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

"Travel Expense Reimbursement Revisited"

By Harry W. Rosensteel, Esq.

We last visited the issue of travel expenses to obtain medical treatment in our Summer 2012 issue of the TR&C Pennsylvania Workers' Compensation Bulletin. In that issue, we advised that travel expenses are reimbursable when the travel is considered "long distance," i.e., is not available locally. Nothing has changed since that issue. We set forth some guidelines in that issue for analysis of whether travel is reimbursable, which are:

1. Determine if the claimant is travelling more than 100 miles one way. If so, the travel is *per se* "long distance," and therefore, reimbursable (providing the *same* treatment cannot be garnered somewhere locally).
2. If the *same* treatment is available locally, but claimant is travelling to obtain it, advise claimant of the locally available option and refuse reimbursement of the travel expense.
3. If the treatment is available locally, and claimant is availing himself of the local treatment, then the travel is not reimbursable (absent some exigent circumstance, such as a bed-ridden claimant who requires assisted transport), as it is local travel.
4. If the claimant is receiving treatment outside of his locale, then determine if other people in the claimant's locale would routinely have to travel to that same location to receive the treatment claimant is receiving. If so, then the travel is to be considered local and, therefore, not reimbursable (absent some exigent circumstance). *Note: It may be difficult to prove the travel is local in such a situation.*
5. If the treatment at issue is not available locally, and other people in claimant's locale do not routinely travel to the treatment location, then the treatment is "long distance." However, you must still consider whether the travel is for reasonable treatment under *Harbison-Walker Refractories v. WCAB (Huntsman)*, 99 Pa. Commonwealth 382, 513 A.2d 566 (1986) before paying that expense.

Once you have determined that a travel expense is reimbursable, the next issue you may face is: what expenses must you reimburse? Clearly, you would have to reimburse the claimant for mileage, tolls and parking expenses.[1] The tolls and parking expenses are easily determined by what is actually paid by the claimant, but the rate you pay for mileage may be debatable. In the past, the Commonwealth Court has held that an employer is required to reimburse mileage to obtain medical treatment in accordance with the Internal Revenue Code Standard Mileage Rate (IRCSMR) unless

(Continued on page 7)

Inside This Issue...

Commonwealth Court Case Reviews

The Village at Palmerton Assisted Living v. Workers' Compensation Appeal Board (Kilgallon), No. 334 C.D. 2014, Filed June 12, 2015.

(Impairment Rating Evaluation—Employer need not file LIBC-765 *and* LIBC-766 in order to meet criteria for timely requesting IRE.)

(Impairment Rating Evaluation—Where employer prematurely files LIBC-765, its subsequent timely letter to Bureau, and Bureau's receipt thereof, was enough to satisfy timely request in 60-day window.)

Claimant suffered a work-related injury in 2007. As of November 28, 2009, claimant had received 104 weeks of temporary total disability (TTD) benefits; however, on September 21, 2009, employer filed Form LIBC-766, "Request for Designation of a Physician to Perform an Impairment Rating Evaluation [IRE]." Upon receiving a copy of the LIBC-766, claimant advised that she would not attend an IRE absent an Order of Court. The Bureau issued a Notice of Designation of IRE Physician, appointing Dr. Nickischer to conduct the evaluation.

Employer then filed a Petition for Physical Examination. Claimant responded that employer was not entitled to an IRE because the LIBC-766 was untimely. While the proceedings on employer's petition were pending, employer filed Form LIBC-765, "IRE Appointment," with the Bureau, which stated that claimant reached 104 weeks of TTD as of September 19, 2009 and scheduled the evaluation with Dr. Nickischer for November 16, 2009.

Realizing that the Request for Designation was premature, employer attempted to timely request the designation of a physician to perform an IRE. The Bureau informally advised employer that there was nothing that could be done to correct the situation and that if employer filed a second LIBC-766, it would be denied.

Employer made a second request for designation of an IRE physician by letter addressed to the Bureau dated December 16, 2009. Employer attached a copy of its initial LIBC-766 and the Bureau's prior designation of Dr. Nickischer. Employer's letter stated that, by copy of the letter, it was notifying claimant's counsel and Workers' Compensation Judge Kutz of its request for the designation of an IRE physician.

