Pennsylvania Workers' Compensation Bulletin

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"Mental—Mental" Injuries Revisited

Under the Pennsylvania Workers' Compensation Act, a claimant may recover benefits for a psychiatric injury when the injury was caused by a psychic stimulus. Pennsylvania jurisprudence has limited an employee's recovery of benefits under this "mental-mental" theory to those instances in which the employee can prove that the injury resulted from an "abnormal working condition." While this has historically been a difficult burden for employees to meet, the recent decision of the Pennsylvania Supreme Court in Payes v. Workers' Compensation Appeal Board (Commonwealth of PA/State Police), 79 A.3d 543 (Pa. 2013) has adjusted the focus for this type of case.

In Payes, a Pennsylvania State Trooper accidentally struck and killed a mentally ill woman when she ran in front of his patrol car. The accident occurred on November 29, 2006 at 5:45AM. Trooper Payes immediately called for assistance and directed traffic, all the while performing CPR on the injured woman as she bled from the mouth. Despite his efforts, the woman was pronounced dead at the scene.

Trooper Payes was granted a leave of absence from work due to this incident, but returned full-time on January 2, 2007. After working for four days, the anxiety and stress associated with this event made Trooper Payes believe he could no longer satisfy his duties as a state trooper. Accordingly, he stopped working.

During his leave, Trooper Payes had sent a request for workers' compensation benefits to his employer, the Pennsylvania State Police. In response, a Notice of Workers' Compensation Denial was issued on December 8, 2006 stating that, although an injury occurred, Trooper Payes was not disabled. The employer did, however, agree to pay for Trooper Payes' medical expenses related to his exposure to the deceased woman's blood.

Following his brief return to work, Trooper Payes sent a second request for benefits, which was also denied on February 6, 2007. The second Notice of Workers' Compensation Denial stated that Trooper Payes had not been injured while working within the scope of his employment and explicitly denied any claim for post-traumatic stress; however, the employer continued to accept responsibility for medical treatment associated with his exposure to the deceased woman's blood.

On August 6, 2007, Trooper Payes filed a Claim Petition alleging that he suffered from post-traumatic stress disorder ("PTSD") due to the November 29, 2006 incident and that he was consequently entitled to total disability benefits, medical expenses and attorney's fees. Employer denied all claims and the case was heard before a Workers' Compensation Judge ("WCJ").

At the hearing, Trooper Payes presented testimony from a psychiatrist and a psychologist, both of whom diagnosed him with PTSD resulting from the November 29, 2006 accident. The employer called its own psychiatrist, who testified that Trooper Payes had recovered from PTSD and was suffering only from pre-existing mental conditions. The employer also called the commander of Trooper Payes' organization to testify as to the training he received, which included first aid at a car accident and stress management. The commander also testified that he had encouraged Trooper Payes to contact another patrolman who had gone through

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Commonwealth Court Case Reviews

Ace Wire Spring and Form Company v. Workers' Compensation Appeal Board (Walshesky), No. 1916 C.D., 2013, Filed June 10, 2014)

(Course and Scope of Employment—If employee is "actually engaged in furtherance of employer's business or affairs" when injured on employer's premises, the injury is determined to be sustained in the course of employment.)

On December 4, 2007, claimant sustained a serious head injury (which led to left-side paralysis) when he slipped and fell on ice in the parking lot after he arrived early at employer's premises to begin his 8:00 a.m. shift. He never was able to return to work for employer.

On May 8, 2009, claimant filed a claim petition. Employer denied the claim on the basis that claimant was not in the course and scope of his employment when his injury occurred. The Workers' Compensation Judge granted claimant's petition. Employer then appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision. Employer then appealed the WCAB's order to the Commonwealth Court, arguing that claimant was not in the course and scope of his employment or furthering employer's interests or affairs when he arrived at employer's facility at an unreasonable time prior to his scheduled work shift.

The WCJ made the following findings of fact: Claimant's regular work shift on December 4, 2007 was scheduled to start at 8:00 a.m.; he arrived early at work and parked in the employee parking lot next to employer's building between 6:30 a.m. and 7:30 a.m. to pick up his uniforms and then go to work; claimant subsequently fell in the parking lot and hit his head, which caused it to bleed; he was taken to the hospital by another employee; and employer was given due and timely notice of claimant's injury. Pursuant to these findings, the WCJ concluded that claimant had sustained his burden of proof on the claim petition that the injury arose in the course of his employment and was medically related to it, and he also was furthering his employer's business affairs when he was injured.

The WCAB affirmed the WCJ's grant of claimant's claim petition. In considering employer's appeal of the WCAB's decision, the Court stated that, since there was no question that claimant's injury occurred on employer's premises as he was headed into work, it had to determine whether claimant was on employer's premises at a reasonable time before his work day began.

The Court noted that there is no bright-line test in Pennsylvania for assessing how long before commencement of the scheduled work day is a reasonable time for an employee to be furthering the employer's interests. Pennsylvania case law appears to suggest that the exact *amount* of time is not as important as the claimant's *purpose or activities* during that time.

In upholding findings of fact supported by substantial evidence, examining the testimony in the light most favorable to the prevailing party, and liberally construing the Workers' Compensation Act, the Court first concluded that the evidence did not establish that claimant arrived at employer's premises on December 4, 2007 at an unreasonable amount of time before his shift began. In support thereof, the Court noted that claimant habitually left his home early for work in order to avoid traffic that otherwise could cause him to be late. Moreover, it was common for employer's employees to arrive at work early. Indeed, the record revealed that other employees were also on the premises early on the day of the injury. The Court then concluded that the WCAB did not err in affirming the WCJ's determination that claimant's December 4, 2007 injury occurred while he was in furtherance of employer's interests and, therefore, was in the course and scope of his employment. The evidence clearly revealed that claimant was retrieving uniforms from his car and then heading into the facility when the injury occurred. Uniforms were a benefit provided by the employer. For the foregoing reasons, the Court affirmed the WCAB's September 30, 2013 order.

