What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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Pennsylvania Workers' Compensation

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Employer entitled to Supersedeas Fund Reimbursement for benefit payments made under NCP issued by mistake.

Comcast Corp. v. WCAB (Jones); 2208 C.D. 2010; filed December 12, 2011; by Judge Brobson

The employer filed a Petition to Review / Set Aside a Notice of Compensation Payable (NCP) pursuant to §413, alleging that the NCP had been issued in error. In connection with that petition, the employer requested supersedeas, which was denied. The parties later entered into a Compromise and Release Agreement to resolve future payments, but agreed to allow the employer's review petition, as well as a termination petition, to go to decision. The Workers' Compensation Judge granted the review petition. The employer then sought reimbursement from the Supersedeas Fund for the benefits they paid to the claimant under what the judge found to be a null and void NCP.

The employer's request to obtain Supersedeas Fund Reimbursement on the review petition was denied at the agency, judge and Appeal Board levels. The Commonwealth Court reversed those decisions, agreeing with the employer that under §443 (a) of the Act, Supersedeas Fund Reimbursement was available to the employer. ||

Side Bar

This decision clears up a common misconception that Supersedeas Fund Reimbursement is only available where an employer succeeds in a petition to modify, suspend or terminate benefits. In this instance, however, the judge decided that the NCP was issued in error and, therefore, that compensation benefits paid to the claimant were not, in fact, payable. This precisely meets the criteria for Supersedeas Fund Reimbursement.

Fatal claim petition granted for death of claimant from overdose of medications that were previously found to be neither reasonable nor necessary.

JD Landscaping v. WCAB (Heffernan); 1866 C.D. 2010; filed December 2, 2011; by Judge Brobson

This case has been a hot topic of conversation in the Pennsylvania workers' compensation community. It involved the death of a claimant from an overdose of medications that had been prescribed to him by his treating provider. Two weeks before the claimant's death, a Utilization Review Determination (UR) was issued, concluding that all of the provider's treatment, including prescriptions, was neither reasonable nor necessary. After the UR was issued, the provider tried to prescribe medications, but the pharmacy refused to fill them. The provider then told his sister, a physician in his practice, that the pharmacy would not fill the claimant's prescriptions because of the UR and asked her to handle the situation. She then saw the claimant and prescribed

medications for him. Two days later, the claimant passed away from overdosing on the medications.

The Commonwealth Court affirmed the Workers' Compensation Judge's decision granting a fatal claim petition, holding that the issue of causation was separate and distinct from the reasonableness and necessity of medical treatment. In the court's view, the prior UR concerned only reasonableness and necessity of treatment and was irrelevant in determining whether the claimant's death was causally related to his work-related injury. ||

Side Bar

In reading the facts set forth in the court's opinion, one is left with the distinct impression that the providers involved were very knowledgeable of the UR process and very aware of the fact that URs are provider-specific and not treatment-specific.

Claimant who stops working a light-duty job due to a known incorrect restriction given by her treating physician is not entitled to a reinstatement of benefits.

Karen Verity v. WCAB (The Malvern School); 356 C.D. 2011; filed October 11, 2011; by Judge Cohn Jubelirer

Following the claimant's work injury, she returned to a light-duty position with the employer. The claimant later sought a reinstatement of total disability benefits, alleging a worsening of her condition and that there were no restricted-duty positions available. According to the claimant, the employer accommodated her return to light-duty work until her treating physician issued a note restricting her from going up and down stairs. The claimant presented this note to the employer and was informed she could not work since she had to go up a flight of ten stairs approximately four times per day.

During litigation, the claimant testified that she thought she could perform the light-duty job with the employer since she went up and down three flights of stairs in her apartment complex throughout the day. The claimant's treating physician testified that she was not aware that the claimant had this ability.