Because the original Request for Designation was prematurely filed, the WCJ dismissed employer's Petition for Physical Examination and further ordered that employer was permitted to present the WCJ's order to the Bureau in support of its second request for the designation of a new IRE physician.

The Bureau responded that the date upon which a Request for Designation is filed is not relevant to determining whether the actual IRE is timely or premature. Citing to the Supreme Court's decision in Dowhower v. WCAB (Capco Contracting), 919 A.2d 913 (Pa. 2007), employer advised the Bureau that a Request for Designation is premature if filed before the claimant has reached 104 weeks of TTD. Employer again requested that the Bureau issue a new formal Notice of Designation of IRE physician.

When a new formal Notice of Designation was not received, employer filed a second LIBC-766 on February 11, 2010, which requested the designation of an IRE physician. The Bureau responded that it could not process this second Request because it currently had a pending Request which had not been completed.

On March 25, 2010, the Bureau notified the parties that the physician designated to conduct the IRE was changed from Dr. Nickischer to Dr. Bruno. Employer then rescheduled the IRE and issued a LIBC-765, Notice of Appointment. Employer also filed a Petition for Physical Examination. The WCJ granted the petition and directed claimant to submit to the IRE with Dr. Bruno on July 26, 2011. Claimant did so and, on September 14, 2011, employer issued a Notice of Change of Workers' Compensation Disability Status.

Claimant then filed reinstatement and review petitions alleging that the IRE request and resulting IRE were untimely. The petitions were assigned to WCJ Pletcher, who found employer's February 11, 2010 Request for Designation was untimely and, thus, employer was not entitled to an automatic changes in claimant's disability status. Employer appealed and, upon review, the Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, employer argued the WCAB erred by concluding that, in order to timely request that a claimant submit to an IRE, an employer must: (1) file Form LIBC-766, Request for Designation of an IRE Physician; (2) receive the Bureau's designation of an IRE physician, and (3) file Form LIBC-765, IRE Ap-

WCAIS Alert:

SUBMITTING PAPER FORMS: It is imperative when submitting paper forms to the Bureau that all two-sided (duplex) forms should be submitted as a single, full page image in duplex form. This is important to ensure that the scanners can read them and that they are uploaded to the proper claim. Detailed information on submitting paper forms can be found on the Bureau's website at: http://www.portal.state.pa.us/portal/server.pt/community/claims_information/10431/wc_claim_forms/1850215

pointment, all within the 60-day window following a claimant's receipt of 104 weeks of TTD in order for an employer to obtain an automatic change in the claimant's disability status.

The Court reviewed the legislative intent behind §306(a.2) of the Act governing IREs, as well as the relevant case law. The Court concluded that, when the parties cannot agree on an IRE physician, the date the insurer requests that a physician be designated to perform an IRE is the determinative date as to whether the IRE request is timely under the Act. The WCAB erred by holding that, in order to secure an automatic change to claimant's benefits, employer was required to request the designation of an IRE physician by filing both Form LIBC-766 *and* request claimant's attendance at the IRE by filing Form LIBC-765, within 60 days of claimant's receipt of 104 weeks of TTD or, in this case, by November 28, 2009.

Here, it was undisputed that employer's initial request for designation of an IRE physician was premature. Nevertheless, no IRE was performed as a result of that request. Moreover, the Bureau apparently accepted employer's letter, with the attached copy of its original Form LIBC-766 filed on September 21, 2009 as a formal request for designation of an IRE physician. The WCJ's determination that employer had to file a subsequent request on Form LIBC-766 pursuant to the Bureau's regulations for the request to be valid and timely is elevating form over substance.

Accordingly, the Court concluded that employer's December 16, 2009 letter, with attached completed LIBC-766, was filed within the required 60-day time period for an automatic change in claimant's disability status.

The Order of the WCAB was reversed.

