TR&C

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, Editor

CLAIMS FOR MILEAGE REIMBURSEMENT

A troubling issue for most claims adjusters and other workers' compensation administrators involves claims for mileage reimbursement. It is not uncommon for an adjuster to receive claims for hundreds or even thousands of miles at a time. With IRS mileage reimbursement rates currently at 55.5¢ per mile, these claims can be very costly. More importantly, however, they are an administrative nightmare.

Authority for the reimbursement of travel expenses has traditionally been gleaned from §306(f.1)(1) of the Pennsylvania Workers' Compensation Act (hereinafter the "Act"). While §306(f.1)(1) once contained language requiring the reimbursement of travel expenses, this language was removed in 1939. As such, the current provision does not specifically state that travel expenses shall be reimbursed.[1]

Following the removal of specific language relative to reimbursement, the courts have held that the cost of transportation to and from the physician's office or other place of treatment is not included within the phrase "reasonable surgical and medical services," and, hence, the employer was not liable for such expenses. Accordingly, an employer was not liable for traveling expenses incurred in visiting a doctor in the absence of a special agreement, regardless of whether the employer furnished the medical services or not.[2]

Nonetheless, a series of subsequent cases[3] eroded the legislature's intent, which was arguably established by removing the language requiring reimbursement of travel expenses from the Act. These cases have interpreted the act to require reimbursement where travel expenses are a reasonable and necessary incident to authorized medical services. The term "reasonable" has been interpreted to include long distance travel expenses if necessary to obtain medical care. Most notably, the court in Harbison-Walker Refractories v. W.C.A.B. (Huntsman), 99 Pa. Commonwealth 382, 513 A.2d 566 (1986) outlined five factors relevant in determining the reasonableness, and thus reimburseability, of travel expenses:

1. Whether the employer was aware of the long distance treatments;
2. Whether the employer had contested underlying liability, i.e., whether the condition being treated was work related;
3. Whether the claimant was specifically referred to the distant location for treatment;
4. Whether the treatment was available at a closer location; and
5. Whether the long distance treatment comprised an integral part of the ongoing medical treatment.

The court in Helen Mining Co. v. Workers' Compensation Appeal Bd. (Tantlinger), 151 Pa. Commw. 242, 616 A.2d 759 (1992) then outlined the general rule for determining reasonability of reimbursing travel expenses for the treatment of a work-related injury. If treatment is available locally and claimant seeks prescribed treatment locally, any travel expenses incurred going back and forth to the physician or treatment center are not reimbursable; however, if necessary treatment is not avail-

(Continued on page 15)

Inside This Issue...

COMMONWEALTH COURT CASE REVIEWS

Brian Soja v. Workers' Compensation Appeal Board (Hillis-Carnes Engineering Associates), No. 455 C.D. 2011, Filed November 7, 2011.

(Reinstatement - Burden of Proof - Where claimant seeks reinstatement of benefits and alleges a loss of wages due to ongoing pain, it is claimant's burden to prove that his pain has persisted through the pendency of the reinstatement proceeding.)

In 2005, claimant sustained a work-related injury to his lower back when he pulled a heavy piece of equipment from a ditch. The injury was acknowledged as an aggravation of claimant's underlying degenerative disc disease. Claimant returned to work soon thereafter.

In April of 2006, claimant went to work for another employer. In October of 2006, while bending over to tie his shoe at home, he experienced intense pain to his back. He filed a reinstatement petition seeking temporary total disability as of November 1, 2006.

In support of his petition, claimant testified on 3 occasions that he suffered from ongoing back and leg pain and that, as a result, he was disabled. Claimant also presented testimony from 3 of his friends who confirmed that he had difficulty standing or walking. Finally, he presented testimony from 2 physicians, both of whom testified that claimant was disabled and that his symptoms were related to the 2005 work injury.

In response, employer presented testimony from an IME physician as well as a surveillance videotape of claimant, which was taken on the same day claimant testified before the Workers' Compensation Judge for the third and final time. The video showed claimant walking to and from the WCJ hearing limping and leaning on a cane. After the hearing, claimant is seen driving his pickup truck to a house where he picked up a passenger. The two traveled over 30 miles to an auto salvage yard, where claimant then climbed out of the truck without difficulty and did not use a cane to walk in the salvage yard. Claimant laid on the ground to remove a part from the bottom of a van, placing a hand jack under the van. After his friend changed the tire, claimant used a wrench to tighten the lug nuts on the tire. As he did so, he bent and twisted his body. He then jumped into the back of his truck, throwing parts into it.

The WCJ accepted the opinions of claimant's medical experts that claimant's ongoing pain symptoms were due to the work injury, but rejected their opinions that claimant was unable to work. Claimant's own actions, as shown on the April 24, 2008 surveillance video, contradicted their opinions. Thus, the WCJ granted claimant's petition and awarded benefits through April 23, 2008, and suspended them as of April 24, 2008.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that the video was not substantial evidence and was insufficient to suspend benefits. The WCAB agreed that a video alone cannot support an employer's suspension petition; however, it was claimant's burden here to establish ongoing disability after the date of reinstatement.

Claimant then petitioned for the Commonwealth Court's review, arguing that the WCAB did not apply the correct burden of proof because, once he established a disability, the burden shifted to employer to prove that his continued loss of earnings was not caused by the work injury. The Court did not agree.

Employer did not have a burden of proof in this reinstatement petition, unlike a reinstatement where the claimant's light duty job has ended. Where the employer has the burden of proving that a claimant is entitled to partial, not total, disability, a video alone is not sufficient evidence.

Here, the factual issue in the reinstatement petition was whether claimant's loss of wages was caused by ongoing pain. It was claimant's burden to prove that his pain persisted, not dissipated, through the pendency of the reinstatement proceeding. The nature of the reinstatement and the issue raised therein determines the burden of proof. Here, claimant's evidence failed to prove a continuation of disabling pain throughout the pendency of the reinstatement petition.

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

****

Donald Argyle v. Workers' Compensation Appeal Board (John J. Kane McKeesport Regional Center and UPMC Work Partners Claims Management), No. 43 C. D. 2011, Filed September 2, 2011, Reported November 10, 2011.

(Medical Testimony - Competency - Where the foundation for the medical opinion is contrary to established facts of record, the medical opinion is valueless and not competent.)

Employer acknowledged claimant's 1993 work injury as a "sprain right wrist." As a result, claimant began receiving temporary total disability benefits. He underwent multiple medical procedures, including a fusion of his wrist on January 12, 1995. Claimant returned to light duty work for a period of time, but ceased working in 1998, complaining that he was unable to perform his assigned job duties.

On November 2, 1998, claimant filed a reinstatement petition, alleging that his injury resolved into a specific loss of his right

forearm and/or hand. At the same time, employer filed a suspension petition alleging claimant refused to return to light duty work. By decision issued February 18, 2000, Workers' Compensation Judge Torrey denied both petitions. No appeal was filed.

On December 10, 2008, claimant filed a modification petition, again alleging that his work injury resolved into a specific loss of his right forearm and/or hand. The petition was assigned to WCJ Tobin.

In support of his petition, claimant testified that he makes no use of his right hand except in emergency situations. On cross-examination, he agreed that, basically, there had been no change in his condition since he testified before WCJ Torrey in support of his 1998 reinstatement petition.

Claimant also presented testimony of William Swartz, M.D., who opined that claimant lost the use of his upper extremity for all practical intents and purposes. On cross-examination, Dr. Swartz agreed that claimant's condition had remained essentially the same since the 1998 reinstatement petition.

Finally, claimant presented IME reports from Dr. S. Thomas, who examined claimant in February 2006 and December 2006. The reports reflected Dr. Thomas' opinion that claimant lost the use of his right wrist for all practical intents and purposes.