The Commonwealth Court agreed with the Workers' Compensation Judge and the Appeal Board that the claimant was not entitled to a reinstatement of benefits since she voluntarily left her light-duty position. The court held that the claimant was not forced to stop working due to an elimination of the light-duty job. Rather, the claimant stopped working because of an incorrect "no stair" restriction that she knew was not accurate. The court held that the claimant failed to meet her burden of proving that her earning power was once again adversely affected by her work-related disability. ||

Side Bar

The court seems to be putting the onus on the claimant to challenge a restriction given by a physician that the claimant knows is not correct. There is no evidence that the claimant did that in this case. The take away is that claimants should be more proactive in regard to their medical treatment and their return to work in some form.

Claimant is not entitled to a resumption of temporary total disability benefits after the expiration of the 500-week period of partial disability, even when employer reinstated benefits after the 500-week period ended.

Andrew Cozzone v. WCAB (Pa. Municipal / East Goshen Township); 664 C.D. 2011; filed January 5, 2012; by Judge Brobson

The claimant suffered an injury on January 24, 1989. When he returned to work on September 20, 1989, his benefits were suspended. Beginning in May of 2003, a series of Supplemental Agreements were signed, reinstating the claimant's benefits at various periods of time. In late 2008, the claimant filed a reinstatement petition, requesting an adjustment from partial disability to total disability. The claimant also filed a penalty petition, alleging the employer violated the Act by unilaterally ceasing payment of partial disability benefits.

The Commonwealth Court affirmed the Appeal Board's reversal of the Workers' Compensation Judge's decision granting the reinstatement petition. The court pointed out that under §413 (a) of the Act, the claimant had until approximately April 1999 to file a reinstatement petition, but had failed to file it until 2008, over nine years after the 500-week period had expired. The court also did not buy the claimant's contention that he was lulled into a false sense of security by the series of Supplemental Agreements executed in 2003.

According to the court, an employer has no legal duty to notify claimants of the existence of the 500-week statute. The court further rejected the claimant's argument that the reinstatement petition was timely filed since it was done within three years from the last date a compensation payment was made. The court held that §413's three-year limitation is not applicable where there has been a suspension and is only applicable to reinstatements following a termination of benefits. ||

Side Bar

Interestingly, the court points out that, although the claimant returned to work on September of 1989 without a loss of earnings, there was no Supplemental Agreement executed at that time reflecting this, nor was there an order from a judge suspending benefits. Although the claimant made this an issue in his appeal, the court negated it by concluding that the employer was entitled to a suspension, notwithstanding the lack of a Supplemental Agreement or an order. It is highly recommended that this pitfall be avoided by taking appropriate action to reflect a change in a claimant's disability status, such as when a claimant returns to work, by promptly filing the appropriate forms with the Bureau.

Employer not entitled to a termination of benefits for a chronic conjunctivitis injury, despite claimant's lifelong allergies.

City of Philadelphia v. WCAB (Whaley-Campbell); 981 C.D. 2011; filed December 23, 2011; by Senior Judge Friedman

A Workers' Compensation Judge granted a claim petition, finding that the claimant developed a chronic eye condition in the 1990s while working as a youth study counselor for the employer. Many years later, the employer filed a petition to terminate the claimant's benefits,

alleging full recovery. In support of the petition, the employer presented testimony from an ophthalmologist, who said the claimant was fully recovered from the injury. According to the employer's expert, the claimant experienced recurrent episodes of conjunctivitis due to her baseline allergic condition, which could flare-up when exposed to certain irritants, such as dust, dirt, pollen and grass. The claimant's expert, however, testified that, although the claimant had a genetic propensity to react to certain allergens in the air, if the claimant returned to work and was placed in the same environment, she could have a recurrence of chronic conjunctivitis.

The Commonwealth Court affirmed the judge's dismissal of the termination petition. In doing so, the court distinguished this case from *Bethlehem Steel Corporation v. WCAB (Baxter)*, 550 Pa. 658, 708 A.2d 801 (1998), in which the Supreme Court reversed an award of benefits for an asthmatic condition since the claimant's asthma was pre-existing and not directly caused by his employment. In this case, although the claimant had lifelong allergies, she did not have chronic conjunctivitis until beginning work for the employer. ||

Side Bar

The testimony given by the claimant's expert in this case is significant. The expert acknowledged that the claimant was most likely predisposed to allergic reactions to irritants in the air. However, the expert also said that if the claimant returned to work in the same environment, she could have a recurrence of her chronic conjunctivitis and that she, therefore, remained disabled from this condition.