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PPL v. Workers' Compensation Appeal Board (Kloss), 1634 C.D 2013, Filed June 11, 2014.

(Course of Employment—Premises—An employer's "premises" can encompass property that "could be considered an integral part of the employer's business; the critical factor is whether the employer caused the area to be used by employees in performance of their assigned tasks.)

Claimant, a steno clerk, worked in employer's North Building which was connected by a skywalk to a multi level parking garage known as the Linden Deck. The parking garage was not owned by employer, but employer maintained a parking program for its employees through a series of agreements with the owner of the garage. Employer did not require employees to use the Linden Deck but offered the spaces on a first come, first serve basis through a lottery. The owner of the Linden Deck was responsible for its maintenance. The Linden Deck was used exclusively by employer's employees and by employees of a nearby bank; it was not open to the public and employees could only gain access through the use of a magnetic swipe card.

On December 15, 2009, claimant parked her car on the second floor of the Linden Deck. She walked to work using the skywalk without incident. After her shift ended, claimant left the North Building and walked along the street to enter the garage. As she approached the elevator she tripped and fell to the ground, injuring her right arm and shoulder. Em-

ployer issued a Notice of Compensation Denial alleging that claimant did not sustain a work related injury within the course and scope of her employment. Claimant thereafter filed a Claim Petition. Claimant testified before the Workers' Compensation Judge that there were several different ways to exit her building and return to the parking garage. She acknowledged that there were other parking garages and metered street parking near her building. She also stated that employer deducted money from her paycheck for parking and that she obtained her spot through a lottery.

Employer offered the testimony of its director of corporate facilities who testified that employer provides a subsidy for parking to the employees who work in employer's general office complex. Employees are not required to park in either of the two garages where it has parking agreements, but these are the only facilities for which the subsidy is available. The employer also provided a subsidy program for public bus transportation. The director also testified that employer does not own or have any responsibilities with respect to the custody, control or maintenance of the Linden Deck; however, it reimbursed the owner of the garage for its proportionate share of the maintenance and operation costs. The director described the Linden Deck as the more desirable of the two subsidized parking garages due to its proximity to the building. He admitted that employer owned the skywalk that connects the Linden Deck to the North Building and that the skywalk is only accessible with an employer identification card.

The WCJ decided that claimant was within the course and scope of her employment at the time of her injury and granted claimant's Claim Petition. In so finding, the WCJ held that the area where claimant fell was integral to the employer's premises and was a reasonable means of access. The employer appealed and the Workers' Compensation Appeal Board affirmed, agreeing with the WCJ that the area where claimant was injured could be considered an integral part of employer's business.

On appeal to the Commonwealth Court, employer argued that the WCAB erred in concluding that claimant was injured in the scope and course of her employment because the fact that employer provided subsidized parking was immaterial to a determination of whether the garage constituted employer's premises. Employer argued that claimant failed to establish that her injuries resulted from a condition of the premises. The Court agreed that the parking subsidy was irrelevant to a determination of whether the Linden Deck constituted employer's premises, citing to its decision in Ortt v. WCAB (PPL Services Corp.), 874 A.2d 1264 (Pa.Cmwlth. 2005) as support for this conclusion. In Ortt, the employer leased parking spaces in a commercial parking lot owned and operated by a third party and gave employees the option of renting spaces at a reduced rate but did not require that the employees rent spaces in that lot. The owner of the lot remained responsible for maintaining the premises. The Court in Ortt concluded that the parking lot was not an integral part of the employer's business because the use of the lot was purely optional, the lot was owned and operated by a private company, and the claimant paid for at least part of her own parking space.

Similarly, here, employer did not require claimant to park in the Linden Deck. Instead, it was optional and subject to availability. Employer also offered subsidized parking in an additional lot as well as a subsidy for public bus transportation. The Court therefore concluded that the subsidies merely represented a benefit of employment and did not render the Linden Deck or the other parking garage a part of employer's premises. While the WCJ, the WCAB and the claimant all placed emphasis on the fact that the employer had constructed a skywalk connecting the Linden Deck to its building, it was not a determinative factor in the case because it was nothing more than an added convenience for employees who chose to rent a space in the Linden Deck. The Court also agreed that claimant failed to establish that her injuries resulted from a condition of the premises. Claimant was not required to prove that there was a *faulty* condition or negligent operations that caused her fall; but rather, the injuries must have been sustained as a result of some condition *of the employer's premises.* The Court noted that because it did not find that the garage was a part of employer's premises, claimant's injuries could not have been caused by a condition of the employer's premises. The Court therefore reversed the order of the WCAB.

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Cooney/Serrano v. Workers' Compensation Appeal Board (Patterson UTI, Inc.), No. 1681 C.D. 2013, Filed June 12, 2014.

(Common Law Marriage—A common law marriage that was invalid in another state when contracted was still invalid when the couple moved to Pennsylvania, even though it would have been valid in Pennsylvania when originally contracted.)

Claimant was the alleged common law spouse of the decedent, who sustained a traumatic brain injury as a result of a drilling accident while working for employer in 2011. Employer accepted liability for the injury through a Notice of Compensation Payable. Claimant filed a Fatal Claim Petition seeking death benefits as a widow under Section 307(3) of the Workers' Compensation Act. The Workers' Compensation Judge determined that claimant had failed to establish a valid common law marriage to the decedent. She appealed and the Workers' Compensation Appeal Board affirmed. Claimant appealed to the Commonwealth Court.

Claimant, a native of Wyoming, met the decedent in late 2002 or 2003 when he had moved to Wyoming to work in the oil and gas industry. She testified that within a few months,

they began living together, opened a joint checking account and bought vehicles together, although the vehicles were titled in claimant's name. Claimant and decedent had two children together: a son born in 2004 and a daughter born in 2008. Both children were born in Wyoming. Approximately one year prior to their son's birth, decedent purchased a ring and gave it to claimant stating "you're my wife." Claimant responded with "yes, I'm your wife." She continued to wear the ring following decedent's death. Claimant and decedent introduced themselves as husband and wife. In June 2009 decedent, claimant, and their two children moved to Pennsylvania where decedent found work with employer. Employer provided health insurance for all four family members and paid their health insurance premiums.