In opposition to the petition, employer presented Dr. S. Thomas' 2007 addendum IME report, in which he clarified his opinion that claimant's loss of use of his wrist dated back to the 1995 wrist fusion. Employer argued that the doctor's opinion was incompetent because it contradicted the finding of fact established in WCJ Torrey's February 18, 2000 decision that claimant had not sustained a specific loss.

Employer also presented testimony from Dr. Adelsheimer, who testified that claimant's physical condition did not change between his September 2000 and March 2009 examinations, and that his findings were consistent with those made by Dr. V. Thomas during resolution of claimant's 1998 reinstatement petition.

WCJ Tobin denied claimant's reinstatement petition. She credited Dr. Adelsheimer's testimony over that of Dr. Swartz and further determined that claimant's petition must be denied under the principles of *res judicata* and collateral estoppel, stating: "It was already adjudicated that the claimant did not have a specific loss of use in prior litigation. It is found as fact that there has not been a material change in the claimant's condition. Thus, the claimant is essentially attempting to relitigate an issue which has already been decided."

The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant argued that the WCJ erred in finding that he failed to satisfy his burden of establishing a specific loss. The Court disagreed.

The standard for determining whether a work-related injury has resolved into a specific loss is whether the claimant has *permanently lost the use of his injured body part for all practical intents and purposes.* In order to establish such a loss, the claimant must present medical evidence.

Here, the testimony of claimant's medical expert, Dr. Swartz, was rejected in favor of the testimony of employer's expert, Dr. Adelsheimer. Such a determination is not subject to appellate review.

Even if WCJ Tobin had rejected Dr. Adelsheimer's opinions, claimant's medical evidence was still insufficient to satisfy claimant's burden of proof. The opinions of claimant's medical experts were not competent. Where the foundation for the medical evidence is contrary to established facts in the record, or is based on assumptions not in the record, the medical opinion is valueless and not competent. Here, the opinions of Dr. Swartz and Dr. S. Thomas are directly contrary to a fact established in WCJ Torrey's February 18, 2000 decision, i.e., that claimant did not suffer the complete loss of use, for all practical intents and purposes, of his right forearm and/or hand as of November 2, 1998.

In order to maintain his modification petition, claimant had the burden to prove, through the presentation of medical evidence, that his condition changed after WCJ Torrey's February 18, 2000 decision. Claimant's case had to begin with the facts as found by WCJ Torrey and work forward in time to show the required change. Because the evidence showed no material change since the prior adjudication, claimant failed to meet his burden of proof.

The decision of the WCAB was, therefore, affirmed.

****

Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Excalibur Insurance Management Service), No. 376 C.D. 2011, Filed November 17, 2011.

(Supersedeas Fund Reimbursement - Heart & Lung Benefits - Where self-insured employer is required to pay Heart & Lung benefits in addition to workers' compensation benefits, 2/3 of the amount paid represents workers' compensation benefits such that, if all other provisions of §443(a) are met, reimbursement may be had from the Supersedeas Fund.)

Claimant, a police officer, suffered a work injury on January 10, 2006. On July 25, 2007, employer filed a termination petition, which included a request for supersedeas. Supersedeas was denied on September 11, 2007. On May 27, 2009, the Workers' Compensation Judge granted the termination peti-

tion. No appeal was filed and, on August 20, 2009, employer filed a Petition for Supersedeas Fund Reimbursement. On May 24, 2010, the WCJ granted the petition. The Bureau appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

On appeal to the Commonwealth Court, the Bureau argued that the WCJ and the WCAB did not have subject matter jurisdiction because claimant's compensation benefits were paid pursuant to the Heart and Lung Act.

The Court was not persuaded, stating that neither the WCAB nor the WCJ attempted to adjudicate a Heart and Lung issue. Further, employer did not request Supersedeas Fund reimbursement for Heart and Lung benefits paid. Instead, it requested reimbursement of alleged workers' compensation benefits paid to claimant.

Under the Heart and Lung Act, certain types of employees receive their full rate of salary if temporarily disabled due to a work injury. Any workers' compensation benefits the employer receives while collecting Heart and Lung benefits are to be turned over to the employer. If that is not done, the employer is to deduct that amount from the employee's salary which is paid under the provisions of the Heart and Lung Act.

Here, the issue before the WCJ and the WCAB was whether employer was entitled to reimbursement for its portion of the payments made as workers' compensation benefits. Accordingly, the WCJ and the WCAB had subject matter jurisdiction.

The Bureau next argued that, because the proof of payment attached to the Petition for Supersedeas Fund Reimbursement clearly shows that the payments at issue were entirely Heart and Lung benefits and not workers' compensation benefits, reimbursement may not be had. Again, the Court disagreed. It was undisputed that employer is self-insured. The Court held that, unless there is evidence to the contrary, as a matter of law, when an employer is self-insured for workers' compensation purposes and is required to pay Heart and Lung payments in addition to workers' compensation benefits. 2/3 of the amount paid automatically represents workers' compensation benefits.

Finally, the Bureau argued that employer did not meet the criteria of §443(a) of the Act because employer was required to pay Heart and Lung benefits during the time period at issue regardless of whether supersedeas was denied. The Court rejected that argument as well, noting that supersedeas was requested and denied and it was subsequently determined that workers' compensation benefits were not payable. As such, the provisions of §443(a) were met.

The order of the WCAB was affirmed.

****

Joseph Bucceri v. Workers' Compensation Appeal Board (Freightcar America Corporation), No. 2021 C.D. 2010, Filed November 22, 2011.

(Average Weekly Wage - Supplemental unemployment benefits payable under a collective bargaining agreement which accrue as a result of the claimant's services for the employer are to be included in the calculation of the claimant's AWW.)

Claimant's disability benefits were calculated under §309 of the Act at $287.42 per week based upon an average weekly wage (AWW) of $319.36. Claimant filed penalty and review petitions alleging that his AWW had been improperly calculated and that employer had failed to pay the correct amount of benefits.

During the proceedings before the Workers' Compensation Judge, it was determined that the primary issue was whether supplemental unemployment benefits (SUB) and unemployment compensation (UC) benefits received by claimant during a period of layoff prior to his work-related injury should be included in the calculation of his AWW. The evidence reflected that, during his 29 years of employment, claimant was laid off numerous times during which he received SUB payments and UC benefits. The SUB payments were paid by employer as a benefit negotiated through a collective bargaining agreement. The SUB payments were paid to employees based upon seniority and were taxable for federal income tax purposes, but not taxable for Social Security purposes.

The WCJ found that excluding the SUB payments and UC benefits resulted in an artificially low AWW. As a result, the WCJ included both and recalculated the AWW to be $562.21. The WCJ also concluded that the Act had not been violated. Thus, the review petition was granted but the penalty petition was denied.

Employer appealed to the Workers' Compensation Appeal Board, which reversed the WCJ's decision. The WCAB noted that, in Reifsnyder v. WCAB (Dana Corp.), 584 Pa. 341, 883 A.2d 537 (2005), the Supreme Court determined that UC benefits are to be excluded from the calculation of AWW. The WCAB also noted that because SUB payments are intended to be paid when an employee is no longer working, they are likewise to be excluded under §309 of the Act.

The Commonwealth Court agreed with the WCAB that it is well settled UC benefits received by a claimant are not included in the calculation of his or her AWW under §309 of the Act. However, SUB payments made under a CBA are "in the nature of wages" if such payments are an entitlement accrued as a result of the claimant's services for the employer. Likewise, sickness and accident benefits received as compensation for days missed from work are to

be included in the calculation of a claimant's AWW. In addition, vacation and holiday pay are considered to be wages under §309(d) of the Act because they are entitlements earned through and exchanged for services performed for the employer.

