform local work after the initial endurance test.

After working less than 13 weeks, claimant suffered a work injury. Employer issued a Notice of Compensation Payable accepting liability for the injury and setting forth claimant's average weekly wage (AWW) as $720.00 per week ($18.00/hour x 40 hours) for a weekly compensation rate of $480.00.

Claimant filed a Review Petition asserting that employer erroneously calculated his AWW. Claimant credibly testified before the Workers' Compensation Judge that, based on his pre-injury discussions with employer, he expected to work mostly non-local jobs and would not have accepted jobs at the local rate. The WCJ also credited claimant's testimony that he expected to work an average of 8-10 hours per week in overtime.

As a result, the WCJ found as fact that claimant had an hourly wage rate of $27.54 on the date of his injury, and that there was an expectation of 58.5 hours of work per week. Under §309(d.2) of the Act, the WCJ then calculated claimant's AWW to be $1,611.09 ($27.54 x 58.5 hours) with a compensation rate of $716.00 per week.

The Workers' Compensation Appeal Board determined that the WCJ's calculation improperly disregarded claimant's different hourly wages earning during the same week, that is wages earned for travel ($18.00/hour) and non-local work ($27.54/hour). The WCAB then established a new hourly rate by averaging claimant's wages paid at each rate, and then multiplying the new hourly rate by the number of expected work hours. The WCAB thus calculated claimant's AWW at $1,591.76.

On appeal to the Commonwealth Court, employer argued that the WCAB's AWW calculation is unsupported by the evidence. The Court agreed, stating that the determination of a claimant's hourly wage is a question of fact to be answered by the WCJ. Based on the evidence before him, the WCJ was free to set claimant's hourly wage rate at $27.54 so long as the record supported the finding.

Employer maintained that the record did not support the WCJ's conclusion. Rather, employer contended that the record demonstrated that claimant earned $18.00/hour for local jobs with no guarantee that claimant would continue to work non-local jobs.. The Court disagreed. The WCJ's hourly wage determination was based on claimant's testimony. The documentary evidence also showed that, except for travel time, claimant earned mostly the non-local rate. Hence, use of the non-local rate more accurately measures claimant's recent pre-injury earnings.

Accordingly, the WCJ did not err. The order of the WCAB was reversed and the WCJ's order was reinstated.

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Thomas Lennon, Dec'd, c/o Lara Goldman Lennon v. Workers' Compensation Appeal board (Epps Aviation, Inc.), No. 757 C.D. 2007, Filed October 10, 2007.

(Average Weekly Wage—Board and lodging received from an employer are wages to be included in calculating the employee's AWW regardless of when the employer pays these amounts to the employee.)

Decedent, a pilot, transported freight for employer and, typically, flew out of Philadelphia International Airport. He occasionally was required to stay overnight in hotels and dine out while working. Decedent would submit expense reports for these expenditures to employer, and employer would reimburse decedent based on those reports. Decedent was killed in a plane crash while on a work assignment.

Claimant then filed a Fatal Claim Petition. Employer and

claimant disagreed as to whether decedent's reimbursed hotel and restaurant expenses should be included in his AWW.

Employer maintained that the expenses were not to be included in the calculation of the AWW because employer never furnished decedent with housing in lieu of pay and did not advance decedent any funds for him to use for board and lodging; but rather, employer reimbursed decedent after the fact for his hotel and meal expenses.

The Workers' Compensation Judge agreed with employer, reasoning that employer did not *advance* decedent the money to pay for board and lodging but, instead, *reimbursed* decedent for those expenses after the fact. Reimbursed expenses are not to be considered earnings for purposes of calculating a claimant's AWW. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Claimant sought review by the Commonwealth Court, arguing that the WCJ erred in excluding the reimbursed board and lodging expenses from decedent's AWW based on *when* employer paid those expenses. The Court agreed.

Under the clear language of §309(e) of the Act, board and lodging received from an employer are wages to be included in calculating the employee's AWW. Section 309(e) of the Act is devoid of any language suggesting, as asserted by employer, that whether to include amounts received for board and lodging depends on *when* the employer pays these amounts to the employee.

Moreover, it is irrelevant that employer characterized its payments to decedent as mere reimbursement for "out of pocket expenses." These "out of pocket expenses" were used for work-related board and lodging and, therefore, under §309(d) of the Act, must be included in decedent's AWW.

The decision of the WCAB was vacated insofar as it calculated decedent's AWW without including his work-related board and lodging expenses. The matter was remanded to the WCJ to recalculate the AWW to include all work-related board and lodging expenses.

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City of Philadelphia v. Workers' Compensation Appeal Board (Sherlock), No. 881 C.D. 2007, Filed October 10, 2007.