Claimant offered into evidence two automobile titles registered in her name; a bank application for a joint account between claimant and decedent; and a copy of the health insurance cards employer provided for claimant and the children as decedent's dependents. Employer offered decedent's 2009 W-4 on which decedent claimed single status, his 2009 1040A tax return in which he filed as head of household, and a residential lease agreement signed only by decedent. The WCJ denied claimant's petition, finding that although decedent had given a ring to claimant in Wyoming in 2003 and they exchanged words recognizing that they were husband and wife, Wyoming did not recognize common-law marriage, a fact which claimant did not dispute. The WCJ also noted that decedent and claimant did not move to Pennsylvania until 2009, well after Pennsylvania abolished common law marriage in 2005. The WCJ rejected claimant's contention that her marriage should be recognized because it took place before 2005 and would have been valid if it had taken place in Pennsylvania. The WCAB affirmed the decision of the WCJ finding that claimant's marriage lacked validity in the state where it was contracted and therefore it did not qualify as an "otherwise lawful marriage" for purposes of the grandfather clause in 23 Pa. Cons. Stat. § 1103.

On appeal to the Commonwealth Court, claimant argued that the WCAB erred by inquiring into whether Wyoming recognized common-law marriage because such an inquiry has no bearing on Pennsylvania's workers' compensation law concerning the validity of common law marriages. She also argued that the "otherwise lawful" language in the statute had been previously interpreted by the Commonwealth Court as applying to the individual capacity of the claimant and decedent to marry, and not as to whether the law of the forum state recognized common law marriage. In support, claimant cited to Costello v. WCAB (Kinsley Construction, Inc.), 916 A.2d 1242 (Pa.Cmwlth. 2007). In that case, the Costellos executed a confirmation of marriage document after the Court's decision in PNC Bank Corp. v. WCAB (Stamos), 831 A.2d 1269 (Pa.Cmwlth. 2003), which prospectively abolished common law marriage but before the statute abolishing common law marriage was enacted. The employer there argued that if the statute was interpreted as a blanket violation of common law marriages before January 1, 2005 then the phrase "otherwise lawful" would be mere surplusage. The Court pointed out that under employer's interpretation, all common law marriages became unlawful after the PNC decision and the entire Act would be surplusage. Thus, a more logical interpretation was that "otherwise lawful" referred to any of various reasons that previously might have rendered such a marriage unlawful.

Nevertheless, the Costello opinion did not address the validity of a common law marriage formed in a state that did not recognize common law marriages. Thus the Commonwealth Court here rejected claimant's argument that the phrase "otherwise lawful" would include recognition of out of state common law marriages regardless of where they occurred, so long as the couple met the elements of a common law marriage in Pennsylvania.

The Court also rejected claimant's argument that Pennsylvania does not require a claimant to establish that the common law marriage occurred in one of the few remaining states that recognize common law marriages. The Court distinguished its decision in Sullivan v. American Bridge Co., 176 A. 24 (Pa.Super. 1935), wherein the Court held that a couple who were residents of New Jersey and attempted to celebrate a common law marriage in Maryland and then resided in New Jersey for 18 years as husband and wife, had a valid common law marriage. In that case, the couple resided together as husband and wife in New Jersey and Pennsylvania at times when both states recognized common law marriage. In contrast, here, decedent and claimant neither entered into a common law marriage nor resided as husband and wife while in a state that recognized common law marriage. Wyoming did not recognize common law marriage when the couple attempted to celebrate their common law marriage and resided as husband and wife; Pennsylvania did not recognize common law marriage when the couple lived here as husband and wife. Accordingly, the Court held that claimant failed to prove the existence of an otherwise lawful common law marriage, contracted on before January 1, 2005 and the WCJ had therefore properly denied her fatal claim for widow's death benefits.

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Evans v. Workers' Compensation Appeal Board (Highway Equipment & Supply Company), No. 2252 C.D. 2013, Filed June 30, 2014.

(Subrogation—Subrogation rights are not self-executing, and a party asserting such rights must exercise reasonable diligence in protecting its interest.)

Claimant petitioned for review of the November 21, 2013 Order of the Workers' Compensation Appeal

Board, insofar as it affirmed a Workers' Compensation Judge's decision that $29,995.59 of work-related medical expenses were not payable directly to claimant. The Commonwealth Court affirmed.

On January 20, 2009, the WCJ granted claimant's petition for a work-related injury that he sustained on April 25, 2007. Pursuant to the Order, the WCJ awarded claimant ongoing workers' compensation benefits for total disability and medical expenses. On February 16, 2009, claimant's counsel informed employer of the amount owed to claimant pursuant to the January 20, 2009 Order. Claimant also submitted a subrogation lien from Highmark Blue Shield for payment of medical expenses in the amount of $29,995.59.

On February 27, 2009, claimant filed a Penalty Petition against employer for failure to pay the January 2009 award in a timely and accurate manner. One of the documents that claimant submitted at the hearing was an October 8, 2008 letter from Healthcare Recoveries, which provides recovery services to Highmark. The WCJ concluded that employer had violated the Workers' Compensation Act and granted claimant's Penalty Petition. On February 23, 2010, the WCJ ordered employer to pay the $29,995.59 in medical expenses to the healthcare provider, minus the twenty percent fee of claimant's attorney.

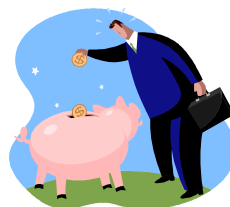
Claimant appealed the WCJ's order to the WCAB, arguing that the WCJ erred in not directing employer to pay the $29,995.59 in medical expenses plus interest directly to him. The WCAB remanded the case to the WCJ for a determination of this issue. On remand, the WCJ found that Healthcare Recoveries' October 8, 2008 letter proved that a subrogation lien had existed prior to the WCJ's January 20, 2009 decision and, thus, employer was not to pay the medical expenses directly to claimant. The WCJ further found that no statutory interest on these medical expenses was owed to claimant.