****

William Kane v. Workers' Compensation Appeal Board (Glenshaw Glass), No. 1172 C.D. 2013, Filed June 25, 2015.

(Reinstatement—Where claimant suffers one work injury in 1995 and a second in 1999, claimant's application for reinstatement is not time-barred if filed within three years after the date of the last payment of compensation for his 1995 injury, which benefits claimant received in lieu of compensation for the 1999 injury.)

Claimant suffered a work-related injury to his left shoulder in 1995. Employer, which was self-insured at that time, issued a Notice of Compensation Payable and paid temporary total disability (TTD) benefits at the rate of $509.00 per week. Following surgery, claimant returned to modified duty work for employer.

In 2000, claimant filed a petition alleging that he suffered a work injury to his right shoulder in 1999. The Workers' Compensation Judge granted claimant's petition. Employer's carrier in 1999, Chubb, was directed to periods of both total and partial disability. TTD benefits were paid at the rate of $470.97 per week. Benefits were suspended as of August 2, 1999, at which time claimant returned to his modified duty position with employer.

Claimant continued working, with a loss of wages, until November 2004, when employer ceased operations and eliminated claimant's job. Employer reinstated TTD benefits for the 1995 left shoulder injury by supplemental agreement. Thereafter, the parties entered into a Compromise and Release of the 1995 left shoulder injury, which was approved on September 23, 2010.

On September 29, 2010, claimant filed a Reinstatement petition against employer and Chubb seeking TTD benefits for the 1999 right shoulder injury, effective September 23, 2010. The WCJ granted the petition, concluding that claimant's disability arising out of the 1999 work injury recurred on November 25, 2004, at the time employer's plant closed. The WCJ concluded that, as a matter of law, because the 1999 benefits were suspended due to his receipt of TTD for the 1995 injury, the 500-week statute of repose under §413(a) of the Act was inapplicable.

Employer and Chubb appealed to the Workers' Compensation Appeal Board, which reversed the WCJ's decision. The WCAB held that the Reinstatement Petition was outside the 3-year limitation period since claimant had not received indemnity benefits for his 1999 right shoulder injury since August 1, 1999.

On appeal to the Commonwealth Court, claimant argued that the WCAB erred in finding his petition time-barred under §413(a) of the Act.

Section 413(a) provides, in pertinent part:

> …[N]o notice of compensation payable, agreement or award shall be reviewed, or modified, or reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation…And provided further, that where compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury that payments under the agreement or award may be resumed at any time during the period for which compensation for partial disability is payable…

Section 306(b) of the Act defines "the period for which compensation for partial disability is payable" as "not more than 500 weeks."

In the case of Cozzone v. WCAB (Pennsylvania Municipal/ East Goshen Township), 73 A.3d 526 (2013), the Supreme Court determined that the limitations periods set forth in §413(a) are to be "construed and considered concurrently," and "effect must be given to both as far as possible."

Here, the Court found it of "utmost significance" that claimant suffered two disabling injuries, either

of which would have entitled him to TTD benefits; however, he cannot receive benefits for both at the same time. The workers' compensation system requires a claimant to "choose one injury" and receive compensation for that totally disabling injury in lieu of receiving compensation for the other totally disabling injury at that time. Should circumstances change, however, such that the loss in earning power from that injury for which a claimant is receiving benefits resolves or lessens, it makes no logical sense to ignore the circumstance that the claimant would have been receiving benefits for one totally disabling injury had he not been receiving benefits for another. Because claimant received compensation for one totally disabling injury (the 1995 injury) in lieu of receiving compensation for the other totally disabling injury (the 1999 injury) claimant must be permitted to seek reinstatement under §413(a) of the Act within three years after the date of the most recent payment of compensation received in lieu of compensation for the 1999 injury, to which he was otherwise entitled.

As such, claimant's petition was not time-barred under §413(a) of the Act because it was filed within three years after the date of the last payment of compensation for his 1995 injury, which he had received in lieu of compensation for the 1999 injury. The Order of the WCAB was reversed.

****

Michael C. Duffey v. Workers' Compensation Appeal Board (Trola-Dyne, Inc.), No. 1840 C.D. 2014, Filed June 26, 2015.