Receipt of Social Security disability benefits unrelated to a work injury demonstrates claimant's voluntary removal from the workforce and justifies suspension of benefits.

Burks v. WCAB (City of Pittsburgh); No. 980 C.D. 2011; filed January 13, 2012; by Judge Friedman

The claimant sprained her right knee in the course of her employment, which ultimately required multiple knee surgeries, including a knee replacement. The claimant has not worked or looked for work since then. As a child, the claimant underwent multiple surgeries for a left hip problem that resulted in hip fusion and replacement, and the left hip problems were aggravated by motor vehicle accidents that occurred after the work injury. An IME identified that the claimant was capable of full-time, light-duty work due to the work injury.

The employer filed a suspension petition, alleging the claimant was physically able to work but had voluntarily removed herself from the workforce. The Workers' Compensation Judge agreed, and the court affirmed, holding that because the claimant sought a disability pension that was based on her inability to engage in gainful activity, and the work injury itself did not prevent her from working, she had voluntarily withdrawn from the workforce. ||

Side Bar

The key to this decision is the court's finding that the employer's medical evidence proved that the claimant's work injury was limited to the right knee and did not implicate the multiple other medical conditions that affected her ability to work. As a result, the court viewed the Social Security disability benefits as unrelated to her work injury, even though it is not clear from the decision that the Social Security award was based solely upon her non-work-related injuries. This decision illustrates the importance of isolating work capabilities due to the work injury from non-work-related medical conditions.

"Old age" Social Security retirement benefit offset is constitutional.

Caputo v. WCAB (Commonwealth of Pennsylvania); No. 191 C.D. 2010; filed January 5, 2012; by Judge Leavitt

Section 204(a) of the Act permits an employer or insurer to take a credit against workers' compensation disability benefits for 50% of the claimant's Social Security retirement benefits. The claimant challenged this offset, arguing that it violated the equal protection clause of the Pennsylvania Constitution because it treats individuals over the age of 65 and receiving Social Security benefits differently. The court rejected this position in a lengthy analysis, finding that the statute has a rational basis as it promotes a legitimate governmental interest of cost containment for employers and encourages individuals collecting Social Security retirement benefits to remain in the workforce. ||

Side Bar

This decision reinforces the importance of verifying a claimant's receipt of all types of benefits, including "old age" Social Security so that an appropriate deduction can be taken against compensation payments.

Medical evidence supports finding that lifting at work precipitated heart attack.

Bemis v. WCAB (Perkiomen Grille Corp.); No. 2687 C.D. 2010; filed December 27, 2011; by Judge McCullough

The importance of a physician's overall testimony, as opposed to a couple of particular statements, determines whether the testimony is unequivocal so as to support a claim of a work-related injury. In this case, the claimant moved kegs of beer for the employer and developed chest pain that recurred two days later while lifting a heavy pot of chili. The claimant was hospitalized and thereafter underwent quintuple bypass surgery after which the employer replaced him at work. Medical evidence in support of a claim petition indicated that the lifting incidents "certainly could have precipitated and probably did precipitate the incident" and were "very likely" to have done so. The Workers' Compensation Judge rejected such evidence as equivocal. On appeal, however, the court reversed, finding that the doctor's further statements that the incidents certainly caused the claimant's hospitalization and heart attack and that lab studies after the events were indicative of a heart attack. In consideration that the claimant only reported problems after the work activities indicate that, on the whole, the medical evidence was not equivocal. ||

Offset for pension benefits received affirmed.