As such, the order of the WCAB was affirmed with respect to the exclusion of the UC benefits claimant received from the calculation of his AWW, but was reversed with respect to the SUB payments.

****

J.D. Landscaping v. Workers' Compensation Appeal Board (Heffernan), No. 1866 C.D. 2010, Filed December 2, 2011.

(Utilization Review - A UR determination, which concerns only reasonableness and necessity of treatment, is irrelevant in determining whether decedent's death was causally related to decedent's work-related injury.)

Decedent suffered a work-related low back injury for which he came under the care of George L. Rodriguez, M.D.

On June 4, 2007, a utilization reviewer determined that all treatment provided by Dr. George Rodriguez, including prescriptions for Sonata, Fentanyl, Oxycodone, Fentora, Docusate and Lyrica was neither reasonable nor necessary from February 15, 2007 and into the future.

Decedent died on June 18, 2007 of multiple drug intoxication and a fatal claim petition was filed. At the hearing before the Workers' Compensation Judge, employer presented testimony from Dr. George Rodriguez who testified that he and his sister, Dr. Daisy Rodriguez, are engaged in practice together. He last saw decedent on June 14, 2007, at which time he prescribed medications for decedent's work injury, but which the pharmacy refused to fill. He could not state whether or not the pharmacy's refusal was based on the UR determination. His sister then saw the decedent on June 16, 2007.

Dr. Daisy Rodriguez also testified on employer's behalf. She stated that, on June 16, 2007, she briefly examined decedent and determined "that this was purely just an issue of replacing prescriptions." She did not intend to alter her brother's treatment in any way.

The WCJ granted the fatal claim petition, finding decedent's death was causally related to an accidental overdose of pain medications which were prescribed by Dr. Daisy Rodriguez for decedent's work related injury. Employer appealed to the Workers' Compensation Appeal Board, arguing that the WCJ erred in granting the fatal claim petition because decedent died as a result of an accidental overdose of medications deemed by the June 4, 2007 UR determination to be neither reasonable nor necessary. Finding that the UR determination applied only to treatment by Dr. George Rodriguez, the WCAB affirmed the WCJ's decision.

Employer then argued to the Commonwealth Court that the June 4, 2007 UR determination should apply to Dr. Daisy Rodriguez' treatment in this instance because she wrote prescriptions identical to those issued by her brother 2 days earlier. Employer further argued that a favorable UR determination obviates an employer's obligation to pay not only for the subject medical treatment, but also for any resultant effects of said treatment. The Court was not persuaded.

The Court noted that it was undisputed that decedent's death resulted from an accidental overdose of pain medications that Dr. Daisy Rodriguez prescribed to treat decedent's work injury. The fact that the treatment may have been found to be unreasonable and unnecessary is irrelevant. The UR process does not and cannot address the causal relationship between the treatment at issue and the decedent's death. The issue of causation is separate and distinct from the reasonableness and necessity of medical treatment. The UR determination, which concerns only reasonableness and necessity, is irrelevant in determining whether decedent's death was causally related to decedent's work injury. Hence, the WCJ did not err in granting the fatal claim petition.

The decision of the WCAB was affirmed.

****

Hakif Namani v. Workers' Compensation Appeal Board (A. Duie Pyle), No. 552 C.D. 2011, Filed December 6, 2011.

(Res Judicata - Where claimant fails to file a petition to amend NCP to include additional injuries during pendency of employer's termination petition, claimant's subsequent review petition is barred by the doctrine of res judicata.)

Claimant suffered a work injury on December 23, 2004. Employer acknowledged the injury through the issuance of a Notice of Compensation Payable (NCP) as "left arm and left hand contusions."

By order dated November 29, 2006, employer's termination petition was granted, terminating claimant's benefits effective June 21, 2005.

On November 11, 2008, claimant filed a reinstatement petition alleging a worsening of his condition. Shortly thereafter, he filed a claim petition alleging that he suffered additional injuries on December 23, 2004, in the form of cervical spine injuries and complex regional pain syndrome. Claimant alleged that he did not know of these diagnoses until February 6, 2008. Finally, on February 13, 2009, claimant filed a review petition seeking to correct the description of his December 23, 2004 work injury to in-

clude various cervical spine injuries as well as complex regional pain syndrome.

By decision circulated on April 27, 2010, the Workers' Compensation Judge denied and dismissed claimant's petitions. The WCJ found that claimant's medical expert's testimony was legally insufficient inasmuch as he was unaware of the WCJ's prior decision terminating claimant's benefits. While a finding of full recovery is not a total bar to further relief under proper circumstances, it is a relevant factor to be addressed by the medical experts. Further, the claimant's medical expert based his opinions regarding claimant's cervical spine injury on a January 2005 EMG study which was available to claimant's medical expert during the proceedings on the termination petition. As such, the alleged cervical spine injury should have been addressed at that time. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Claimant sought review by the Commonwealth Court. The Court noted that, pursuant to §413(a) of the Act, a WCJ may reinstate a claimant's benefits upon proof that the claimant's disability has increased or recurred. In order to prevail on a reinstatement petition after benefits have been terminated, a claimant must establish that his disability has increased or recurred since the prior decision and that his physical condition has changed in some manner. The claimant must prove a change in his physical condition by precise and credible evidence that the change occurred after the date of total physical recovery. Where, however, the medical expert's opinion is based on an assumption that is contrary to the established facts of record, the opinion is incompetent.

Here, claimant's medical expert's opinions on causation were legally insufficient because the doctor was unaware of the decision terminating claimant's benefits. Nowhere in the expert's testimony did he state that claimant's condition had changed since the termination of benefits. Accordingly, his opinions on causation were contrary to established facts of record and based on inaccuracies.

Moreover, the doctrine of res judicata applies and precludes the amendment of the NCP to include additional cervical injuries. The results of the January 2005 EMG were available to claimant's expert prior to the filing of employer's termination petition. Therefore, the issue of whether claimant suffered a cervical injury could have been litigated during the termination proceedings. Claimant did not choose to file a petition at that time to modify the description of his injury and may not seek to correct that oversight at a later date. Claimant's petitions were barred by technical res judicata because he should have litigated the issue of his cervical injuries during the termination proceedings.

The WCAB's order was affirmed.

****

Nicole Lee v. Unemployment Compensation Board of Review, No. 2085 C.D. 2010, Filed December 21, 2011.

(Resignation - When a claimant agrees to execute a resignation/ release in order to settle a workers' compensation claim, the claimant terminates his or her employment voluntarily without necessitous and compelling cause and is, thus, ineligible for unemployment compensation benefits.)

After claimant returned to modified duty work, claimant and employer's insurance carrier agreed to settle her workers' compensation claim for $12,500. In consideration for the settlement agreement, claimant also agreed to execute a separate resignation/ release and resign her position. The resignation/release contained a provision stating that claimant would waive any and all claims against employer, including, but not limited to, any claim under the Pennsylvania Unemployment Law.

The local Unemployment Compensation Service Center determined claimant was nevertheless eligible for UC benefits under section 402(b) of the UC Law because she was forced to resign as a part of the agreement.

Employer appealed and a hearing was held before a UC referee. At the hearing, employer presented testimony to establish that, had claimant not resigned, her modified duty position would have continued. The referee affirmed the UC Service Center's determination.

On appeal, the Unemployment Compensation Board of Review reversed, finding that claimant voluntarily terminated her employment in order to resolve her workers' compensation claim. The UCBR concluded that claimant did not establish necessitous and compelling cause for voluntarily terminating her employment and, accordingly, she was found ineligible for benefits.