(Impairment Rating Evaluation—An IRE that considers a claimant's work injury, as it is defined and exists at the time the IRE is performed, is valid notwithstanding a subsequent expansion of the injury description.)

On March 6, 2009, claimant suffered work-related injuries to both hands in the form of electrical burns while stripping electric wire. On March 6, 2011, claimant reached 104 weeks of receiving total disability compensation. Employer requested an Impairment Rating Evaluation (IRE) under §306(a.2)(1) of the Act on March 17, 2011. Thus, on June 2, 2011, claimant submitted to an IRE with Dr. Sicilia, who opined that claimant had a 6% impairment rating. Based on Dr. Sicilia's rating, employer issued a Notice of Change of Workers' Compensation Disability Status on June 28, 2011, changing claimant's disability status from total to partial.

Claimant filed a Review Petition, arguing that the IRE was invalid because the injury description was incomplete. Claimant presented testimony from his physicians that he suffered from "adjustment disorder with depressed mood" as well as post-traumatic stress disorder (PTSD).

Dr. Sicilia testified that his imposition of a 6% whole body impairment rating addressed only those injuries described in the IRE designation sheet, not claimant's mental conditions.

The Workers' Compensation Judge accepted claimant's evidence and added adjustment disorder with depressed mood and PTSD to the description of claimant's work injuries. Because claimant established that he suffered additional work injuries, the WCJ concluded that Dr. Sicilia's IRE was invalid.

Employer appealed to the Workers' Compensation Appeal Board, which reversed the WCJ's determination, noting that Dr. Sicilia properly performed the IRE based upon the accepted injuries. Claimant then petitioned the Commonwealth Court for review.

The Court first noted that §306(a.2) of the Act governs the manner in which an employer may obtain a change in a claimant's disability status based on an IRE, as well as how a claimant may challenge an IRE. A claimant has the right to immediately appeal the reduction of his or her disability status before the reduction becomes effective, i.e., during the 60-day notice period. During this period, a claimant may challenge the IRE itself. Thereafter, a claimant may appeal the change to partial disability at any time during the 500-week period of partial disability by presenting an IRE showing an impairment rating of equal to or greater than 50%.

Here, claimant argued that, because he filed his appeal during the initial 60-day period, he could challenge the IRE as being invalid based on the fact that the injury description used by Dr. Sicilia did not include *all* of his compensable work injuries.

Employer responded that, as a practical matter, an IRE physician is only able to assess a claimant for injuries that have been accepted as work-related; otherwise, the IRE physician must use his or her imagination to guess what other work-related injuries a claimant could have. Here, claimant had 2 years to expand the description of his work injury, but did not do so until *after* the IRE was performed. Such conduct frustrates the very purpose of the IRE process, which is to establish a claimant's impairment rating at a fixed moment in time.

The Court agreed. The IRE produces a snapshot of the claimant's condition at the time of the IRE, not a survey of the claimant's work-related injuries over a period of time. The focus in determining the validity of an IRE is on the state of the claimant and the compensable injury, as described *at the time the IRE is performed.* An IRE that considers a claimant's work injury, as it is defined and exists at the time the IRE is performed, is valid notwithstanding an after-the-fact expansion of the scope of a claimant's work-related injury.

The WCAB's Order was affirmed.

****

Pipeline Systems, Inc. and Continental Western Insurance Company v. Workers' Compensation Appeal Board (Pounds), No. 1577 C.D. 2014, Filed July 7, 2015.

(Course and Scope—Under Section 601(a)(10) of the Act, protects employees who may render aid from being removed from the definition of "employe" where rending aid is not a part of the services they regularly perform for consideration from their employer.)

Employer obtained a contract to construct a new addition to the Sewickley Borough Sanitation Department Plant, which included the installation of pipelines and manholes. On January 29, 2010, claimant was at the Borough Plant installing new pipeline in an area located approximately 30 feet away from a concrete pit. Claimant heard a call for help from the area of the pit. He and his co-workers responded by running to the pit. Claimant descended a ladder attached to the pit in order to rescue or provide aid to the person who lay at the bottom. Claimant found the man dead. He then attempted to ascend the ladder, but was overwhelmed by methane gas in the pit. Claimant fell back down into the pit, approximately 20 feet. He sustained injuries to his left leg, knee, foot, ribs, back, head and lungs.