School District v. WCAB (Davis); No. 166 C.D. 2011; filed December 22, 2011; by Judge Brobson

The employer is entitled under § 204(a) to take an offset against compensation benefits for money a claimant receives from a defined benefit or contribution plan to the extent funded by the employer. The employer in *Davis* sought to obtain an offset for the claimant's receipt of disability benefits through the School Employees Retirement System and offered actuarial testimony on the amount of the employer's contribution toward the claimant's pension fund and the formula involved. The Workers' Compensation Judge found the testimony unpersuasive and not credible because it did not quantify the value of the return on investment retained in the fund after non-vesting employees are paid their contribution plus four percent return, which potentially reduced the calculation of the employer's contribution. On appeal, the court reversed, holding that the employer met its burden of proof and offered testimony consistent with the requirements of the law that an employer need not offer proof of exact contributions to a pension plan. The claimant is required to offer his or her own evidence challenging the employer's contribution to the pension fund and cannot rely on hypothetical questioning on employee contributions to the plan. ||

Medical opinion that fails to consider previous full recovery determination is insufficient, and claimant is estopped from arguing NCP is incorrect where that issue was not raised in litigation on termination petition.

Namani v. WCAB (A. Duie Pyle); No. 522 C.D. 2011; filed December 6, 2011; by Judge Jubelirer

The claimant was found to be fully recovered from the accepted left arm and hand injury. He then filed a reinstatement petition and claim petition alleging worsening of his condition and additional work injuries involving his cervical spine. The Workers' Compensation Judge denied the petitions, which was upheld on appeal. The claimant's doctor's opinion was found to be legally insufficient because he did not know of and failed to address the prior termination petition, his testimony of an additional injury was given more than three years later, and he failed to identify any change in condition since that decision. The claimant's argument that the NCP was materially incorrect was precluded as the information about an additional injury was available during the termination petition. ||

Side Bar

This case illustrates the importance of having a reviewing doctor know and understand prior adjudications in the workers' compensation claim so that the medical opinion does not run contrary to the established benefit status. It also notes that challenges to the nature of the work injury must be brought as soon as possible, particularly in pending litigation on a termination petition.

Installation of an in-home therapy pool held neither reasonable nor necessary treatment where judge did not consider all of the circumstances, including alternative devices.

Commonwealth of Pennsylvania, Dept. of Transportation v. WCAB (Clippinger); No. 1142 C.D. 2011; filed December 30, 2011; by Judge Simpson

The claimant, paralyzed from the waist down following surgery for a work-related back condition, filed a review petition and a Utilization Review request seeking payment for the installation of an aquatic therapy pool at this home, along with the construction of an additional room to house it. Although the claimant was able to return to work full-time in a sedentary job, he had a permanent impairment that made it difficult to stand, walk without assistance, transition and dress himself. His treating physician prescribed aquatic therapy, but the claimant complained that the physical therapy facility was busy and he had difficulty getting into the building and navigating the locker room. The Workers' Compensation Judge upheld the claimant's position, finding that the pool installation was reasonable and necessary treatment.

The court, however, reversed that decision, finding that the judge failed to address alternative treatment. In its discussion, the court noted that the claimant is able to travel to physical therapy to obtain aquatic treatment and his concerns about the physical therapy facility are not an impediment to treatment. The court further cautioned that the cost of the proposed appliance and any windfall to the claimant from improvements to his home have to be considered. As a result, the court remanded the case back to the judge, overturned awards for penalties and attorney's fees on this issue, but upheld a penalty for the failure to pay other medical expenses on the basis that the claimant's providers had not submitted medical reports but where the claimant complied with the carrier's instructions in submitting the receipts. ||

Side Bar

This case is significant as it represents a departure from recent decisions finding that adaptations to the home to accommodate paralyzed claimants were reasonable and necessary orthopedic appliances under § 306(f.1)(1), thus indicating that the courts will draw the line on proposed treatments that are not properly evaluated by the judge for alternatives and cost.