Claimant then sought review by the Commonwealth Court. Claimant argued that the resignation/release was invalid because it contained a waiver of her right to unemployment compensation benefits in violation of §701 of the UC Law. The Court noted that §701 plainly states that: "No agreement by an employe to waive, release or commute his rights to compensation, or any other rights under this act, shall be valid." However, in order for that section to be relevant, a claimant must first establish that he or she has a right to benefits under the UC Law.

Here, the UCBR determined that claimant was ineligible for benefits pursuant to §402(b) of the UC Law because she chose to

terminate her employment in order to settle her claim. The claimant's own testimony was that she resigned because her attorney advised her that the workers' compensation settlement would not occur if she did not resign. Hence, the Court found that the evidence supported the UCBR's conclusion that claimant terminated her employment voluntarily without necessitous and compelling cause.

As such, the decision of the UCBR ,which found claimant to be ineligible for UC benefits, was affirmed.

****

School District of Philadelphia v. Workers' Compensation Appeal Board (Davis), No. 166 C.D. 2011, Filed December 22, 2011.

(Pension Offset - Where employer establishes a prima facie case that it is entitled to a pension offset under §204(a), the burden then shifts to claimant to offer contrary evidence.)

Claimant sustained a work-related injury on September 9, 2003 and retired on February 7, 2004. Thereafter, employer filed a review offset petition, asserting that it was entitled to an offset of workers' compensation benefits reflecting claimant's receipt of petition benefits.

At hearings before the Workers' Compensation Judge, employer submitted the deposition of Janet Cranna, a consulting actuary who provides actuarial services to the Pennsylvania School Employees Retirement System (PSERS), which administers the pension fund for employees such as claimant. The WCJ determined Ms. Cranna's testimony to be credible, in part. He did not find her testimony credible or persuasive as to employer's contribution to the pension plan due to her responses to questions put to her on cross-examination. In sum, the WCJ deemed the testimony to be insufficient to carry employer's burden because her testimony did not quantify the value or amount of the return on investment that may be retained in the Fund after non-vesting employees are paid their contributions plus the 4% statutory rate of return upon their termination (Retained Investment Returns), if any. The WCJ determined that consideration of the Retained Investment Returns potentially reduces the calculation of an employer's contribution to the Fund. Thus, the WCJ denied employer's offset petition. The Workers' Compensation Appeal Board affirmed.

On appeal before the Commonwealth Court, employer raised a single issue: Whether the WCAB erred in affirming the WCJ's decision because the WCJ accepted as credible the testimony of Ms. Cranna that employer funded some portion of claimant's pension benefits, thus entitling employer to some offset of compensation benefits. The Court agreed.

The Court noted that the WCJ overlooked the fact that a primary goal of §204(a) of the Act, and the actuarial methods approved by the Supreme Court, are designed not only to ensure that a claimant does not fund his own workers' compensation benefits, but also that an employer should not have to pay a claimant, in essence, "double" compensation for his work injury.

The testimony here of Ms. Cranna was quite similar to the expert testimony presented in the case of Dept. of Public Welfare v. WCAB (Harvey), 605 Pa. 636, 993 A.2d 270 (2010). The Supreme Court in Harvey approved the formula for determining the employer's share of the claimant's pension, which was the same formula utilized here. Thus, the WCJ erred in finding that employer failed to satisfy its burden to prove its contribution to claimant's pension given Ms. Cranna's testimony that returns above 4% remain in the Fund.

Moreover, the Supreme Court in Harvey noted that claimants, at least as a practical matter, may bear some burden of going forward with contrary evidence after the party bearing the initial burden puts forward a credible prima facie case. Here, employer established a prima facie case through the credited testimony of Ms. Cranna. If claimant desired to challenge the prima facie case, claimant was required to offer her own evidence demonstrating the materiality and relevance of her assertion that retention in the Fund of investment returns of non-vesting employees impacted the extent to which employer contributed to her pension.

The order of the WCAB was reversed.

****

Rose White v. Workers' Compensation Appeal Board (City of Pittsburgh), No. 673 C.D. 2011, Filed December 29, 2011.

(Social Security Offset—The "old age" offset under §204(a) of the Act does not violate the Pennsylvania Constitution on the basis of age.)

Claimant sustained a work injury on November 2, 1996 and began receiving workers' compensation benefits. On August 27, 2007, employer filed a Notice of Workers' Compensation Benefits Offset, notifying claimant that it would begin taking an offset due to her receipt of Social Security old age benefits. Claimant filed a petition requesting review of the offset and alleging employer was not entitled to an offset of 50% of the entire amount of her Social Security benefits because a portion of the amount she receives is a widow benefit attributable to her husband's earnings.

The Workers' Compensation Judge denied claimant's petition, noting that there is nothing in the Act or in the Board's regulations that provides for reducing an offset by the amount of widow benefits. Moreover, there was nothing in the record indicating that claim-

ant's benefits increased when her husband died. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

Claimant then sought review by the Commonwealth Court, arguing that §204(a) of the Act violates the equal protection requirement of the Pennsylvania Constitution. She contended that it imposes an unequal burden on the indemnity benefits of a claimant solely on the basis of age because only old age Social Security benefits may be offset. Further, she argued that §204(a) distinguishes between claimants over the age of 62 or 65, depending on when the injured worker becomes eligible for old age benefits, and claimants under the age of 62 or 65 who are not entitled to old age benefits.

The Court was not persuaded, noting that §204(a) more accurately distinguishes between those workers who were receiving Social Security old age benefits at the time of the compensable injury and those who were not. The statute distinguishes between those who begin receiving Social Security old age benefits before experiencing a work injury and those who begin receiving old age benefits after the injury. The distinction is not based on age, but upon the timing of work-related injuries in relation to specified Social Security benefits. Because the offset is rationally related to the purpose of the workers' compensation law (i.e., wage loss replacement income), the "old age" offset does not violate the Pennsylvania Constitution on the basis of age.

The Court agreed with claimant that the offset under §204(a) applies only to the portion of benefits available to a claimant under §402(a) of the Social Security Act, or old age benefits and does not apply to widow's benefits. Here, however, the evidence showed that employer took the offset on the claimant's benefits, not the benefits paid under her husband's Social Security number. As such, the asserted offset was appropriate.

The order of the WCAB was affirmed.

****

Commonwealth of Pennsylvania, Department of Transportation and CompServices, Inc. v. Workers' Compensation Appeal Board (Clippinger), No. 1142 C.D. 2011, Filed December 30, 2011.

(Orthopedic Appliance—Where a viable alternative to a new in-home pool exists, the installation of a new in-home pool and addition to home to house the pool will not be found to be reasonable and necessary.)

Claimant suffered a low back injury in 1992 which, following 3 surgeries, resulted in permanent impairment from the waist down, which included partial paralysis, weakness, loss of sensation, difficulty with balance and partial bowel and bladder dysfunction. Because claimant's neurological deficits interfered with his ability to perform land-based exercise, claimant's physician prescribed aquatic therapy, one hour per day, 5 days per week. Claimant's physician opined that it would be more beneficial and safer for claimant to perform the aquatic therapy at home because it would be risky for him to walk around a gym on slippery floors. There was also the possibility that if claimant used a public facility, someone could bump into him or he might have to move quickly, resulting in a fall and possibly severe injury.

In May 2008, claimant filed a penalty petition alleging employer failed to pay medical bills for physical therapy and prescriptions. He also filed a review petition seeking payment for the installation of an aquatic therapy pool at his home and an addition to his home to house the pool.

In September 2008, employer filed a UR request, seeing review of the reasonableness and necessity of a home fitness pool and the construction of an additional room to house it. In the UR Determination, Dr. Spellman found the pool and the construction of an addition to be reasonable and necessary *if alternative means were not available.* Employer then filed a petition for review of the UR Determination.

