PENNSYLVANIA WORKERS' COMPENSATION UPDATE

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TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2013

1. Workers' Compensation Act does not cover occupational diseases, such as mesothelioma, that manifest more than 300 weeks after employment ends. *Tooey v. AK Steel, ARMCO Steel, Crown Cork & Seal, et al.,* 2013 Pa. LEXIS 2816

2. An employer's burden of proof when seeking a modification of benefits based on a labor market survey requires showing the existence of open jobs the claimant is capable of filling, not simply the existence of jobs that are already filled.
Phoenixville Hospital v. WCAB (Shoap), 2013 Pa. LEXIS 2810

3. A Pennsylvania state trooper who struck and killed a woman with his patrol car was entitled to benefits for a psychic injury due to abnormal working conditions.
Payes v. WCAB (Commonwealth of Pennsylvania State Police), 2013 Pa. LEXIS 2588

4. Section 413 (a) of the Act allows claimants to retain the right to petition for any modification that they hold at the time of any workers' compensation payment for a minimum of three years from the date of that payment. Where such payments have been suspended due to a return to work or an attempted return without a loss in earnings, § 413 (a) extends the right to petition for the entire 500-week period during which compensation for partial disability is payable. In the event payments are resumed after a suspension of benefits, claimants continue to retain the right to petition for any modification they hold at the time of any payment received subsequent to suspension for a minimum of three years from the date of payment. In the event that a period of suspension comes to an end upon the resumption of payments, claimant's retain the right to petition for modification as set forth in § 413 (a).
Gina Cozzone, Executrix of The Estate of Andrew Cozzone v. WCAB (Pa. Municipal/East Goshen Township), 73 A. 3d 526 (Pa. 2013)

5. A claimant's receipt of pension benefits is not a presumption of retirement but is, instead, an inference that must be considered in connection with the totality of the circumstances.
City of Pittsburgh and UPMC Benefit Management Services, Inc. v. WCAB (Robinson), 67 A.3d 1194 (Pa. 2013)

6. Grace period payments made to the claimant are considered compensation under the Act, and the employer is entitled to reimbursement of them from the Supersedeas Fund.
Department of Labor and Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board, (Excelsior Insurance), 58 A.3d 18 (Pa. 2012)

7. Massage therapy provided by an LPN not licensed in massage therapy is, nevertheless, reasonable and necessary.

Kevin Moran v. WCAB (McCarthy Flowers and Donegal Mutual Insurance), 2013 Pa. Commw. LEXIS 421

8. An impairment rating given for a condition not part of the recognized work injury will not bar the employer from obtaining a termination for the official work injury.
Richard Harrison v. WCAB (Auto Truck Transport Corp.), 2013 Pa. Commw. LEXIS 391

9. A claimant is not in the course and scope of employment at the time of injury when the claimant abandons his employment to work on his child's go-cart.
Trigon Holdings, Inc., v. WCAB (Griffith), 74 A.3d 359 (Pa. Cmwlth 2013)

10. Denial of fatal claim petition because decedent's death did not occur within 300 weeks of the date of the original work injury was proper, even where the injury was later expanded by a judge's decision.
Jamie Whitesell v. WCAB (Staples, Inc.), 74 A.3d 297 (Pa. Cmwlth 2013)

RECENT DECISIONS

In a modification petition based upon a labor market survey, the employer meets its burden of proving that it does not have an open and available job for the claimant through testimony from the employer that the jobs it did have did not comply with the claimant's restrictions.

James Reichert v. WCAB (Dollar Tree Stores); 42 C.D. 2013; filed 11/8/13; by Judge Brobson

After the claimant's work injury, the employer filed a modification petition based on the results of a labor market survey. In connection with that petition, the employer presented testimony from its district manager, who testified that the employer, which had a total of 10 retail stores, had positions available in the stores that required a lot of physical movement. He also testified that there was very little office work to be done in the stores. The witness further said that, having reviewed the restrictions given by an IME physician, who released the claimant to do light-duty work, the employer did not have any open positions that met these limitations. On cross examination, the employer admitted that no one asked him to look for a job and that he was never contacted by the employer's vocational expert. He also acknowledged that he did not have any actual written job descriptions for the retail store positions.

The WCJ granted the modification petition. In doing so, he found the testimony given by the employer's witness credible that there were no open and available jobs for the claimant within the restrictions of

continued on page 16

PA Workers' Comp

continued from page 15

the IME physician. The claimant appealed.