New Feature:

Ask Our Attorneys

Future issues of What's Hot in Workers' Comp *will feature a new column* ***"Ask Our Attorneys."*** *Please send us your workers' compensation questions, and our authors will answer them in this publication. Send your questions to tamontemuro @mdwcg.com.*

New Jersey Workers' Compensation

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Dario J. Badalamenti

There is no requirement that a judge of compensation consider expert testimony as to causation in an occupational exposure claim before granting a motion to dismiss based on statute of limitations

Russo v. Hoboken Board of Education, Docket No. A-1861-10T4, 2010 N.J. Super. Unpub. LEXIS 2910 (App. Div., decided November 29, 2011)

The petitioner was a teacher employed by the respondent from 1971 through 1993. On February 24, 2004, the petitioner filed a claim with the Division of Workers' Compensation alleging pulmonary and related injuries as a result of exposure to asbestos while in the respondent's employ. The petitioner testified as to an asbestos remediation program that took place at the high school where he taught in the early 1990s. The program, which was carried out during school hours, lasted about a year and included replacement of all ceiling tiles and removal of asbestos from piping in the basement. On cross examination, the petitioner acknowledged that, from early in his teaching career, he was aware that "asbestos had harmful effects, including lung disease," and that he was concerned for his own health, as well as that of the students and other teachers.

In March 2000, the petitioner was diagnosed with a metastatic brain tumor and underwent surgery to remove the tumor. Surgery was followed by a regimen of radiation and chemotherapy. Approximately three months later, a cancerous upper lobe of the petitioner's lung was removed and further radiation and chemotherapy followed. In or about 2001, the cancer returned to the petitioner's brain, and he underwent additional radiation therapy. In 2003, his adrenal gland was removed when it was discovered that his cancer had spread. Additional radiation and chemotherapy followed until sometime in 2005. At the time of his testimony, the petitioner's condition continued to require periodic MRI studies.

At the conclusion of the petitioner's testimony, the respondent moved to dismiss the petitioner's claim as time-barred. The judge of compensation ordered the parties to submit briefs as to the respondent's motion and heard oral argument shortly thereafter. In the judge's decision, she concluded that "[p]etitioner admitted knowledge of potential harmful effects of asbestos during the remediation project" and "he had permanent loss of function in 2000 and 2001." Accordingly, the judge found that the petitioner's claim filed on February 23, 2004, was time-barred as it had not been filed within the two-year statute of limitations as provided by the Workers' Compensation Act. The petitioner appealed, contending that medical knowledge as to the cause of his cancer could not be imputed to him in the absence of expert testimony as to the issue of causation.

In affirming the judge of compensation's holding, the Appellate Division examined N.J.S.A. 34:15-34 which provides:

> [W]here a claimant knew the nature of the disability and its relation to the employment, all claims for compensation for occupational disease . . . shall be barred unless a petition is filed . . . within 2 years after the date on which the claimant first knew the nature of the disability and its relation to the employment.

The Appellate Division found that the petitioner had knowledge of the potential harmful effects of asbestos from early in his career and that he knew he had suffered a permanent loss of function in 2000, when he first had a cancerous tumor removed from his brain, or shortly thereafter in 2001, when he had a cancerous upper lobe removed from his lung. This knowledge, the Appellate Division concluded, provided ample basis for the judge of compensation's dismissal of the petitioner's claim.

As to the petitioner's argument that medical knowledge as to the cause of his cancer could not be imputed to him in the absence of expert testimony to establish causation, the Appellate Division found same unconvincing. Rather, the court concluded that "there is no requirement that the [Judge of Compensation] consider expert testimony before granting a motion to dismiss based on the statue of limitations." Rather, knowledge will be imputed to the petitioner if he:

> [w]as aware of facts that would alert a reasonable person to the possibility of an actionable claim. [O]nly some reasonable medical support, not medical confirmation is required. **II**

Side Bar

By holding that a Judge of Compensation need not hear medical testimony before dismissing an occupational exposure claim based on the statute of limitations, the Appellate Division has eliminated certain procedural and evidentiary obstacles to utilizing the statute of limitations defense. As such, the Russo decision clearly demonstrates that the statute of limitations defense, long thought to be extinct in the context of occupational exposure claims, in fact remains a potentially potent defense tool.