Claimant again appealed to the WCAB. The WCAB concluded that Healthcare Recoveries had protected Highmark's subrogation lien, and therefore affirmed the WCJ's ruling that the medical expenses were not payable directly to claimant. Employer also appealed to the WCAB, arguing that the WCJ had erred in refusing to take evidence on remand to establish that Highmark's lien was moot because the healthcare provider had repaid the $29,995.59 to Highmark. The WCAB found that this issue was not before the WCJ on remand and, thus, the WCJ properly declined to accept the evidence. Therefore, the WCAB affirmed the WCJ's determination and reinstated the WCJ's February 23, 2010 Order.

On appeal to the Commonwealth Court, claimant argued that the WCJ erred in (1) failing to order that payments for medical expenses be made directly to him or claimant's insurer; (2) failing to award him statutory interest for past due medical benefits; and (3) determining that Highmark's subrogation lien had not been waived.

The Court has held that, under Section 319 of the Act, no subrogation is due unless claimed; subrogation rights are not self-executing, and a party asserting such rights must exercise reasonable diligence in protecting its interest; and a party asserting subrogation rights must do so during the pendency of the claim proceedings. The Court previously addressed this matter in <u>Frymiare v. Workers' Compensation Appeal Board (D. Pileggi & Sons)</u>, 524 A.2d 1016 (Pa. Cmwlth. 1987).

The proposition set forth by the Court in <u>Frymiare</u> is that an employer still must pay medical expenses to a claimant even if a third-party already has defrayed the cost



but has not asserted its subrogation rights. In accordance with <u>Frymiare</u>, claimant contended that the WCAB erred in not directing the medical expenses to be paid directly to him because Highmark did not act to preserve its subrogation lien.

The Court, in affirming the WCAB's order, stated that the facts in <u>Frymiare</u> are distinguishable from the instant case. The Court said that claimant here, unlike the insurer in <u>Frymiare</u>, submitted into evidence a letter from Healthcare Recoveries stating that Highmark had a subrogation lien for the awarded medical expenses. The Court also found that Highmark, through Healthcare Recoveries' October 8, 2008 letter, had established that an agreement for the subrogation lien was in place prior to the disposition of the initial claim proceeding. Thus, the Court stated that the WCJ's determination that Highmark had preserved its subrogation lien was supported by the record, and, therefore, the WCJ did not err in concluding that the medical expenses should not be paid directly to claimant.

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Richard Marek v. Workers' Compensation Appeal Board (Logistics Express, Inc.), No. 2128 C.D. 2013, Filed July 16, 2014.

(Utilization Review—Section 127.476 of the Medical Cost Containment Regulations imposes a duty of service of the UR Determination solely on the URO, not the employer or insurer.)

Claimant petitioned for review of an October 30, 2013 order of the Workers' Compensation Appeal Board, which affirmed the decision of a Workers' Compensation Judge denying and dismissing claimant's Penalty Petition.

On July 17, 1995, claimant injured his back in the course of his employment with Logistics Express, Inc. Employer then issued a Notice of Compensation Payable on August 1, 1995. Subsequently, claimant returned to work at wages equal to or greater than his pre-injury wages,

and his benefits were suspended; however, he often suffered a recurrence of symptoms related to his original work injury, which resulted in a reinstatement of his total disability benefits.

Most recently, claimant's benefits were suspended effective October 6, 2003, and a WCJ denied a later petition seeking reinstatement of benefits as of January 11, 2005. Although claimant was not receiving wage loss benefits, employer remained responsible for his medical expenses relating to his work injury.

On December 3, 2009, claimant filed a Penalty Petition, alleging that employer had violated the Workers' Compensation Act by unilaterally ceasing payment of his medical bills. Employer filed an answer denying claimant's allegation. Subsequently, a WCJ conducted multiple hearings.

In defense of the Petition, employer offered a "UR Request Packet," which included a UR determination face sheet indicating that KVS Consulting Services, a Utilization Review Organization, received the assignment of employer's UR Request on February 14, 2008, and issued a determination on April 21, 2008. The UR determination face sheet was mailed to all parties and the Bureau of Workers' Compensation on April 21, 2008, and identified the name and address of the URO, employer's insurance representative, claimant, and the provider under review, but did not include claimant's counsel. Both the face sheet and the UR report suggest that claimant had notice of the UR request, as he submitted a statement to the URO noting that the treatment at issue from Dr. Maxime G. Gideon from January 7, 2008 and ongoing allowed him to cope with his pain and improved his quality of life.

On April 15, 2011, the WCJ denied and dismissed claimant's Penalty Petition, concluding that he failed to establish that employer violated any provision of the Act or the accompanying regulations by failing to serve him with a copy of the UR determination. Rather, the WCJ found that §127.476 of the Medical Cost Containment Regulations, 34 Pa. Code §127.476, upon which claimant relied, imposed a duty of service solely on the URO, and the Act only provides for payment of penalties by employers or insurers and not the URO. Further, the WCJ noted the lack of evidence in the record that an employer or insurer has any responsibility for the action or inaction of a URO. Claimant appealed to the WCAB, which affirmed.

On appeal to the Commonwealth Court, claimant argued that the WCJ erred in concluding that he failed to establish that employer violated the Act by failing to serve him or his counsel with a copy of the UR determination. The Court disagreed.

In affirming the WCAB's order, the Court stated that the plain language of §127.476 imposes no service requirement on employer. Rather, it imposes the requirement on the URO to serve the determination on all of the parties. The Court further said that, because §127.476 does not impose a service requirement on employer, claimant cannot establish that employer violated the Act or its regulations, and the WCJ properly denied and dismissed claimant's penalty petition.

The Court further stated that claimant's reliance on Gallie v. Workers' Compensation Appeal Board (Fichtel & Sachs Industries), 859 A.2d 1286 (Pa. 2004), which concerned the issue of the proper date for commencement of the 30-day time period for filing a petition to review a UR determination (Review Petition) under §306(f.1)(6)(iv) of the Act, 77 P.S. §531(6)(iv), was misplaced. In so doing, the Court noted that claimant was not prejudiced because he actually received the UR report.