The Workers' Compensation Judge granted claimant's review and penalty petitions and denied employer's petition for review of the UR Determination, finding that the installation of a physical therapy pool in claimant's home, along with the necessary renovations to install the pool, was reasonable and necessary. The Workers' Compensation Appeal Board affirmed.

Employer sought review by the Commonwealth Court, which noted that §306(f.1)(1)(ii) of the Act requires an employer to provide payment for, inter alia, "orthopedic appliances." The Court noted that, in the case of Griffiths v. WCAB (Seven Stars Farm), 596 Pa. 317, 943 A.2d 242 (2008), the Supreme Court held that a wheelchair accessible van may constitute an "orthopedic appliance" under §306(f.1)(1)(ii). The Griffiths Court cautioned, however, that the extent of an employer's obligation will depend upon the specific facts of the case. Because the claimant in Griffiths was a quadriplegic as a result of his work injury and did not have access to a vehicle that was adequate to transport him and his wheelchair, the van was an "indispensable device necessary to accommodate his catastrophic injury." The Supreme Court observed that, in order to avoid "windfalls," other circumstances deserved consideration. For example, an orthopedic device need not be brand new. Additionally, the claimant's circumstances prior to his injury, including his pre-injury vehicles, deserved focus.

Here, the claimant was not wheelchair bound. In fact, he was sufficiently mobile to work full-time in a sedentary duty position

and to travel to a physical therapy facility to receive aquatic therapy. Here, unlike in Griffiths where the van was indispensable, a viable alternative to a new in-home pool existed, i.e., aquatic therapy treatment at a nearby facility. As such, the circumstances of this case did not support the extraordinary relief of installation of a new in-home pool as well as a new addition to claimant's home to house the pool.

The order of the WCJ directly employer to pay for the "orthopedic appliance" was vacated and remanded for further findings relative to "indispensable devices" and "windfalls." The imposition of unreasonable contest counsel fees and penalties with respect to that issue was reversed.

Because all of the testifying physicians agreed that claimant's prescriptions expenses were related to the work injury, the penalty for failure to pay those prescription expenses in a timely manner was affirmed. Additionally, the penalties, unreasonable contest counsel fees and litigation costs awarded in connection with that issue were upheld.

****

Judith Caputo v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania), No. 191 C.D. 2010, Filed January 5, 2012.

(Old Age Social Security Offset—The offset provision in §204(a) for Social Security retirement benefits does not violate equal protection.)

Claimant sustained a work-related injury in 2002 while employed at the Hollidaysburg Veterans Home. She was awarded total disability benefits in the amount of $452.85 per week. In August 2006, claimant began receiving Social Security retirement benefits in the amount of $862 per month. One month later, she began receiving a pension benefit of $405.47 per month from the State Employees Retirement System (SERS).

On December 5, 2006, employer filed a Notice of Workers' Compensation Benefit Offset advising claimant that it was taking a credit equal to 50% of her SS benefit, or $99.31 per week, and $74.56 per week for her SERS pension benefit, or a combined offset of $173.87 per week.

Claimant filed an Offset Review Petition alleging that employer was not entitled to an offset credit of $173.87. The Workers' Compensation Judge found that the pension offset had been slightly miscalculated such that employer was entitled to a pension offset of only $67.66 per week. The WCJ also found that employer was entitled to deduct $99.31 per week from claimant's wage loss benefit, which equaled 50% of her Social Security retirement benefit.

Claimant appealed to the Workers' Compensation Appeal Board arguing, *inter alia*, that the offset for Social Security retirement benefits under §204(a) of the Act is unconstitutional. The WCAB affirmed the WCJ's decision without addressing the constitutional issue.

Claimant then sought review by the Commonwealth Court, again arguing that §204(a) violates the Equal Protection Clause of Article I, Section 1 of the Pennsylvania Constitution which provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

The Court noted that, in the case of Kramer v. WCAB (Rite Aid Corp.), 584 Pa. 309, 883 A.2d 518 (2005), the Supreme Court summarized the basic principles governing equal protection, stating: "The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications provided that those classifications are reasonable rather than arbitrary and bear a relationship to the object of the legislation."

Section 204(a) permits an employer or its insurer to take a credit against workers' compensation benefits for other types of benefits payable to the employee, including SS retirement benefits. The legislature has made the policy decision that, because the employer helps to fund Social Security, it should receive a credit towards workers' compensation disability.

The first step in an equal protection inquiry is to determine if the statute creates a classification for the unequal distribution of benefits or imposition of burdens. Section 204(a) actually creates two classes: (1) individuals to whom the offset does not apply because they are already receiving SS retirement benefits at the time they sustain a compensable injury and (2) individuals to whom the offset does apply because they sustained a compensable injury before they began collecting SS retirement benefits.

Because §204(a) creates a legislative classification, there must be a rationale basis for that classification if the statute is to be constitutional. In other words, does the challenged statute seek to promote any legitimate state interest or public value and, if so, is the classification reasonably related to accomplishing that articulated state interest.

In Kramer, the Supreme Court identified one legitimate governmental interest underlying all of the offsets in §204(a): "Reasonable workers' compensation cost containment for employers, and the concomitant competition benefits such cost containment offers for Pennsylvania businesses." Moreover, a second legitimate governmental interest of this particular offset is to encour-

age individuals collecting SS retirement benefits to remain in or reenter the workforce. Permitting an employer to offset workers' compensation disability benefits is reasonably related to reducing the employer's workers' compensation costs. Thus, the offset does not violate equal protection and is constitutional.

Claimant argued that the offset is not reasonable because workers' compensation benefits and SS retirement benefits serve different purposes. The programs compute benefits on different bases and neither are solely wage replacement schemes. The two benefits are not duplicative and one should not offset the other.

The Court rejected this argument noting that employment relationship is the basis for providing both workers' compensation benefits and SS retirement benefits. The latter benefit is traceable to the SS tax contribution every employer makes toward its employees' social security retirement. The General Assembly recognized that the employer's contribution is only partial by enacting a 50% offset rather than a dollar for dollar offset. The 50% offset is not a perfect fit because a claimant may have a long work history with multiple employers. In that case, the last employer would benefit even though it was not the employer that made all of the contributions to the SS trust fund on behalf of the claimant. Legislative classifications are, however, not required to be perfect to pass constitutional muster.

The order of the WCAB was affirmed.

****

Susan Burks v. Workers' Compensation Appeal Board (City of Pittsburgh), No. 980 C.D. 2011, Filed January 13, 2012.

(Suspension—Voluntary Withdrawal from Workforce—Where claimant suffers from a work injury and non-work-related medical conditions and the work injury does not prevent claimant from working, then claimant's receipt of Social Security Disability benefits can only mean that claimant is unattached to the workforce for reasons unrelated to the work injury and benefits should be suspended.)

Claimant had Legg-Parthes disease as a child which resulted in her left leg being 2 1/2 inches shorter than the right. In addition, she developed severe hip arthritis at an early age and underwent multiple surgeries, including a hip fusion and a hip replacement.

On April 12, 1984, claimant sustained a work-related right knee sprain. She then underwent multiple right knee surgeries, including a right knee replacement that shortened her right femur to equalize her leg lengths. She subsequently was involved in 2 motor vehicle accidents injuring her thoracic and lumbar spine, as well as her left leg.

On April 3, 2008, claimant was examined by Dr. Tucker, who opined that, with regard to the work injury, claimant was capable of full-time, light duty work. Dr. Tucker also believed that, taking into consideration all of claimant's conditions, she would be capable of full time, sedentary duty work. Based on Dr. Tucker's report, employer issued a Notice of Ability to Return to Work.

On August 27, 2008, employer filed a petition to suspend claimant's benefits alleging that claimant is physically capable of performing work but has voluntarily removed herself from the workforce.