The court held that the employer presented sufficient evidence to establish that it did not have an open and available position for the claimant. It went on to note that, once an employer has presented evidence that it does not have an available position, a claimant is entitled to rebut that evidence by demonstrating that during the period in which the employer has or had a duty to offer a specific job, the employer was actively recruiting or had posted or announced the existence of a specific job vacancy. In this case, the claimant did not present any evidence that the employer was actively recruiting for a specific job vacancy. The court also held that there was no legal authority for the proposition raised by the claimant that a vocational expert is prohibited from conducting a labor market survey unless he first contacts the liable employer to determine whether it has any open and available positions for a claimant.

Benefits were properly suspended after the claimant returned an employment verification form by fax which was signed but not dated.

John McCafferty v. WCAB (Trial Technologies, Inc.); 208 C.D. 2013; filed 11/21/13; by Judge Leavitt

The claimant filed a claim petition for an injury he sustained while working for the employer. While the claim petition was pending, the employer sent the claimant an "Employee Verification of Employment, Self-Employment or Change in Physical Condition Form" (LIBC-760). The claimant was instructed to sign, date and return the form within 30 days. The form was sent on January 18, 2010, and returned by fax on February 22, 2010. On April 13, 2010, the forms were rejected by the employer since they were not the originals and were not dated. About 30 days thereafter, the claimant returned the form by hand delivery, but the form was still not dated. The claim petition was granted, and the employer then sent the claimant a notification of suspension because he had not properly completed and returned the LIBC-760 to the employer. The claimant then mailed a second LIBC-760 to the employer that was dated, and the employer promptly reinstated benefits. The claimant filed a penalty petition, alleging that the employer violated the Act for suspending benefits and sought a reinstatement of benefits for the period benefits were suspended.

The judge dismissed the claimant's petitions, concluding that the claimant's failure to date the form on a line that was located next to the signature line was a fatal omission. the claimant appealed to the Appeal Board, and the Board affirmed the judge's decision.

The Commonwealth Court agreed that transmission of the LIBC-760 form by facsimile is proper. However, they rejected they claimant's argument that the form was not defective because the date was contained on the fax. According to the court, there was no way of determining from the fax when the claimant signed the form. This would have an impact on when the employer could send another form to the claimant, which they are entitled to do every six months. The court held that the signature and date are essential to an unsworn statement being given and that the date is necessary to confirm the substance of the statements made in the form as of a date certain.

An automobile insurance carrier that pays first-party benefits to a claimant and fails to pursue their lien during the pendency of workers' compensation proceedings fails to exhaust its remedy under §319 of the Act and may not recoup its lien.

Liberty Mutual Insurance Company a/s/o Catherine Lamm v. Excalibur Management Services d/b/a Excalibur Insurance Management and Luzerne County; 1792 C.D. 2012; filed 11/8/13; by Judge Leadbetter

The claimant sustained injuries as a result of a work-related motor vehicle accident and filed a claim against the employer. Later, a settlement was reached by compromise and release agreement. Subsequently, the automobile carrier filed a complaint to recover first-party benefits it paid to the claimant pursuant to an automobile insurance policy. The payments were made as a result of the workers' compensation carrier's initial denial of the workers' compensation claim. The automobile insurance carrier sought recovery from the workers' compensation carrier. The workers' compensation carrier secured a dismissal of the complaint by successfully arguing that the automobile insurance carrier failed to exercise or exhaust its statutory remedy under §319 of the Workers' Compensation Act (the subrogation provision) during the pendency of the workers' compensation claim.

The Commonwealth Court agreed. The automobile insurance carrier argued that §319 of the Act did not apply. The court cited the second paragraph of §319, which contemplates subrogation established either by contract or by litigation. The automobile insurance carrier did not file a complaint in Common Pleas Court seeking reimbursement until one year after the settlement by compromise and release agreement was approved. The court held that the automobile insurance carrier not only sought reimbursement in the wrong forum, but waited too long to do so.

A judge does not have jurisdiction for a utilization review petition filed on the basis that records were not timely supplied to the URO by a foreign provider who was treating a claimant who had permanently relocated to his native country.

