MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 21 | NO. 10 | OCTOBER 2017

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

Protz II prompts Commonwealth Court to reverse a Workers' Compensation Judge's decision to modify benefits based on an IRE performed in 2005 using the Fifth Edition of the AMA Guides.

Debra Thompson v. WCAB (Exelon Corporation); No. 1227 C.D. 2016; filed Aug. 16, 2017; Judge Brobson

The claimant was injured on October 16, 1998, and received varying periods of temporary total disability and partial disability benefits. On October 8, 2001, she began working a light-duty position and was paid partial disability benefits. She was then laid off on September 23, 2003, and received severance and unemployment compensation through September 15, 2004, at which time total disability benefits were reinstated. In September of 2005, an IRE was performed, and the claimant was given an impairment rating of 23%. A Notice of Change of Workers' Compensation Disability Status (Notice) was issued, changing her status from total to partial effective August 30, 2005. Later, in April of 2011, the claimant filed a review petition regarding the 2005 IRE, alleging she had not yet reached maximum medical improvement.

The Workers' Compensation Judge concluded that the claimant was properly adjusted to partial disability status based on the results of the 2005 IRE. The claimant appealed to the Workers' Compensation Appeal Board, which concluded that she was time barred from challenging the change in status since she did not appeal it within the 60-day period after receiving the Notice adjusting her to partial disability. Additionally, the Board held that the claimant could not challenge the IRE within the 500-week period of partial disability without a qualifying IRE determination.

The claimant then appealed to the Commonwealth Court. The court vacated the Board's order and remanded the case to the Board on the issue of whether the Notice deprived the claimant of due process. In July of 2016, the Board concluded the Workers' Compensation Judge did not err in determining that the employer was entitled to an automatic modification of the claimant's benefits for total to partial disability.

Again, the claimant appealed to the Commonwealth Court, this time arguing that the Workers' Compensation Judge erred in concluding that her benefits were modified based on an IRE performed using the Fifth Edition of the AMA Guides, which the Commonwealth Court declared unconstitutional in *Protz v. WCAB (Derry Area School District)*, 124 A.3d 406, 416 (Pa. Cmwlth. 2015) (*Protz I*).

The Commonwealth Court reversed the Board's opinion, affirming modification of the claimant's benefits from total to partial based on the Supreme Court's holding in *Protz II*, 161 A.3d 827 (Pa. 2017). According to the court, in *Protz II*, the Supreme Court struck the entirety of Section 306 (A.2) of the Act as unconstitutional and, in effect, eliminated the entire IRE process from the Act. II

An employer that establishes that a claimant's loss of earnings is not related to the work injury, but is related to other factors, is not required to prove job availability within the claimant's medical restrictions.

Carlos Torijano v. WCAB (In a Flash Plumbing); No. 1686 C.D. 2016; filed; Aug. 30, 2017; Judge Hearthway

The claimant sustained a work injury to his low back while working for the employer as a plumber's helper. A Notice of Compensation Payable described the injury as a low back strain. The employer filed a suspension petition, alleging that a specific job was offered to the claimant within his restrictions, which he refused. The claimant contested the petition.

At the Workers' Compensation Judge level, the employer presented medical evidence that the claimant could perform light-duty work at the time his physician first examined him and that he had fully recovered by the time the physician last saw him. Additionally, the employer presented testimony from a witness who said that the claimant did return to work with a 10-pound lifting restriction on June 11, 2014, but that he was reprimanded for not calling in before jobs, which he was required to do. According to this witness, the claimant became upset when asked to sign a paper regarding the reprimand and thereafter did not show up for work. The claimant was never fired. Another witness for the employer testified that the claimant quit because he was asked to sign the letter about the reprimand. Additionally, the claimant admitted he told the insurance adjuster that the only reason he was not working was because of the reprimand.

The Workers' Compensation Judge granted the suspension petition, mainly because the claimant refused to work because of the reprimand. The judge considered this a "voluntary quit." The Workers' Compensation Appeal Board affirmed.

The Commonwealth Court affirmed the suspension as well. According to the court, the critical fact was the claimant's admission that he voluntarily left his job because of his reprimand. The court concluded that the claimant's loss of earnings was related to a factor other than the work injury, requiring a suspension of benefits. II

The claimant is not entitled to a reinstatement of benefits for the worsening of a condition that had already been judicially excluded as related to the work injury.

Janie McNeil v. WCAB (Department of Corrections, SCI-Graterford); No. 2022 C.D. 2016; filed Sep. 1, 2017; Judge McCullough

The claimant suffered multiple injuries while working as a gate sergeant for the employer on January 26, 2011. Later, the employer filed a termination petition, alleging full recovery from the work injuries. The claimant filed a review petition, alleging an incorrect description of the work injury.

The claimant's review petition was partially granted by the Workers' Compensation Judge, as to further thoracic and lumbar strain and sprain injuries, but denied as to a work-related left shoulder rotator cuff tear. The judge's decision was affirmed by the Workers' Compensation Appeal Board, and no further appeal was taken.