(Penalty—Payment of "Injured on Duty" benefits to claimant does not relieve employer of liability for workers' compensation benefits and penalties will be assessed for employer's unilateral refusal to pay workers' compensation benefits based on payment of IOD benefits.)

On September 10, 1997, claimant sustained a work-related injury. On March 25, 1998, he filed a claim petition seeking benefits. Employer did not answer the claim petition or appear at the hearing. Benefits were thus awarded. Employer did not appeal the Workers' Compensation Judge's order, but did not pay any benefits or attorney's fees pursuant to the order.

On November 28, 1998, claimant filed a Penalty Petition, alleging employer violated the Act by unilaterally refusing to pay the benefits and fees ordered by the WCJ. Employer responded, arguing that it had constructively complied with the WCJ's order because it had paid claimant Injured on Duty (IOD) benefits pursuant to an agreement made in claimant's separate civil service action. The WCJ agreed with employer and denied claimant's petition.

The Workers' Compensation Appeal Board reversed, concluding that the resolution of the civil service appeal was irrelevant to the issue of whether employer had violated the Act and it was undisputed that employer failed to render any payments under the WCJ's order in clear violation of the Act. The WCAB thus remanded the case to the WCJ for additional findings concerning penalties, litigation expenses and attorney's fees.

On remand, the WCJ concluded employer violated the Act and assessed a 50% penalty. The WCAB affirmed.

Employer petitioned the Commonwealth Court for review, arguing that it had fully satisfied its obligation to pay workers' compensation benefits to claimant under the Act by paying the IOD benefits. The Court disagreed, noting that employer had engaged in impermissible "self-help." Rather than following the procedures set forth in the Act, employer decided that it would credit itself for the IOD benefits paid against the workers' compensation benefits due. The Act does not give employers the right of self-help. Employer could have ensured its entitlement to a credit had it appeared at the initial hearing before the WCJ and asserted that entitlement. However, employer did not appear, did not pay the benefits and fees awarded, and acted under its own regulations, essentially ignoring the workers' compensation proceedings.

Penalties were appropriately awarded. The decision of the WCAB was affirmed.

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Richard Ryndycz v. Workers' Compensation Appeal Board (White Engineering), No. 318 C.D. 2007, Filed October 18, 2007.

(Burden of Proof—A claim petition will be treated as a termination petition where no documentation has been filed with the Bureau, but claimant's medical expenses have been paid and claimant has been given modified duty work by employer.)

Claimant filed claim and penalty petitions alleging that he suffered a work-related back injury on June 18, 2001. Employer denied both petitions. After receiving evidence from both parties, the

Workers' Compensation Judge McManus accepted the claimant's evidence as more credible and convincing and granted claimant's petitions.

In his decision, the WCJ noted that employer did not issue a Notice of Compensation Payable nor a Notice of Compensation Denial, but did move claimant to light duty and paid his medical bills. As a result, the WCJ expressed the view that "accordingly, the underlying action is a termination case not an original Claim Petition."

Employer appealed to the Workers' Compensation Appeal Board and to the Commonwealth Court, both of which affirmed.

Within thirty days of WCJ McManus' decision, however, employer had requested utilization review of the treatment provided by Dr. Warner instead of paying his charges. Dr. Cavello, acting for the URO, determined that the treatment at issue was reasonable through December 2, 2002, but not thereafter.

Before WCJ Desimone, claimant testified that Dr. Warner's treatment relieves his pain and stiffness. Additionally, Dr. Warner testified that his treatment should continue indefinitely, and that claimant cannot perform even sedentary duty work. In response, Dr. Cavello testified that he tried three times to contact Dr. Warner by telephone, but he did not return the calls. Dr. Cavello further noted that his review of the records did not show any clinical gains in the claimant's condition after December 2, 2002.

WCJ Desimone found Dr. Cavello to be credible, and found that Dr. Warner's treatment after December 2, 2002 was neither reasonable nor necessary.

Claimant appealed. The WCAB vacated WCJ Desimone's decision to address WCJ McManus' decision and to determine what effect, if any, it had on the litigation relative to the URO Determination.

On remand, WCJ Desimone concluded that WCJ McManus had found that services were provided by Dr. Warner for which his charges were $7,747 and that employer was liable for payment. WCJ Desimone also noted that WCJ McManus did not refer to the dates of service by Dr. Warner and that WCJ McManus did not order payment of any specific amount. WCJ Desimone then concluded that employer's utilization review request was filed in the context of claimant's claim petition and that, therefore, employer could file its utilization review within thirty days of WCJ McManus' decision. The WCAB affirmed.