After considering the testimony of Dr. Tucker, claimant and her treating physician, the Workers' Compensation Judge accepted claimant's testimony that she has been receiving Social Security Disability benefits since 1984 and that she has not looked for work since that time. The WCJ rejected the testimony of claimant's doctor and accepted Dr. Tucker's opinions as credible. The WCJ concluded, based on claimant's admission that she has not sought work since 1984, that claimant has voluntarily withdrawn from the workforce and the suspension petition was granted.

Claimant appealed and the Workers' Compensation Appeal Board affirmed.

Claimant then petitioned for review by the Commonwealth Court, arguing that the WCJ and WCAB erred in relying solely upon her admission that she has not sought work since 1984 to conclude that she voluntarily removed herself from the workforce.

The Court agreed noting that, a claimant has no duty to seek work until the employer meets its initial burden to show a voluntary retirement. Until the employer proves a voluntary retirement, the employer has a duty to make job referrals to the claimant.

Nevertheless, considering all of the circumstance of this case, the Court found that claimant did voluntarily withdraw from the workforce. This is so because claimant sought a disability pension based on her inability to engage in substantial gainful activity when the WCJ found based on Dr. Tucker's opinion that, taking into account solely the work injury, the claimant was capable of performing some form of work. Her disability must then be related to non-work-related conditions.

The receipt of Social Security Disability benefits can be evidence that a claimant's work injury forced him or her out of the job market. Indeed, if a WCJ finds that a claimant suffers from a work injury and no other medical condition, the receipt of Social Security Disability benefits can only mean that claimant's work injury has forced him or her out of the labor market. On the other hand where as here, the WCJ finds that the claimant suffers from a work injury and non-work-related

medical conditions, and the work injury does not prevent the claimant from working, then the receipt of Social Security Disability benefits can mean only that the claimant is unattached to the workforce for reasons unrelated to the work injury.

The order of the WCAB was affirmed.

****

City of Pittsburgh and UPMC Benefit Management Services, Inc. v. Workers' Compensation Appeal Board (Marinack), No. 100 C.D. 2011, Filed February 7, 2012.

(Suspension—Voluntary Withdrawal from Labor Market—Claimant's application for disability pension is irrelevant; it is the burden of employer, not claimant, to prove that claimant intended to withdraw from workforce.)

Claimant, a firefighter, sustained a work-related injury on May 21, 2004. A Notice of Compensation Payable was issued and total disability benefits were paid.

On September 16, 2008, claimant's treating physician advised employer that claimant was capable of full-time, light duty work. An LIBC-757, Notice of Ability to Return to Work form, was sent to claimant. On September 28, 2008, employer filed a suspension petition, not because claimant was capable of working, but because claimant had removed himself from the workforce. Claimant denied the allegations of the petition.

In support of its petition, employer submitted the deposition of Dr. Phillips, a board certified orthopedic surgeon who treated claimant for his work injury since 2004. He could not recall any time over the years that claimant had asked for assistance in working with the Office of Vocational Rehabilitation (OVR) to return to work.

Employer also presented testimony from Dr. Swan, who is board certified in physical medicine and rehabilitation and who began treating claimant in 2005. She testified that claimant never asked her to help him return to work or to identify what job restrictions should be placed on him.

Claimant testified that he considers himself disabled, but denied that he has withdrawn from the workforce. He stated he applied for a disability pension following his injury, but his application was denied because he was fired in April 2005. (Claimant was discharged because he did not inform employer that he was earning wages in construction while collecting disability compensation and benefits under the Heart & Lung Act. Claimant's firing rendered him ineligible for a pension, disability or retirement.)

Claimant testified that, after receiving the LIBC-757, he interviewed for 2 jobs, one with his aunt and the other with a high school friend. He stated that he searched the want ads for jobs, but because he was uncertain as to his physical capabilities, it would not be fair to a potential employer to accept a job. Finally, he stated that he planned to go to OVR again to seek employment training.

The Workers' Compensation Judge credited the testimony of Dr. Phillips and Dr. Swan and found claimant capable of modified duty work at all relevant times. The WCJ also found claimant never sought help from his physicians to enable him to return to work. The WCJ rejected claimant's testimony that he had not withdrawn from the workforce and had essentially retired. Further, he found claimant's efforts to find work to be questionable and lacking good faith. Consequently, claimant's benefits were suspended.

Claimant appealed and the Workers' Compensation Appeal Board reversed noting that claimant had been fired and rendered ineligible for any pension. Consequently, the WCJ erred in finding claimant had retired and, therefore, had withdrawn from the workforce.

Employer then petitioned for review by the Commonwealth Court, arguing that the facts show that claimant intended to remove himself from the workforce because he has done nothing meaningful to look for work.

In its review of the applicable case law, the Court noted that there is no presumption that a claimant collecting a *disability* pension has withdrawn from the workforce. In that case, it is the employer's burden to prove that the claimant intends not to return to work. The employer is relieved of that burden where "*it is clear from the totality of the circumstances that such efforts would be unavailing*" because the claimant has withdrawn from the workforce.

In contrast, where a claimant accepts a *retirement* pension for which he is eligible due to age and years of service, the presumption is that the claimant has withdrawn from the workforce. In that case, the retired claimant may defend against a suspension by producing evidence that he his looking for a job within his capabilities or that the work injury has rendered him totally disabled.

Here, claimant applied for a disability pension and would be on one, except for his own misconduct. The Court agreed with employer that a claimant need not be receiving a pension before he can be considered retired. It is enough if he applied for a pension. That means that the "totality of circumstances" test applies.

Employer pointed to the claimant's lack of effort to secure employment as proof of claimant's intention to withdraw from the workforce. The Court, however, was not persuaded, stating only after the employer proves the claimant's intent to withdraw from the workforce does the claimant's failure to look for work become

relevant. A claimant's lack of effort to look for a job does not prove an intention to withdraw from the workforce.

The order of the WCAB reversing the WCJ's order suspending benefits was affirmed.

****

Diana Dillinger v. Workers' Compensation Appeal Board (Port Authority of Allegheny County), No. 770 C.D. 2011, Filed March 1, 2012.

(Pre-existing Condition - A claimant with a pre-existing injury, whether mental or physical, is entitle to benefits as long he or she shows that the injury has been aggravated by a working condition to the point of disability; it is irrelevant whether or not the pre-existing condition is related to the work injury.)

On November 15, 2003, claimant, a bus driver, sustained a left shoulder strain when a passenger assaulted her from behind. Claimant was released to modified duty work on November 19, 2003. Supplemental Agreements were subsequently executed, modifying claimant's benefits. On February 24, 2004, claimant signed a final receipt as well as another Supplemental Agreement suspending her benefits.

Claimant filed a review petition on March 22, 2007 alleging that she suffered PTSD due to her original injury and that, although employer paid for her treatment for that condition, it failed to accept PTSD as work-related. Claimant also filed a reinstatement petition alleging that her left shoulder injury had recurred. On November 13, 2007, claimant filed a claim petition alleging an aggravation of her PTSD due to her continued interaction with the public in her role as a bus driver.

At hearings before the Workers' Compensation Judge, claimant testified that continued bus driving affects her PTSD, stating that: 1) aggressive passengers are triggers; 2) because bus runs are based on seniority, she has no control over the route she drives; and 3) the individual who attacked her in 2003 was released from prison. Claimant also submitted a report from Dr. Hughes verifying that the 2003 work incident caused her PTSD. Finally, claimant offered a report from Dr. Hoffman advising that claimant was being treated for severe PTSD and recommending that claimant be transferred from her position. Dr. Hoffman explained that claimant's PTSD is frequently exacerbated while driving a bus route.