The claimant then filed a reinstatement petition, seeking payment of benefits as of the date her left shoulder surgery was performed. The employer moved to dismiss the petition on the basis that the claimant was seeking a reinstatement of benefits for surgery performed on a condition that was found to be unrelated to the work injury. No evidence was presented by the employer, and the judge dismissed the petition. The Appeal Board affirmed the decision on appeal.

The Commonwealth Court dismissed the claimant's appeal. In the court's view, the Workers' Compensation Judge previously found that the left rotator cuff was excluded from the work injury and the judge's order became final as to the scope of that work injury. According to the court, the claimant was collaterally estopped from relitigating a critical fact in the reinstatement petition proceeding. II

The employer's utilization review petition was improperly granted where the employer asserted they were not liable for treatment of RSD/CRPS when they accepted responsibility in a C&R Agreement for fractured right and left feet.

Thomas Haslam v. WCAB (London Grove Communication); No. 1655 C.D. 2016; filed Sep. 1, 2017; Judge Hearthway

In February of 1998, the claimant sustained injuries when he fell off a building in the course and scope of his employment. The employer accepted the injury by issuing a Notice of Compensation Payable. The nature of the injury accepted was a right and left foot fracture. In 2008, the indemnity portion of the case was settled by Compromise & Release Agreement. Later, the employer filed a Utilization Review Request, seeking review of compounded medication being provided to the claimant. It was determined that the medication was reasonable and necessary. The employer then filed a petition challenging the Utilization Review Determination. In connection with that petition, the employer argued that the claimant was being treated for RSD/CRSP, which was not expressly accepted by the employer in the C&R Agreement. The claimant also filed a review petition requesting recognition of the RSD/CRPS as being related to the original work injury.

The Workers' Compensation Judge denied the employer's UR Petition and granted the claimant's review petition. The judge held that the claimant's RSD/CRPS was within the scope of the C&R Agreement. The employer appealed to the Workers' Compensation Appeal Board, which reversed the judge's decision and determined that the C&R Agreement precluded the claimant from expanding the description of his injury.

The Commonwealth Court reversed the Board. In doing so, it noted that the employer did not contend that the challenged treatment was not reasonable and necessary for the claimant's pain but, rather, argued it should not be liable for the treatment because the C&R Agreement only accepted responsibility for "fractured right and left feet." The court pointed out that the utilization review process was not the proper method to determine causation of an injury or condition. Although the court agreed that the Appeal Board correctly concluded the claimant could not expand the description of the injury acknowledged in the C&R Agreement, they also found that the Board was wrong to conclude that the medical treatment at issue was beyond the scope of the C&R Agreement. The court pointed out that the agreement described the claimant's work injuries as "various injuries and bodily parts including but not limited to fractured right and left feet." In the court's reading of the agreement, the employer did not agree to pay ***only for*** medical treatment of fractured feet, but rather, agreed to pay for all reasonable and necessary expenses ***related to*** the fractured feet. II

Delaware Workers' Compensation

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwcg.com)

Paul V. Tatlow

The Superior Court holds that a claimant, who is receiving partial disability benefits and then has a recurrence of total disability, is eligible for those benefits since he has not voluntarily removed himself from the labor market merely because he did not seek employment while partially disabled.

State of Delaware v. Darren Archangelo, (C.A. No. N16A-09-004 JAP – Decided Aug. 9, 2017)

The employer appealed the Board's decision that found the claimant had suffered a recurrence of total disability.

In 2012, the claimant had been a physical education teacher and wrestling coach at a middle school when he was injured while breaking up a fight between students. The claimant was receiving total disability benefits and, as of March 6, 2014, was capable of doing light-duty work. As a result, his benefits were reduced to a partial disability rate. In 2015, the claimant needed additional back surgery. Following litigation on a DACD petition, the Board found that the claimant had a recurrence of total disability and was entitled to ongoing compensation benefits.

The issue raised by the employer on appeal was whether, as a matter of law, the claimant had voluntarily removed himself from the labor market and was, therefore, not eligible for total disability benefits following the recurrence since he had not sought employment while receiving partial disability. On appeal, both parties agreed that the claimant had proven a recurrence of his work-related disability. The narrow issue was whether the claimant had voluntarily withdrawn from the workforce during the period he was receiving partial disability.

The court summarized the applicable law by stating that when a totally disabled claimant improves to the point where he can do some type of modified work, benefits are then reduced to two-thirds of the difference between the pre-injury average weekly wage and what the worker is capable of earning, as opposed to any actual earnings. The court further noted that a complication could arise when a worker has retired in the traditional sense, meaning for reasons unrelated to the work injury. In those instances, there are no longer any wages to replace because the claimant would not have been earning any wages after his or her retirement and, thus, has no reason for wage replacement benefits. The court cited the Delaware Supreme Court case of *Estate of Jackson v. Genesis Health Ventures*, 23 A.3d 1287(Del. 2011) for the proposition that, in a voluntary retirement situation where a claimant does not look for any work or contemplate working after retiring and is content with the retirement lifestyle, the claimant is not eligible for compensation wage benefits thereafter.