Claimant again sought review by the Commonwealth Court, arguing that employer utilization review request was not timely. The Court agreed, noting that WCJ Desimone was bound by WCJ McManus' ruling that the underlying action was a termination case, not a claim petition. Therefore, employer was not able to challenge all of Dr. Warner's treatment, but was limited to challenging only the bills submitted no more than thirty days prior to the filing of the utilization review request. The case was again remanded for a determination of the total of the bills submitted by Dr. Warner during the relevant thirty-day window.

Judge Leavitt filed a dissenting opinion noting the Court's legal gymnastics and her disagreement with the majority's finding that WCJ McManus' transformation of the claim and penalty petitions into a termination petition was valid.

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Gary Kelly v. Workers' Compensation Appeal Board (US Airways Group, Inc.), No. 2199 C.D. 2006, Filed October 26, 2007.

(Credit—Employer is not entitled to credit for furlough benefits received when claimant is expected to return to work.)

Claimant sustained a work-related injury on September 20, 2004. Thereafter, he filed a claim petition seeking partial disability benefits from September 20, 2004 and total disability benefits thereafter. On that same date, employer furloughed claimant, but indicated that he would possibly be recalled to work. Under the terms of the collective bargaining agreement, claimant began receiving a furlough allowance. Claimant was subsequently recalled to work on a part-time basis.

Because employer originally denied that claimant was disabled as a result of his work injury, the claim petition was assigned to a Workers' Compensation Judge. Employer agreed that claimant was entitled to partial disability benefits from September 20, 2004 through November 16, 2004, but argued that it was entitled to a credit against the benefits claimant received from November 8, 2004 through November 16, 2004 because he received "furlough benefits" which constituted "severance benefits" within the meaning of §204(a) of the Act.

After a hearing, the WCJ found that the furlough allowance was a severance benefit and granted employer a credit. The Workers' Compensation Appeal Board affirmed.

Claimant argued to the Commonwealth Court that the furlough benefit was not a severance benefit because an employee only receives "severance" benefits when he is severed or permanently separated from employment. Here, the furlough allowance claimant received provided for a non-permanent separation from employment.

The Court agreed, stating that "a *furlough* from employment is unlike a *severance* from employment in that it is considered to be much different than an end, i.e., a severing of employment…[W]hen an employee is furloughed, the relationship is maintained but held in abeyance due to an employer's lack of work or financial resources. The employee retains the prospect of resuming his previous obligations with the employer (although

sometimes to different degrees) at a future date, and, much like claimant, seniority is unaffected. Just as claimant's furlough did not sever his relationship with employer, his furlough allowance was not paid as compensation for a separation from his employment."

The order of the WCAB was reversed.

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Seven Stars Farm, Inc. v. Workers' Compensation Appeal Board (Griffiths), NO. 990 C.D. 2007, filed November 8, 2007.

(Medical Bills—Where medical bills are paid without being submitted on the proper HCFA or Department of Labor form, employer may not refuse to pay future bills submitted by the same provider for the same service on the basis that provider failed to submit the appropriate forms and reports.)

On August 21, 2000, claimant suffered a catastrophic work injury that left him a quadriplegic. On February 18, 2003, he filed a penalty petition because employer refused to pay for his home health aide services provided to him three hours per day, five days per week.

At the hearing before the Workers' Compensation Judge, claimant's home health aide testified that she had provided personal care for claimant since his injury. She kept track of her hours on time sheets and turned those over to employer.

Employer's bookkeeper testified that she forwarded claimant's medical expenses, including the time sheets, to the carrier every 30-45 days. The carrier did not, however, pay for any home health aide services after September 21, 2002.

The adjuster testified that he did not pay the home health aide's bills because there were not "clean bills," i.e., they were not on a Department of Labor and Industry form accompanied by the proper Medicare form, they did not disclose the dates of services and no payroll records were provided in support of the bills. The adjuster admitted that the home health aide's bills were not paid for approximately 1 1/2 years, although one of her bills was paid to show good faith even though it was not submitted on the proper form.

The WCJ granted claimant's petition and awarded penalties, finding that the carrier had all of the information necessary to pay for the home health aide's services except that the bills were not provided on the proper forms. This was apparent given the fact that the carrier paid one of the bills in question. If it was possible to pay one bill, it was then possible for the carrier to pay all of the bills.

The Workers' Compensation Appeal Board affirmed.

Employer argued before the Commonwealth Court that the WCJ erred in assessing penalties because the carrier did not violate the Act by denying reimbursement of payments to the home health care aide. It is the claimant's burden to supply the carrier with bills on the proper forms. Employer argued that, absent the forms, there was no obligation to pay.

The Court disagreed. Employer's "technical" defense failed because the carrier actually made a payment for the services, even though that bill had not been submitted on the proper form. Therefore, forms were not necessary for an actual payment to be made.