The WCJ found claimant's PTSD to be a condition that should have been listed on the NCP inasmuch as it existed at the time the NCP was issued. Thus, the review petition was granted. The claim petition was dismissed as moot.

Employer appealed to the Workers' Compensation Appeal Board, and claimant cross-appealed from the WCJ's decision. The WCAB concluded that the review petition was untimely under Fitzgibbons v. WCAB (City of Philadelphia), 999 A.2d 659 (Pa.Cmwlth. 2010). The WCAB also denied claimant's cross-appeal, concluding claimant's PTSD was not a consequential injury, but existed from the date of the original injury and was not perfected as an acknowledged injury within 3 years of the last payment of compensation.

Claimant then sought review by the Commonwealth Court arguing that the WCAB erred in relying upon Fitzgibbons for its conclusion that her review petition was untimely. The Court disagreed. In Fitzgibbons, the Court held that, while WCJs may amend NCPs during proceedings involving any pending petition, the WCJ may only do so if the petition is filed within 3 years of the most recent payment of compensation as set forth in §413 of the Act. Here, claimant's review petition was filed beyond the 3-year limitation period.

Claimant argued that, because she filed her reinstatement petition within 500 weeks from the suspension of her benefits, she may rely upon that petition to correct the NCP. Again, the Court disagreed. Section 413 of the Act clearly provides that, where compensation has been suspended, payments *under the agreement or award* may be resumed during the 500-week period for partial disability. Here, the agreement recognized only a shoulder injury. Thus, payments for her alleged PTSD are not encompassed by the provisions of §413.

Finally, claimant argued that the WCAB erred in denying her cross-appeal based on the WCJ's determination that her PTSD existed from the date of her original injury and, thus, her claim petition was moot. The Court agreed. A claimant with a pre-existing injury, whether mental or physical, is entitled to benefits as long as the injury has been aggravated by a working condition to the point of disability. Here, claimant alleged that her ongoing employment as a bus driver continually aggravated her pre-existing PTSD. As such, the claim petition should not have been dismissed. Claimant may be entitled to benefits based on an aggravation of her PTSD. It does not matter if the PTSD was work-related or not.

The WCJ failed to make necessary findings as to whether the PTSD, a psychic injury, was caused by abnormal working conditions. Hence, the case was remanded for additional findings of fact.

****

John Leca v. Workers' Compensation Appeal Board (Philadelphia School District), No. 679 C.D. 2011, Filed March 7, 2012.

(Utilization Review - Where the medical care at issue is repetitive and ongoing in nature, an expert reviewing that treatment

need not necessarily review the records for the treatment at issue in order to render an opinion as to the reasonableness and necessity of that treatment.)

In April 2004, claimant sustained a low back injury while breaking up a fight in the course of his duties as a school police officer. In March 2008, employer filed a utilization review request to determine the reasonableness and necessity of claimant's chiropractic care by Dr. Kent beginning February 14, 2008 and ongoing.

The UR reviewer found the treatment to be reasonable and necessary. Employer then filed a UR Petition which was assigned to a Workers' Compensation Judge for hearings. Before the WCJ, employer submitted the October 17, 2007 IME report of Dr. Mannherz, who diagnosed claimant with low back syndrome with extensive degenerative disc disease at L4-5 and lumbar spinal stenosis with bilateral lumbar radiculopathies. Dr. Mannherz recommended a lumbar fusion or disc replacement surgery and further determined that ongoing chiropractic care was not justified due to the lack of improvement in claimant's condition.

In addition, employer submitted the September 11, 2008 report of Dr. Genovese, who reviewed claimant's records of treatment from May 4, 2004 to October 17, 2007. Dr. Genovese concluded that no further passive modalities, chiropractic care or physical therapy was justified as of the end of 2007. She explained that because there was no objective evidence that such treatment was leading to an increase in claimant's function, continued treatment would not be reasonable.

In response, claimant submitted the report of the UR reviewer, Dr. Auslander, a chiropractor. Dr. Auslander determined that Dr. Kent's records reflected the failure of alternative approaches as well as evidence that the chiropractic care was preventing claimant's regression or increased reliance on medications.

The WCJ found the reports of Dr. Genovese and Dr. Mannherz credible and granted employer's petition. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant argued that the WCJ erred in relying upon employer's experts because neither reviewed records relative to the chiropractic care at issue, i.e., from February 14, 2008 and ongoing. Both of employer's experts reviewed records prior to that time frame.

The Court was not persuaded, noting that this is not akin to a situation in which a specific procedure, such as the implantation of a device, is at issue. Instead, the treatment at issue here, which began in 2004, was repetitive and ongoing in nature. Both of employer's experts addressed the specific type of chiropractic treatment under review and both credibly and persuasively opined that, after reviewing numerous records related to the ongoing chiropractic treatment, further treatment after October 17, 2007 could not be justified.

Claimant next argued that the WCJ erred in considering the opinions of Drs. Genovese and Mannherz because they are orthopedic surgeons and not chiropractors. Again, the Court was not persuaded noting that §306(f.1)(6)(i) of the Act which requires review by a provider licensed in the same profession, applies only to the initial review by an authorized URO. There is no corresponding requirement in §306(f.1)(6)(iv), which governs a challenge to the UR determination. A physician is competent to testify in specialized areas of medicine, even though the physician is neither a specialist or certified in those fields.

The decision of the WCAB was affirmed.

****

United Airlines v. Workers' Compensation Appeal Board (Gane), No. 2028 C.D. 2011, Filed April 23, 2012.

(Pension Offset - Under §204(a), an offset is given for pension benefits to the extent funded by employer; however, there is no requirement that said employer actually be liable for payment of the pension.)

Claimant sustained a work injury in 1997. When he retired on June 3, 2003, he began receiving pension benefits under employer's defined benefit, noncontributory pension plan. Employer filed a notice of offset indicating that claimant's workers' compensation benefits would be completely offset by his receipt of pension benefits.

In 2005, because the employer's Chapter 11 bankruptcy reorganization, the United States Federal Pension Benefit Guarantee Corporation (PBGC) terminated employer's pension plan and became trustee of the plan. PBGC reduced claimant's pension benefits from $2,418.75 to $1,934.89.

Claimant then filed a review petition claiming he was underpaid his workers' compensation benefits since November 2005 because employer was offsetting a greater percentage of the funds that it was entitled to offset. In support of his petition, claimant presented actuarial testimony to establish that employer only funded 32% of claimant's pension rather than the 100% it funded before it went into Chapter 11.

The Workers' Compensation Judge found that, prior to May 11, 2005, the pension plan was funded entirely by employer with no contributions from claimant. As such, the WCJ found that from June 3, 2003 to May 11, 2005, employer was entitled to a 100% offset. After May 11, 2005, employer did not prove, through employee or actuarial testimony, its contribution to the pension plan. Never-

theless, in no event would the WCJ find that employer was entitled to an offset inasmuch as, by declaring bankruptcy and by PBGC's takeover of the plan, employer no longer has a pension plan or future liability regarding claimant's pension. Accordingly, the WCJ granted claimant's petition and ordered payment of benefits plus interest.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

On appeal to the Commonwealth Court, employer argued that it should be entitled to take the offset because it fully funded the pension before PBGC took over the obligation for payment of the pension. The Court essentially agreed. Under §204(a), an offset is given for pension benefits to the extent funded by the employer. There is no requirement that employer be liable for payment of the pension. The key inquiry is the extent to which the employer funded an employee's pension, not who is liable for payment. To the extent an employer can establish that it funded a pension plan, it is entitled to an offset, regardless of whether the PBGC has taken over the plan and assumed liability for it.