Employer denied claimant's Claim Petition on the basis that claimant was not within the course and scope of employment when he was injured. The Workers' Compensation Judge disagreed and issued a decision granting the Claim Petition. The Workers' Compensation Appeal Board affirmed that decision.

Employer sought further review by the Commonwealth Court. The Court noted that §301(c) of the Act provides that the term "injury arising in the course of employment" includes injuries sustained in furtherance of the business or affairs of the employer, as well as other injuries which occur on premises occupied or controlled by the employer.

The courts have developed two tests that are generally used to determine whether an injury was sustained in the course of employment. Under the first test, the question is whether the employee was actually engaged in the furtherance of the employer's business or affairs, regardless of whether the employee was upon the employer's premises. Under the second test, the employee need not be engaged in the furtherance of the employer's business or affairs, however, the employee: (1) must be on the premises occupied or under the control of the employer, or upon which the employer's business or affairs are being carried on; (2) must be required by the nature of his employment to be present on the premises; and (3) must sustain injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

The statute does provide for some exceptions to the general rule. In 2003, in response to the Supreme Court's decision in Kmart Corp. v. WCAB (Fitzsimmons), 748 A.2d 660 (Pa. 2000) (*benefits denied for injuries sustained when, while on a lunch break at a restaurant on employer's premises, claimant came to the aid of a co-worker who was the victim of a knife attack)*, the General Assembly amended §601(a) of the Act to provide workers' compensation benefits for:

> (10) An employe who, while in the course and scope of his employment goes to the aid of a person and suffers injury or death as a direct result of any of the following:
>
> (i) Preventing the commission of a crime, lawfully apprehending a person reasonably suspected of having committed a crime or aiding the victim of a crime. For purposes of this clause, the terms "crime" and "victim" shall have the same meaning as given to them in section 103 of the act of November 24, 1998 (P.L. 882, No. 111), known as the "Crime Victims Act."
>
> (ii) Rendering emergency care, first aid or rescue at the scene of an emergency.

The Court held that this claimant's injuries fell within the ambit of this subsection and, therefore, benefits are payable. The statute does not place any relevance upon the relationship between the employee who is injured and the individual to whom the employee goes to aid; the statute simply requires that the employee goes to the aid of "a person."

Here, the facts demonstrate that, at the time the emergency arose, claimant was actually engaged in the furtherance of employer's business or affairs and was, therefore, within the course and scope of his employment. Claimant responded to a call for help, went to the aid of another and sustained injuries as a result of attempting to render emergency care. According, the Court held that claimant was entitled to benefits.

****

James Tobler v. Workers' Compensation Appeal Board (Verizon Pennsylvania, Inc.), No. 2211 C.D. 2014, Filed July 9, 2015.

(Interest—Simple interest, not compound interest, is to be paid under §406.1(a) of the Act.)

Claimant suffered a work-related injury in 1998.

Following a decision issued in February 2012, which reinstated claimant's compensation benefits as of November 2002, employer issued a payment to claimant in the amount of $117,278.74. Thereafter, claimant filed a Petition for Penalties alleging employer violated the Act by incorrectly using simple rather an compound interest in calculating the interest due on the award.

The Workers' Compensation Judge noted that the sole issue before her was whether simple or compounded interest should have been paid on the prior award. The parties agreed that $117,278.74 would be the appropriate amount due and owed based on 10% simple interest. If compound interest were due, the amount would be $139,929.39.