The order of the WCAB was affirmed.

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Supreme Court Case Reviews

Borough of Heidelberg and Inservco Insurance Services, Inc. v. Workers' Compensation Appeal Board, No. 42 WAP 2006, Decided August 20, 2007.

(Volunteer—Employee Status—64-year old volunteer who had not worked for 32 years and was receiving Social Security old age benefits, is still be considered an "employee" under §601 of the Act and is entitled to an irrebuttable presumption of wages equal to the Statewide average weekly wage.)

Claimant sustained an injury while volunteering as an emergency medical technician (EMT) for employer. Employer issued a Notice of Compensation Payable covering claimant's medical treatment only.

Claimant filed a Claim Petition, seeking wage loss benefits. Claimant was 64 years old, had not had a paying job in the past 32 years, took care of her mother who had Alzheimer's disease, and received Social Security benefits since age 62. Claimant testified that she did not consider herself withdrawn from the workforce.

Employer stipulated that claimant was an employee under §601 of the Act, but denied her eligibility for benefits in light of her unemployed status at the time of injury.

The Workers' Compensation Judge granted claimant's petition, and concluded claimant had not voluntarily withdrawn from the workforce and was entitled to wage loss benefits from the date of injury. The Workers' Compensation Appeal Board affirmed, noting that substantial evidence existed to support the WCJ's finding that claimant did not intend to withdraw from the workforce.

The Commonwealth Court affirmed, noting that by providing in §601(b) that "there is an irrebuttable presumption that his wages shall be at least equal to the Statewide average weekly wage," the Legislature, as a matter of public policy, intended to compensate volunteer emergency workers without regard to their actual earnings. The Commonwealth Court found that employer's argument that claimant had withdrawn from the workforce was irrelevant be-

cause her status as a volunteer entitled her to an irrebuttable presumption of wages.

On appeal to the Supreme Court, employer again argued that, because claimant did not suffer a loss of earning power, she is not entitled to wage loss benefits. The Court was not persuaded.

Section 601 of the Act provides a compensation formula triggered when an "employee" suffers a compensable injury. Section 601 (a)(2) provides the word "employee" shall include "all members of volunteer ambulance corps of the various municipalities who shall be and are hereby declared to be employes of such municipality...who shall be entitled to receive compensation in the case of injuries received while actually engaged as ambulance corpsmen…" Section 601(b) continues that when such an employee suffers a compensable injury, the irrebuttable presumption regarding their wages arises.

Here, claimant was injured while actively engaged as an ambulance corpsman and is entitled to the irrebuttable presumption that her wages are at least equal to the Statewide average weekly wage. The Legislature, taking into account the nature of the position, enacted §601 to ensure that those partaking in this laudable and selfless profession are entitled, at a minimum, to the presumed Statewide average weekly wage. The Legislature intended to compensate these individual for injuries suffered in the course of their duties, irrespective of their time of injury status.

The order of the Commonwealth Court was affirmed.

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(Continued from page 1)

horseplay activity is so far removed from the course of employment that the claimant is deemed to have abandoned it. The claim should have been denied on the basis that, by participating in the "joust," Tom engaged in self-destructive behavior. The argument may not have been successful, but it would have gone further than trying to put the blame on Joe.

Does the fact that Tom was presumably intoxicated at the time of his injury prevent him from successfully pursuing his claim? Section 301(a) of the Act provides that "…no compensation shall be paid if the injury or death would not have occurred but for the employee's intoxication." If the Judge finds that it was Joe's intoxication which caused the injury, the defense is not applicable to Tom's claim. Of course, if the employer can show that, but for Tom's intoxication he would never have engaged in the joust, the employer may have a viable defense.

Additionally, the injury occurred at a party. Does that fact relieve the employer of responsibility? If the warehouse party was not sanctioned or sponsored by the employer, the employer has an argument that the claimant was not acting in furtherance of the employer's affairs and that, therefore, the claimant should not be covered by the provisions of the Act. Will that argument win the day? Not necessarily. The injury still occurred on the employer's premises, and the employer apparently made no effort to put a stop to the party or the joust.

Finally, what effect, if any, does the fact that the employer fired Tom after the incident have on the employer's defense to the claim? Under Pennsylvania law, unless governed by a contract, employment is "at-will," meaning that either party may terminate the relationship without cause. Here, the employer had cause to terminate the employment of both Tom and Joe. If Tom was fired, however, and Joe was not, the employer may be deemed to have fired Tom in retaliation for filing a workers' compensation claim.

With the holidays upon us, parties are going to take place. Encourage employees to act responsibly. If an injury does occur, think before you react. Make your new year and that of your employees a happy one.

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