Applying that law to this case, the court reasoned that it is not enough that the claimant does not look for work, but the employer must also show that the claimant is content with the retirement lifestyle. The court found that the evidence here did not establish that the claimant's failure to look for work while partially disabled established, as a matter of law, that he was ineligible for total disability benefits. The court held that the absence of a job search by a claimant on partial disability status is an appropriate factor to consider in the voluntary removal from the workforce evaluation, but it is not dispositive as a matter of law. In reaching this conclusion, the court noted that the claimant, rather than attempting to undertake light-duty work while partially disabled, had spent time undergoing rehabilitation, which he believed was necessary to enable him to attempt to return to his career as a professional educator. The court also commented that the claimant was only 45 years old, which would be a comparatively young age for retirement. In addition, while receiving compensation benefits, the claimant had not received any other additional income, such as Social Security benefits or a pension. Therefore, the court reasoned that the overwhelming evidence, as found by the Board, supported the fact that the claimant did not voluntarily remove himself from the workforce. As such, the claimant was entitled to compensation for total disability following the recurrence when he underwent the surgery in November 2015. ||

News from Marshall Dennehey

Kacey Wiedt (Harrisburg, PA) successfully prosecuted a termination petition and defeated reinstatement and review petitions on behalf of a school district. The claimant tripped on a hockey stick left by a student in the classroom, resulting in a trapezius muscle strain. The claimant alleged she injured her low back because of undergoing physical therapy for treatment for her work injury. This, in turn, resulted in a disc herniation that required surgery, consisting of a laminectomy at the L5-S1 and fusion of L3, L4 and L5. Kacey established that the claimant had fully recovered from the trapezius muscle strain and that her disc herniation and surgery were not related to the original injury. The Workers' Compensation judge found that the claimant did not suffer a low back injury because of any activity with physical therapy, that she was suffering from multi-level degenerative disc disease, and that she did not suffer any sort of herniation or tear during physical therapy.

Ashley Talley (Philadelphia, PA) successfully defended a penalty petition that sought to compel the payment of medical bills

for treatment outside the scope of the employer's liability. The claimant sustained a work-related knee injury and head contusion while working for a large shipping company. Litigation commenced to expand the injury to include significant cervical spine injuries, although prior to the decision, the parties entered into a binding settlement agreement that specifically denied the cervical injuries as a work-related condition. Subsequent to the settlement, the claimant attempted to coerce the employer to pay for treatment on the cervical spine. Upon a denial of those bills, a penalty petition was filed. Ashley successfully argued that the medical treatment was outside the scope of the employer's liability and amounted to a "case without merit."

Judd Woytek (Allentown, PA) obtained a favorable decision and order denying benefits in a Federal Black Lung claim that had been pending since 2003. This matter was most recently before an Administrative Law Judge on a remand from the Benefits Review Board on the sole issue of whether the miner's medical expert's testimony was sufficient to establish that the miner was suffering from coal workers' pneumoconiosis. Judd persuasively argued to the judge that the claimant's medical expert failed to offer a well-reasoned or well-documented opinion that the miner had developed coal workers' pneumoconiosis as the result of his 37 years of working in the coal mines. The judge denied the claim for benefits, which could have potentially been retroactive.

Andrea Rock (Philadelphia, PA) successfully prosecuted a modification/suspension petition on behalf of a large financial institution nearly 12 years after the claimant's injury. The claimant injured her left shoulder and cervical spine in October of 2005. Since that time, she has had two cervical spine surgeries and two shoulder surgeries. Andrea was able to establish that the claimant was able to return to work in a sedentary-duty capacity, working from home in a telemarketing position, thus modifying her total disability benefits to partial. The Workers' Compensation Judge was particularly persuaded by the factual testimony demonstrating that the actual job duties were no more than what she had to do in her normal activities of daily living.

Michele Punturi (Philadelphia) defeated a claimant's appeal of the Workers' Compensation Judge's remanded decision involving claim and penalty petitions. The initial decision found that the claimant was not credible, his testimony was not supported by the medical evidence, and he failed to prove a work injury. The judge also accepted the opinions of the IME examiner, who testified that there was no evidence of an aggravation or worsening of a meniscal tear, and dismissed both petitions. The claimant appealed, and the matter was remanded by the Appeal Board to address credibility determinations the judge made of the claimant's testimony and the medical evidence. The parties presented their positions before the judge and subsequent briefs were filed. The judge ultimately found, based upon the evidence presented, that the IME physician's testimony provided substantial, competent and credible testimony, which was contrary to the claimant's medical evidence. The judge again found the claimant not credible based upon his testimony. **II**