The Court further noted that claimant, who bore the burden in this case, failed to specifically identify or enter into the record any medical bills which employer purposely refused to pay. The Court said that claimant's penalty petition did not set forth the dates or amounts of any unpaid medical bills. The Court also stated that there was no evidence in the record that employer denied payment of these bills, said bills were causally related to claimant's work injury, or that the bills were submitted on proper forms in accordance with the reporting requirements of the Act.

Finally, the Court noted that the UR determination actually was in claimant's favor, but claimant limited his argument before the WCJ, WCAB and the Commonwealth Court to employer's purported violation of the Act for failing to serve him with a copy of the UR determination, which the Court concluded was without merit. In a footnote, the Court indicated that claimant may seek penalties with respect to employer's failure to pay his medical expenses after the URO had found the treatment at issue to be reasonable and necessary.

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Cucchi v. Workers' Compensation Appeal Board (Robert Cucchi Painting, Inc.), No. 108 C.D. 2014, Filed July 17, 2014.

(Utilization Review—Functional improvement is not required for palliative medical treatment to be deemed to be reasonable and necessary.)

Claimant petitioned for review of a January 8, 2014 Order of the Workers' Compensation Appeal Board, which affirmed the decision of a Workers' Compensation Judge denying claimant's petition for review of a utilization review determination.

On July 12, 2005, claimant sustained lumbar, thoracic and rib fractures, a lung pneumothorax, and liver lacerations while working for Robert Cucchi Painting, Inc. The parties resolved claimant's entitlement to indemnity benefits by way of a compromise and release agreement.

On April 11, 2011, employer requested a UR of the treatment provided to claimant by his physical therapist, Richard Battaglini, from March 23, 2011 onward. On June 22, 2011, the UR reviewer, physical

therapist Jay D. Kaufmann, determined that the physical therapist's treatment from March 23, 2011 onward was unreasonable and unnecessary. On July 6, 2011, claimant filed his UR petition with the WCJ.

Mr. Battaglini initially evaluated claimant on February 17, 2011, and subsequently treated him on February 22, 2011, February 24, 2011, March 1, 2011, March 8, 2011, March 23, 2011 and April 13, 2011. In making his determination that there was insufficient documentation to justify Mr. Battaglini's treatment from March 23, 2011 onward, Mr. Kaufmann noted that claimant's medical records did not show that this treatment resulted in any objective or functional progress. He also questioned why claimant was undergoing physical therapy six years after he sustained his injuries. According to Mr. Kaufmann, medical literature states that a patient with claimant's diagnosis should achieve expected outcomes within eight to twenty-four visits over the course of one to six months.

The WCJ appointed physical therapist Maureen G. O'Leary to conduct an independent UR. On October 20, 2011, she evaluated claimant. At her deposition, Ms. O'Leary noted that claimant potentially could improve his gait, dynamic balance and steadiness with targeted physical therapy. However, she determined that Mr. Battaglini's present treatment did not target any residual or functional impairment, nor did he document any objective progress in claimant's functional status. Therefore, Ms. O'Leary opined that Mr. Battaglini's treatment from March 23, 2011 onward was unreasonable and unnecessary.

Claimant's treating physician, William C. Murphy, D.O., who prescribed the physical therapy at issue, prepared reports on October 27, 2011 and January 25, 2012, and noted that structured physical therapy reduced claimant's pain and increased his ability to perform activities of daily living Claimant also testified by deposition on October 13, 2011, and explained that he ceased physical therapy because he did not want to incur additional bills. He also testified that physical therapy helped to reduce his pain and enabled him to perform more activities of daily living.

The WCJ, in crediting the opinions of Mr. Kaufmann and Ms. O'Leary and discrediting Dr. Murphy's opinions, concluded that Mr. Battaglini's treatment after March 23, 2011 was neither reasonable nor necessary for claimant's July 12, 2005 work injury. Therefore, he denied claimant's UR petition. Claimant then appealed to the WCAB, which affirmed. Claimant then petitioned the Commonwealth Court to review the WCAB's decision. Claimant argued that the WCJ failed to issue a reasoned decision because he failed to adequately explain the reasons for his credibility determinations. For the following reasons, the Court agreed.

The Court stated that the WCJ failed to articulate any objective bases for deeming the opinions of Mr. Kaufmann and Ms. O'Leary more credible and persuasive than those of Dr. Murphy, as required by §422(a) of the Workers' Compensation Act. The Court said that the WCJ also failed to make any credibility findings with respect to claimant's testimony about his positive response to treatment. The Court stated that claimant was progressing with both pain management and increased range of motion, which Dr. Murphy reported were the goals of the physical therapy. Finally, the Court said that functional improvement is not required for palliative medical treatment to be deemed to be reasonable and necessary.

Accordingly, the Court vacated the WCAB's order and remanded the matter to the WCAB to remand it to the WCJ. On remand, the Court ordered that the WCJ must: (1) explain in detail the bases for his prior credibility findings; (2) make credibility findings regarding claimant's testimony; and (3) address the issue of whether Mr. Battaglini's physical therapy is reasonable and necessary as palliative treatment.

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Gregory Simmons v. Workers' Compensation Appeal Board (Powertrack International), No. 2168 C.D. 2013 (Filed July 24, 2014).

(Modification—Earning Power—Where modification based upon earning capacity is sought, it is unnecessary to demonstrate that a claimant's diagnoses have changed since the last proceeding, but only that the symptoms have improved to the point where he or she is capable of gainful employment.)

Claimant petitioned for review of the Order of the Workers' Compensation Appeal Board, which affirmed the grant of employer's petition for modification of benefits based on a labor market survey demonstrating that claimant had an earning capacity. The primary issue on appeal before the Commonwealth Court was whether employer met its burden of demonstrating that claimant's physical condition had changed since the last adjudication of his disability status. After review, the Court affirmed.