Here, employer had the burden to establish the amount of the offset and its contribution per employee or by actuarial testimony. Because of the absence of any credible testimony regarding the extent to which employer funded claimant's pension, employer is not entitled to an offset.

The order of the WCAB was affirmed.

SUPREME COURT CASE REVIEWS

Giant Eagle, Inc. v. Workers' Compensation Appeal Board (Givner), No. 14 WAP 2010, Decided March 13, 2012.

(Forfeiture - In the §314 "forfeiture" setting, a WCJ has discretion to determine whether to suspend wage loss only or wage loss and medical benefits.)

Claimant suffered a work injury on June 4, 1998. A Notice of Compensation Payable was issued and benefits were paid.

On October 29, 2007, employer filed a Suspension Petition under §314(a) of the Act, alleging that claimant failed to appear for an IME. In pertinent part, §314(a) provides:

> "The refusal or neglect, without reasonable cause or excuse, of the employe to submit to such examination or expert interview ordered by the workers' compensation judge, either before or after an agreement or award, shall deprive him of **the right to compensation, under this article,** during the continuance of such refusal or neglect, **and the period of such neglect or refusal shall be deducted from the period during which compensation would otherwise be payable**." (emphasis added)

The Workers' Compensation Judge issued an order directing claimant to attend a physical examination on December 12, 2007. The order also provided that, should claimant fail to attend the IME without good cause, such failure could result in suspension of claimant's wage loss benefits.

Claimant failed to appear and employer filed another suspension petition. The WCJ suspended claimant's wage loss benefits effective December 12, 2007 until such time as claimant submitted to the examination.

Employer appealed to the Workers' Compensation Appeal Board contending that the WCJ erred in suspending only wage loss benefits and not medical benefits as well. The WCAB rejected employer's arguments, stating that medical expenses are not included as compensation when liability has been established. The WCAB affirmed the WCJ's order.

On further appeal, the Commonwealth Court stated that a WCJ could, in his or her discretion, suspend both medical and wage loss benefits as the case required; however, where a WCJ would suspend both wage loss and medical benefits, the WCJ must expressly state that medical benefits are suspended in addition to wage loss benefits.

The Supreme Court accepted review of the case solely to determine if "compensation" **must** include medical benefits as well as wage loss benefits under §314(a) of the Act.

The Court noted that the Act does not define "compensation" and one section will clearly evidence that the term only pertains to wage loss benefits while another will imply that the term encompasses medical benefits as well. The definition of "compensation" then is decided on a section-by-section basis.

The Court focused its review on the specific language found in §314(a). "This article" refers to Article III of the Act, addressing issues of "liability and compensation." However, the General Assembly provided that "the period of such neglect or refusal shall be deducted from the period during which compensation would otherwise be payable" implies wage loss benefits, not medical benefits. Medical benefits are payable as needed, whereas wage loss benefits may be time-limited.

The Court then looked to numerous other sections of Article

III for guidance and found that the term "compensation" appears to be used in §§308, 310, 316 and 320 only in a manner denoting wage loss benefits. Section 306, which addresses medical benefits, does not use the term "compensation" to describe an employer's liability with respect to medical care, but rather uses the word "payment." In contrast, §301 may fairly be interpreted as including medical benefits as "compensation." The Court previously interpreted "compensation" as used in §315, concerning the statute of repose affecting various claims, as including medical as well as wage loss benefits.

As such, the Court concluded that the General Assembly did not intend that "compensation" under §314(a) must always be restricted to wage loss benefits. In the proper circumstances, "compensation" under §314(a) may include medical benefits as well as wage loss benefits. The WCJ is given discretion to determine what is required to induce the claimant to attend an examination or interview. In some cases, a deprivation of wage loss benefits may be sufficient.

In sum, the Court held that the term "compensation" as used in §314(a) may, but need **not always,** include medical expenses. The decision of the Commonwealth Court was affirmed.

(Continued from page 1)

able locally, the claimant is entitled to be reimbursed for travel expenses as long as it is to a facility where others are, or would be referred, so that he is not prevented from receiving treatment he requires.

Subsequent cases further clarified that travel expenses may only be considered reimbursable if treatment was received outside of the local area. "Local" is determined by what the residents living in the same area as claimant consider "local" when treatment is not available in the immediate vicinity, i.e., if residents of the area routinely commute to where claimant is receiving treatment for similar medical care, then that commute is considered local.[4] Additionally, to be entitled to travel expenses, the claimant must show that the type and level of medical treatment sought was not locally available.[5]

Notwithstanding this analysis, the court has held that, as a matter of law, travel exceeding 100 miles one way for medical treatment is "long distance" travel, and not "local" travel, and thus reimbursable.

Accordingly, an adjuster faced with a claim for mileage reimbursement must make the following analysis:

1. Determine if the plaintiff is traveling more than 100 miles one way. If so, then the travel is reimbursable.[6]
2. Determine if the treatment is available locally (i.e. in claimant's home town). If it is, but the claimant is treating elsewhere, then advise the claimant of that fact and refuse reimbursement. Note: make certain the alternative local treatment is truly comparable;
3. If the treatment is available locally, and claimant is receiving that treatment locally (i.e., in his home town), then the travel is local and not reimbursable. Deny reimbursement, unless some special exigent circumstance exists, for example, a bed-ridden patient who needs assisted transport;
4. If claimant is receiving treatment outside of his home town, then determine if other people from claimant's home town routinely seek treatment at the location to which claimant is traveling. If they do, the travel is local. Deny reimbursement absent some exigent circumstance;
5. If the treatment is not available locally, and other people in claimant's home town do not normally travel to the location at which the treatment is being received, then the treatment is "long-distance". To determine if it is reimbursable you must consider whether it possesses the "indicia of reasonableness" as set forth in Harbison-Walker. If the travel is "reasonable", reimbursement of the expense is due.

Of course, from a practical standpoint, it can be difficult for claims adjusters to complete the analysis above. Except in obvious cases, the result will be that most travel expense claims will, and should be, denied.

---

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 531.

[2] *See* Goliat v. Butler Consolidated Coal Co., 155 Pa. Super. 254, 38 A.2d 727 (1944); Mosley v. Middle Pennsylvania Coal Co., 55 Pa. D. & C. 665 (1946).

[3] City of New Castle v. W.C.A.B. (DeCarbo), 65 Pa. Commonwealth 25, 441 A.2d 803 (1982); Bonitz Brothers. Inc. v. W.C.A.B. (Wymes), 81 Pa. Commonwealth 594, 474 A.2d 393 (1984); Roadway Express. Inc. v. W.C.A.B. (Ostir), 104 Pa. Commonwealth 7, 520 A.2d 1261 (1987).

[4] Capper v. Workers' Comp. Appeal Bd. (ABF Freight Sys.), 826 A.2d 46 (Pa. Commw. Ct. 2003).

[5] Berrian v. Workers' Comp. Appeal Bd. (Pa. State Police), 829 A.2d 724 (Pa. Commw. Ct. 2003).

[6] Holly v. Workers' Compensation Appeal Bd. (Lutheran Home), 735 A.2d 153 (Pa. Commw. Ct. 1999).

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

TR&C

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

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

The Bulletin is a semi-annual publication reviewing recent trends in Pennsylvania Workers' Compensation Law. All original materials Copyright 1993-1995 by Thomson, Rhodes & Cowie, P.C. The contents of this Publication may be reproduced, redistributed or quoted without further permission so long as proper credit is given to the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin.

The Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin is intended for the information of those involved in the workers' compensation system. The information contained herein is set forth with confidence, but is not intended to provide individualized legal advice in any specific context. Specific legal advice should be sought where such assistance is required.

Prior issues are available on our web site at http://www.trc-law.com or upon request. Please direct inquiries to Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, hwr@trc-law.com.