Delaware Workers' Compensation

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Keri L. Morris

Utilization Appeals in 45 Days ... Not Any More.

Avila-Hernandez v. Timber Products, Palomino v. Christiana Care Health Services and Munoz v. Berger Brothers, C.A. No. N10A-06-002 Consolidated

In 2011, the Delaware Department of Labor had promulgated regulations that provided for only a 45-day appeal period from any Utilization Review decision, which could be appealed by either party to the Industrial Accident Board for a hearing *de novo*, but only before the expiration of 45 days from receipt of the Utilization Review decision. If an appeal from a Utilization Review decision was filed outside of the 45-day window, the defense would simply file a motion to dismiss the appeal. The Board would have been required to grant the motion based on the regulations.

This process has been turned upside down since the Superior Court rendered its January, 2012 decision in *Avila-Hernandez v. Timber Products, Palomino v. Christiana Care Health Services and Munoz v. Berger Brothers*. The court held, in these consolidated cases, that the 45-day deadline to appeal Utilization Review decisions cannot stand. The court reasoned that the Department's regulation conflicted with the legislature's much longer five-year statute of limitations on open compensation cases. ||

Side Bar

This consolidated case is significant because it allows either party to appeal an adverse Utilization Review decision at any time so long as the five-year statute of limitations for workers' compensation claims has not expired. Employers and carriers could be faced with additional amounts due for the medical treatment based on the statutory interest accrual if the Industrial Accident Board finds that the medical treatment subject to Utilization Review is reasonable and necessary. It is expected that the Delaware General Assembly will address this matter. However until then, failure to file an appeal within 45 days of receipt of a Utilization Review decision does not bar the claim.

News from Marshall Dennehey

Mary Kohnke Wagner (Philadelphia, PA) is co-presenting *Workers' Compensation Issues Involving the Larger Employer* in conjunction with the Pennsylvania Bar Institute. The course will provide valuable insight into the unique aspects of Pennsylvania workers' compensation from the perspective of the large employer. The program will address the challenges involved with a multiple location, multiple jurisdiction employer with a large and diverse workforce, especially in a health care provider setting. The course will be offered in Philadelphia and Pittsburgh on March 1 and March 14 respectively. Visit www.pbi.org for more information and to register to attend.

The Pennsylvania Chamber of Business and Industry has asked **Tony Natale** (Philadelphia, PA) to participate in the upcoming *Unemployment Compensation Roundtable*. He joins officials from the Pennsylvania Bureau of Unemployment Compensation and other top field experts to provide answers on how and when benefits apply and how to handle different situations businesses may face. Tony will specifically address the do's and don'ts of unemployment compensation hearings, including tips on how to prepare for the appeal, review of the due process elements, what to expect at an unemployment referee hearing, the burden of proof and how to avoid common mistakes. The event will take place on March 8, 2012, at the Hilton Scranton & Convention Center and on March 16 at Crowne Plaza Valley Forge in King of Prussia. For more information or to register to attend, visit www.pachamber.org/www/conferences/main.php.

Shannon Fellin and **Kacey Wiedt** (Harrisburg, PA) are the featured speakers at an upcoming meeting sponsored by the Susquehanna Human Resources Management Association. Their presentation will cover Pennsylvania workers' compensation from the employer's perspective. The educational program is scheduled for March 20 in Lewisburg, Pennsylvania. Visit shrma.shrm.org for more details and registration information.

Estelle McGrath (Pittsburgh, PA) successfully defended a local employer and its insurance carrier in review and reinstatement petitions in which the claimant asserted additional injuries and a worsening of his condition. The issue involved whether the claimant's back diagnosis of a herniated disc in his lumbar spine and subsequent disability were caused by the work injury. The factual scenario involved the claimant falling off of a roof while performing construction work. By utilizing surveillance reports documenting that the claimant was advertising a lawn business, and employer witness testimony to dispute the claimant's allegations, Estelle discredited the claimant's testimony that he was unable to work. Based upon all the evidence offered by the employer, the judge denied and dismissed the claimant's petitions. ||