The WCJ determined that claimant was entitled to simple interest under §406.1(a) of the Act

which provides, in relevant part: "Interest shall accrue on all due and unpaid compensation at the rate of ten per centum per annum." Consequently, the WCJ denied claimant's penalty petition.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that interest under the Act is considered to be additional compensation to the worker, not a penalty against the employer. In rejecting claimant's "additional compensation" argument, the WCAB observed that Pennsylvania courts have not indicated that interest is treated the same as compensation benefits for the purpose of calculating interest. The WCAB also observed that §406.1(a) does not contain any language indicating whether the interest that accrues is "simple" or "compound." Noting that the Supreme Court has held that compound interest is not favored in the law and is permitted only where explicitly provided for by statute or in a contract, the WCAB rejected claimant's argument that compound interest was due.

Claimant then sought review by the Commonwealth Court, asserting that an award of compound, rather than simple, interest most accurately calculates a worker's actual loss of use of the unpaid funds over time and serves the humanitarian and remedial purposes of the Act. The Court was not persuaded.

The Court reiterated the Supreme Court's decisions which hold that compound interest will be awarded only where it is explicitly provided for by contract or statute. Clearly, §406.1(a) does not expressly provide for compound interest. Further, as the WCAB noted, statutory interest under §406.1(a) is treated separately from past due compensation. Claimant cited no Pennsylvania appellate case law to the contrary. Consequently, in light of the long-standing judicial policy disfavoring the awarding of compound interest absent explicit statutory language providing for it, the Court concluded that there is no proper authority for an award of compound interest under §406.1(a) of the Act. The order of the WCAB, which affirmed the WCJ's determination that claimant was entitled to an award of 10% simple interest, was affirmed.

Supreme Court Case Reviews

School District of Philadelphia v. Workers' Compensation Appeal Board (Hilton), No. 34 EAP 2014, Decided: May 26,2015.

(Notice of Ability to Return to Work—Where injured employee has not yet proven entitlement to workers' compensation benefits, §306(b)(3) does not require an employer to provide employee with written notice of ability to return to work before offering alternative employment.)

Claimant taught second grade at Pastorius Elementary School from November 2008 to March 2009. The pupils engaged in significant misbehavior, including the use of profanity and physical violence, which prevented claimant from teaching effectively. After completing an assignment on March 3, 2009, the children became unruly and vandalized the room. Claimant thereafter felt dizzy, could not eat, and suffered from tension headaches, heart palpitations and nausea.

Claimant's primary care physician took her off work due to the school's overly stressful environment. Employer's physician disagreed and claimant returned to Pastorius Elementary a few weeks later, but only worked 4 days. On May 29, 2009, employer issued a Notice of Denial, rejecting claimant's contention that she suffered a work-related injury due to excessive stress on the job.

In June of 2009, employer assigned claimant to teach in the fall at Jay Cooke School, which offered a complete opposite environment from Pastorius Elementary in that it was very quiet and the instructors were able to teach the children effectively. At the time employer offered this alternative employment, claimant had not yet filed a claim petition and no depositions had been taken.

When school began in September 2009, claimant did not begin employment at Jay Cooke School, maintaining that she was unable to return to teaching due to the job-related maladies that arose from the stressful work environment at Pastorius Elementary.

In October 2009, claimant filed a Claim Petition, which employer denied. During the litigation, claimant acknowledged that employer assigned her to the Jay Cooke School, but stated that she was incapable of working in the Fall of 2009 because she was still being treated for the stress-related injuries.

Claimant presented the deposition testimony of her treating physician, who not only opined that claimant suffered from work-related stress, but also acknowledged that claimant was capable of working in a less stressful environment.

The Workers' Compensation Judge credited claimant's evidence and found that the stress arising from teaching at Pastorius Elementary resulted in the exacerbation of claimant's pre-existing lupus, as well as a vocal cord injury in the nature of muscle tension dysphonia from voice overuse, which rendered claimant totally disabled as of March 3, 2009. The WCJ also found that claimant could have returned to work at the Jay Cooke School in September of 2009 and, thus, benefits were suspended as of that time.