In 2001, claimant sustained a totally disabling work-related head injury, which a Workers' Compensation Judge subsequently found to be a closed head injury resulting in post concussive syndrome. Since his injury, claimant underwent numerous independent medical examinations, and employer sought to terminate his benefits on two previous occasions. The first petition was filed in 2003 and denied in 2005, and the second one was filed in 2006 and denied on remand.

Employer then filed a third petition, this time seeking to modify benefits based upon earning capacity. In support of this petition, employer offered the medical report and testimony of Eric Fishman, Ph.D., a neuropsychologist, who testified to a diagnosis of "probable malingered neurocognitive dysfunction," based in part on claimant's inconsistent and invalid test results. According to Dr. Fishman, the inconsistent test results also raised a question regarding the

validity of claimant's presentation. Nevertheless, he concluded that claimant was capable of returning to full-time employment. Dr. Fishman approved the five positions included in employer's labor market survey as within claimant's ability, which included a customer service representative at a call center, an unarmed security guard, a hotel front desk clerk, a restaurant dishwasher, and a cleaner at a school. Dr. Taylor, claimant's treating physician, approved all jobs except for the security guard position

Claimant testified before the WCJ three times, from February 2009 through November 2010. He testified that his condition remained unchanged, and he continued to suffer from memory, concentration and cognitive deficits, and an inability to drive for more than 15 minutes. Based on this, claimant maintained that he could not work part-time or perform any of the jobs referenced in employer's labor market survey.

Claimant acknowledged that he used a computer to post on-line greetings, comments on pictures, and other communications consisting of a few lines. He also admitted that he attended several auto races in 2010, one of which was in Virginia. Surveillance of claimant at an auto race was admitted into evidence. While Dr. Taylor testified on claimant's behalf, the WCJ largely rejected his testimony in favor of Dr. Fishman's testimony.

Based on the evidence, the WCJ found that claimant was sufficiently recovered from his injury to return to the work force. She further found that he was capable of performing the jobs of security guard, dishwasher and cleaner, which entitled employer to a modification based upon an earning power of $320.00 a week. The WCJ found the internet postings and surveillance video significant evidence of his ability to function in the jobs. Moreover, she found Dr. Fishman's opinion that claimant demonstrated symptom magnification, as well as the testimony of the vocational experts, to be credible. Therefore, the WCJ granted the petition based on the earning capacity of $320.00 a week, and reduced claimant's weekly temporary total disability compensation to $20.41 a week. The WCAB affirmed.

On appeal to the Commonwealth Court, claimant argued that employer failed to demonstrate that his condition had changed since the last termination proceeding. In support of this, he stated that symptom magnification and/or malingering, which was the only change recognized by Dr. Fishman, does not constitute a change in condition as a matter of law. Claimant also referred to his prior neuropsychological test results from 2001 and 2002, which indicated that he suffered from depression. Finally, contrary to Dr. Fishman's opinion, claimant argued that testing conducted in connection with the prior termination petitions ruled-out malingering and/or symptom magnification.

The Court stated that, where modification based upon earning capacity is sought, it is unnecessary to demonstrate that a claimant's diagnoses have changed since the last proceeding, but only that the symptoms have improved to the point where he or she is capable of gainful employment. The Court believed that such was the situation in this matter. As such, the Court stated that, contrary to claimant's position, a diagnosis of malingering can be a sufficient change in condition as a matter of law to support a modification of benefits if it leads the medical expert to conclude that the claimant's disability or ability to work has changed. The Court also believed that claimant himself had demonstrated that his current symptoms had improved to the point where he was capable of working in some capacity. The Order of the WCAB was thus affirmed.

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Marazas v. Workers' Compensation Appeal Board (Vitas Healthcare Corporation), No. 337 C.D. 2014, Filed August 11, 2014.

(Course and Scope—Claimant may still be found to be in the course and scope of employment despite voluntary quitting prior to his injury.)

Claimant petitioned for review of an order of the Workers' Compensation Appeal Board that reversed the decision of a Workers' Compensation Judge granting his Claim Petition. After a remand, the WCJ awarded benefits based on claimant sustaining his injury within the course and scope of his employment; however, the WCAB reversed based on claimant's injury only being related to work by way of his termination of the employment relationship.

In his petition to the Commonwealth Court, claimant asserted that judicial estoppel precluded denial of his employee status based on a prior related civil suit. Claimant further argued that the WCAB erred as a matter of law in concluding that he was not acting in the scope of his employment at the time of his injury. Based on the WCJ's findings and credibility determinations, the Court reversed the WCAB and reinstated the WCJ's order after remand.

On the date of injury, claimant was employed as a driver technician who delivered and picked up medical equipment in three states. After a weekend when he was on-call, he requested that his manager remove some stops from his itinerary because he was tired. Because the manager refused this request, claimant quit. The manager then escorted claimant to the truck that he used so that he could remove his personal belongings from it. After removing his items from the truck, he tripped over a pallet jack while walking to the warehouse on employer's premises and sustained injuries. The manager observed this fall, and subsequently walked claimant to his vehicle, after which he left employer's premises. Days later, claimant called the manager and advised her of his injury and requested referral to a panel physician; however, the manager informed him that panel physicians were limited to active employees.

In 2007, claimant filed a civil suit in the Delaware County Court of Common Pleas, seeking damages for his injury as a business invitee. He subsequently withdrew his suit after employer pled that he was in the scope of his employment at the time of his injury, thus defending the case based on the exclusiveness of claimant's remedy under the Workers' Compensation Act. Claimant then filed a Claim Petition, alleging work-related injuries. After a series of hearings during which claimant and the manager testified, the WCJ awarded benefits for a closed period, from November 7, 2005 through July 9, 2008. In doing so, the WCJ found that the manager had witnessed claimant's fall after he had tripped on equipment owned by employer on employer's premises.

Employer appealed, arguing that claimant had terminated his employment prior to sustaining his injury so that the Act did not cover it. The WCAB vacated and remanded, directing the WCJ to assess whether claimant was within the scope of employment at the time of his injury. The WCJ held a brief hearing on remand, during which he admitted employer's answer and new matter to claimant's Delaware Common Pleas Court complaint, in which employer admitted that claimant was its employee, such that the Act provided an exclusive remedy. Again, the WCJ found a work-related injury and awarded workers' compensation benefits, which employer appealed.

On appeal, the WCAB again reversed the WCJ. It reasoned that claimant was not within the scope of his employment when he was injured because he quit before he fell, and thus his injury occurred as a consequence of the final act of employment. Therefore, the WCAB concluded that claimant's injury was not compensable. Claimant appealed this order to the Commonwealth Court on the basis of 1) judicial estoppel and 2) scope of his employment when his injury occurred.

Regarding claimant's appeal on the basis of judicial estoppel, he argued that employer's admissions concerning his status as an employee in pleadings in the civil suit estopped it from denying that fact in the workers' compensation proceeding. The Court stated that for judicial estoppel to be properly applied, it must conclude that (1) employer assumed an inconsistent position in an earlier action and (2) employer's contention was successfully maintained in that action. While the Court agreed that employer had made inconsistent statements, it did not believe that the "successfully maintain" element had been satisfied, because there was no legal compulsion that required claimant to withdraw his civil action. Thus, it declined to apply judicial estoppel.

Regarding claimant's appeal on the basis of being within the scope of his employment at the time of his injury, the Court said that by removing his belongings from employer's truck under the manager's supervision, he was both on employer's premises and furthering employer's interests and, therefore, under employer's control at the time of his injury. Thus, it determined that claimant was within the course and scope of employment at the time of injury. The Court therefore reversed the WCAB's order and reinstated the WCJ's order on remand.

Supreme Court Case Reviews

David Cruz v. Workers' Compensation Appeal Board (Kennett Square Specialties and PMA Management Corporation), No. 69 M.A.P. 2012, Decided July 21, 2014.

(Undocumented Worker—Employer bears the burden to prove that the loss of earning power of its injured employee is due to his lack of United States citizenship or other legal work authorization in order to obtain a suspension of his workers' compensation disability benefits.)

In this appeal from the Commonwealth Court, the Supreme Court, through an opinion by Madame Justice Todd, addressed the proper allocation of the burden of proof between an employer and a workers' compensation claimant regarding the injured employee's legal eligibility under federal immigration law to obtain suitable employment whenever the employer seeks to suspend workers' compensation disability benefits.

For the following reasons, the Court held that the Commonwealth Court correctly determined that the employer bore the burden of proof that the loss of earning power of its injured employee was due to his lack of United States citizenship or other legal authorization in order to obtain a suspension of his workers' compensation benefits. The Court further held that claimant's invocation of his Fifth Amendment right against self-incrimination, when questioned at the hearing before the Workers' Compensation Judge, did not constitute substantial evidence of his alleged lack of legal authorization to be employed in the United States and, thus, could not, standing alone, furnish sufficient evidence for the WCJ to suspend his benefits. Therefore, the Court affirmed the Commonwealth Court's decision.

The facts are as follows: On July 19, 2008, claimant, as a truck driver for employer, which owned and operated a mushroom farm in Chester County, sustained a herniated disc while he was loading 15-20 pound barrels onto his truck. As a result, claimant's treating physician restricted him to lifting no more than 15 pounds, and ordered him to undertake no work activities involving stretching, bending or reaching. Employer informed claimant that it had no position compatible with these restrictions. Thereafter, beginning on August 8, 2008, claimant no longer reported to work.

On August 8, 2008, employer issued a Notice of Temporary Compensation Payable, and paid claimant temporary workers' compensation benefits from that date until Septem-

ber 8, 2008, when it issued a formal notice denying compensation. On September 9, 2008, claimant filed a Claim Petition seeking compensation for lost wages and medical bills. Employer filed an Answer to the petition on September 26, 2008, in which it denied all of claimant's allegations.

The WCJ held a hearing on October 22, 2008. During cross-examination, claimant testified that he was born in Ecuador and emigrated to the United States 10 years earlier. At that point, his attorney objected to any further questioning about his citizenship or ability to work. However, the WCJ, opining that citizenship is relevant, overruled the objection. Subsequently, claimant invoked his Fifth Amendment right against self-incrimination in response to any additional citizenship questions. At the final hearing before the WCJ on November 16, 2009, employer sought to question claimant about his alleged use of his wife's social security number, to which he reasserted his Fifth Amendment right. Ultimately, employer did not provide any evidence of record regarding claimant's legal authorization to work in the United States.

The WCJ found that claimant's injury was work related, and it had rendered him partially disabled. Therefore, he ordered employer to pay all of claimant's reasonable and necessary medical expenses; however, the WCJ suspended claimant's benefits from the date of his injury. The WCJ held that employer met its burden of establishing that claimant was not a United States citizen and, thus, not authorized to work in the United States.

Claimant appealed the WCJ's decision to the Workers' Compensation Appeal Board, which affirmed in part and reversed in part. The WCAB ruled that employer, since it provided no independent evidence to support its contention that claimant was an undocumented worker, but rather relied solely on an adverse inference by claimant's failure to testify, was not relieved of its burden to show claimant's earning power or job availability. Thus, it reversed the WCJ's order to the extent that it suspended claimant's disability benefits.

The Commonwealth Court unanimously affirmed the WCAB's ruling. In so doing, it determined that the WCJ erred in relying solely on the adverse inference in finding that claimant was not a United States citizen, and otherwise not legally authorized to work in the United States.

Employer then petitioned the Supreme Court for allowance of appeal, which it granted. On appeal, the Supreme Court addressed the following three issues:

1) Did the Commonwealth Court err in placing the burden of proof in a claim petition on employer, when claimant failed to establish his ongoing entitlement to benefits by providing information on his documented status to employer and to the Court?
2) Did the Commonwealth Court err in failing to consider its own holding in Brehm v. WCAB (Hygienic Sanitation Co.), 782 A.2d 1077 (Pa.Cmwlth. 2001), which states that a claimant who refuses to provide either the Court or his employer with information necessary to make a determination may have his workers' compensation benefits suspended until such information is provided?
3) Did the Commonwealth Court err in concluding that the WCJ's decision was not supported by substantial competent evidence where the record, in its totality, together with an adverse inference, does support the contention that claimant is an undocumented worker, thereby entitling employer to a suspension of benefits?