The Workers' Compensation Appeal Board reversed the WCJ's order suspending claimant's benefits as of September 30, 2009 on the grounds that employer never provided her with a Notice of Ability to Return to Work form as required by

(Continued from page 1)

there is evidence that the employee's expenses differ from that rate. *Barnyock v. WCAB (Garden State Tanning)*, 664 A.2d 683 (Pa. Cmwlth. 1995), and *Williamette Industries v. WCAB (Lockett)*, 647 A.2d 665 (Pa. Cmwlth. 1994). A reading of both of those cases reveals that the Commonwealth Court was never asked to analyze the applicable IRCSMR. The Court in both cases apparently assumed the IRCSMR applicable would be the commonly used rate for reimbursement of business travel. However, the Internal Revenue Service (IRS) has established different travel reimbursement rates for different types of travel. The IRS, at Revenue Procedure 2010-51, has set forth rules for taking deductions for travel mileage based upon the costs of operating an automobile for business, charitable, medical, or moving expenses purposes. Those rates are *NOT* universal. For instance, the current rate is 57.5 cents per mile for business use of an automobie; while the rate for use of a vehicle to obtain medical care is 23 cents per mile (see IRS Notice 2014-79). Undoubtedly, the reimbursement rate for a claimant who is attending an IME at the employer's request should be 57.5 cents per mile, as the examination is obtained at the employer's request for a primarily business-related purpose. However, one could reasonably argue that a claimant who seeks medical care for a work injury, who must use his vehicle to obtain that care, should not be able to seek reimbursement at a higher rate than a non-work related patient that needs such care. If a claimant were to forego the mileage reimbursement from the employer/carrier, and instead seek to deduct the travel expense for tax purposes, he could not deduct that travel at the business use rate. Instead, his deduction would be limited to the lower IRCSMR for medical care. Why should a workers' compensation claimant seeking medical care be entitled to such a windfall? [2] At the time of this publication, this author has not seen a precedential case on point that deals with this issue, but it certainly warrants consideration. Perhaps the amounts generally at issue in these matters have not yet generated a case worth appellate pursuit. Taking this stance in the future is certainly recommended should a client want to test the waters.

---

[1]This author has also seen frequent requests for meals. Meals could arguably be a legitimate expense, but only in a situation where the travel absolutely necessitated a claimant being on the road for substantially the entire day. Absent such circumstance, it does not seem reasonable to this author that meals are a viable travel expense.

[2]This author could anticipate that a counter argument to this position would be that IRS reimbursement for medical travel in a non-workers' compensation matter seeks to ease the burden that obtaining medical care has on taxpayers in general; while the purpose of reimbursement in a workers' compensation case would be to make the claimant whole. That is to say, were it not for the work injury, such expense would not be necessary.

---

§306(b)(3) of the Act, which states:

> If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following:
>
> 1.The nature of the employe's physical condition or change of condition.
>
> 2.That the employe has an obligation to look for available employment.
>
> 3.That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.
>
> 4.That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

The WCAB concluded that because there was no evidence that employer provided claimant with such a notice, employer did not meet the threshold burden required to modify or suspend benefits.

The Commonwealth Court reversed the WCAB's ruling that the WCJ erred in suspending benefits, noting that claimant only established disability until September 30, 2009, at which time the job at Jay Cooke School was available. The Court further concluded that employer had no duty to issue a Notice of Ability to Return to Work under the facts presented. Section 306(b)(3) presumes that an injury has caused disability, that a claim has been acknowledged as compensable, and that the employer is seeking to reduce its existing liability. None of these prerequisites were present here because claimant was not receiving benefits and claimant had not yet filed a Claim Petition when the job was offered to her. The requirement for issuing a §306(b)(3) notice was not triggered.

Claimant sought review by the Supreme Court, arguing that, in order to suspend benefits based upon an offer of alternative employment, the employer must provide the claimant with a notice of ability to return to work, regardless of whether the claimant sought or was receiving benefits at the time the job offer was made. The Court disagreed.

Reviewing the legislative history, the Court noted that §306(b)(3) was intended to speak to an employer's burden in a suspension proceeding, after a compensable injury has been established, and was not meant to impose a requirement upon employers in all circumstances where alternative employment is offered to an injured employee. Accordingly, the decision of the Commonwealth Court was affirmed.

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.

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.