Regarding the first issue, the Court noted that the Workers' Compensation Act was intended to benefit the injured employee and, therefore, must be construed liberally in the employee's favor. Thus, borderline interpretations will be decided in favor of the claimant. With this in mind, the Court stated that a claimant seeking workers' compensation benefits via Claim Petition has the burden of proof to establish that (1) he or she was injured while in the course of employment, and (2) the injury resulted in a loss of earning power. The Court further said that a claimant is not required to establish his or her employment eligibility status under federal immigration law as part of the burden of proof in a Claim Petition. Therefore, in a case such as this, in which an employer is seeking to suspend benefits on the basis that the loss of earning power was unrelated to the work-related injury, the burden of proof is assigned to the employer.

Regarding the second issue, the Court stated that employer in the instant case, unlike in Brehm, presented no independent evidence of claimant's eligibility status. Moreover, there was no other evidence of record on this point. Thus, the Court said that claimant, because he did not have the burden of proof on the suspension question, was not obligated to produce evidence in this regard.

Regarding the third issue, the Court stated that the adverse inference drawn by the WCJ from claimant's invocation of his Fifth Amendment right against self-incrimination did not, by itself, constitute substantial evidence to support the WCJ's finding that claimant was not a United States citizen, and otherwise not authorized to work in the United States. Rather, the Court said that claimant's invocation of his Fifth Amendment right against self-incrimination did not relieve employer of its burden to present independent and probative evidence regarding claimant's citizenship status and corresponding employment eligibility, which it did not do.

(Continued from page 1)
a similar experience. The employer further elicited testimony from two other troopers in an effort to show that employee had failed to attempt his work-related duties following this incident.

The WCJ found the expert testimony in support of Trooper Payes to be more credible than that of the employer's expert. Therefore, the WCJ found Trooper Payes to be temporarily totally disabled. The WCJ further found that Trooper Payes had proven a "mental-mental" injury under the Pennsylvania Workers' Compensation Act based on an abnormal working condition. Although state troopers may be exposed to car accidents, bodily injury and death in the course of their jobs, the WCJ noted that this particular accident was "extraordinary" and "unusual" in that it involved a mentally disturbed woman who essentially elected to commit suicide by running in front of the trooper's car and that the trooper then tried and failed to resuscitate her.

On appeal, the Workers' Compensation Appeal Board reversed the WCJ's decision. The Board found that although it may be atypical for a state trooper to be involved in a fatal and traumatic accident, the Board found that it was not so unusual to constitute an "abnormal" working condition under the Act. Rather, the Board found that the nature of a state trooper's job is, in fact, a "stressful and perilous profession."

In a published opinion, the Commonwealth Court upheld the findings of the Board. Payes v. Workers' Compensation Appeal Board (Commonwealth of PA/ State Police), 5 A.3d 855 (Pa. Cmwlth. 2010). The Commonwealth Court compared the professional duties of a state trooper to that of a police officer and found that employees in this line of work can expect to witness tragedy. Moreover, as it is a part of their training, it is foreseeable that an officer may take another person's life. The Commonwealth Court emphasized that although these circumstances are unusual, they were considered "no more stressful and abnormal than the already highly stressful nature of Appellant's employment to render an award of benefits appropriate."

Trooper Payes appealed to the Pennsylvania Supreme Court, which reversed the Commonwealth Court. In evaluating the underlying basis for "mental-mental" claims, the Supreme Court cautioned against grouping an employee into a class of people and engaging in an analysis limited to the stresses one may expect from that job type. Rather, the Supreme Court held that the WCJ should partake in an exhaustive factual analysis of the specific case at issue to determine if the event experienced by the employee was, in fact, abnormal under that individual's work experience.

In its review of the specific facts of this case, the Supreme Court found that there was no dispute among the parties that the appellant's psychiatric injury was triggered by his work-related event of November 29, 2006. There was similarly no contention that Trooper Payes was performing duties outside the scope of his employment at the time of the incident. The Court noted that these two findings alone would be enough to prove a physical injury under the Act.

Nevertheless, because Trooper Payes was asserting a psychiatric injury, he also had the burden of proving that his injury was the result of an "abnormal working condition." To this end, the Supreme Court noted that the only way in which a WCJ's determination can be overturned is if the factual findings and/or legal application are considered arbitrary and capricious. The Court found that neither the Appeal Board nor Commonwealth Court applied this standard of review. Moreover, the Supreme Court found the WCJ's factual findings and legal analysis to be reasoned. Accordingly, the Supreme Court reinstated the findings and judgment of the WCJ.

Two dissenting opinions were submitted, both of which took issue with the majority's characterization of the "abnormal working conditions" issue as a mixed question of law and fact. Rather, the dissenters advocated that this determination is solely a legal finding, fully reviewable upon appeal. Therefore, the dissenting justices disagreed with the analysis and underlying deference of to the WCJ's determinations.

Following publication of this opinion, the Supreme Court vacated a decision of the Commonwealth Court in the case of Kochanowicz v. Workers' Comp. Ap. Bd. (Pa Liquor Control Bd.), 85 A.3d 480 (Pa. 2014) and remanded it for compliance with Payes. In doing so, the Supreme Court summarized its decision in Payes as holding that "because psychic injury cases are highly fact-sensitive, a reviewing court must give deference to the factfinding functions of the WCJ and limit review to determining whether the WCJ's findings of fact are supported by the evidence."

In sum, the Payes decision effectively assigns significant weight to the WCJ's factual determination in cases where an employee must prove an "abnormal working condition." By extension, it can be expected that the findings of a WCJ in "mental-mental" cases will be more difficult to overturn going forward.

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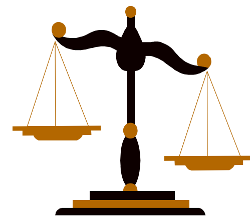

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