Peter Leventakos v. WCAB (Spyros Painting); 2156 C.D. 2012; filed 12/5/13; by President Judge Pellegrini

The claimant sustained injuries in October of 1983. About ten years later, the claimant permanently relocated to his native country of Greece. Many

years later, a judge suspended the claimant's workers' compensation benefits based on his voluntary removal from the work force.

The employer filed a utilization review request (UR) seeking review of the claimant's treatment with a physician in Greece. The UR notified the physician and instructed him to submit his treatment records. The URO advised that a summary of the claimant's treatment could not be considered in lieu of the records. The physician, however, provided the URO with a treatment summary. The treatment summary was sent to the provider performing the UR, and that provider discussed the treatment with the claimant's physician in a phone conversation. During that conversation, the provider performing the review was informed that there were no medical records documenting treatment. Consequently, a utilization review determination was issued indicating that the treatment was not reasonable or necessary due to a lack of documentation. The claimant filed a petition challenging the determination.

The judge dismissed the utilization review petition, concluding that she lacked jurisdiction because the physician in Greece failed to submit any medical records to the URO. The judge also said that there was no basis for an exception because the provider was out of the country or because of "foreign convention" that medical records are not kept in Greece. The claimant then appealed to the Board, which affirmed.

The claimant then appealed to the Commonwealth Court, which affirmed the decisions below. They agreed that the judge lacked jurisdiction because none of the information provided could be considered a "record" appropriate for review. However, they also rejected the claimant's argument that his physician's oral account of the treatment constituted a "record."

An employer or workers' compensation carrier that secures a claimant's signature on a final receipt and files it with the Bureau without any information regarding the claimant's full recovery from a work injury does so fraudulently and subjects the final receipt to be set aside, even after the three-year statute of limitations has passed.

Celeste Kraeuter v. WCAB (Ajax Enterprises, Inc.); 457 C.D. 2013; filed 12/19/13; by Judge Leadbetter

The claimant sustained a work-related injury on September 24, 2004. She continued working but eventually became disabled and began receiving workers' compensation benefits. Approximately one and a half years later, in May of 2006, the employer sent the claimant a notification of suspension (LIBC-751), notifying her that her disability benefits were suspended due to a return to work three days before. Three days later, the claimant signed a final receipt, which stated that the claimant was able to return to work without a loss of earnings and that the claimant received benefits for a period of 69 weeks and two days. The employer then filed the final receipt with the Bureau of Workers' Compensation.

Thereafter, in July of 2011, the claimant filed a petition to set aside the final receipt, alleging fraud and/or improper action. The claimant also filed a penalty petition, alleging that the final receipt and notification of suspension were fraudulently filed because they were based on a return to work that never happened. The claimant also filed a petition challenging the notification of suspension.

At the WCJ level, the claimant acknowledged her signature on the final receipt and said she was pretty sure the employer asked her to come in and sign it. However, she also said that her doctor had performed surgery on her and did not release her to return to work when she signed the final receipt. She further said that she did not return to work for the employer nor was she working for any other employer at the time the final receipt was signed. Finally, she said that she had not fully recovered from her work injury when she signed the final receipt. The employer presented deposition testimony of a claims adjustor who said that he prepared and sent the suspension notification and final receipt to the claimant based on his understanding from paperwork from the employer that the claimant had returned to work. He admitted that the form he received from the employer did not indicate that the claimant had fully recovered from her work injury and that he was not in possession of any medical evidence of full recovery. The judge granted the claimant's petitions, finding that the claim adjustor engaged in fraudulent conduct and that the employer violated the Act by unreasonably and excessively delaying compensation payments. The judge also concluded that the employer did not have a reasonable basis to contest the claimant's petitions.

The court agreed with the claimant and reversed the decision of the Board. The court noted that the claims adjustor conceded that he prepared and sent the claimant the final receipt for signature relying solely on dated information provided by the employer in February of 2005 and without any information that the claimant had returned to work in May of 2006 or had fully recovered from the work injury as of that date. In short, the court concluded that the adjustor failed to perform his duty to ascertain the claimant's medical status before preparing and sending the final receipt to the claimant and that claimant was receiving medical treatment, had not fully recovered from the work injury and had not returned to work, contrary to the statements in the notification of suspension and the final receipt. Concluding this, the court also held that the claimant was not required to present any medical evidence in order to set aside the final receipt.

Ex parte communication prohibited between employer's attorney and claimant's physician.

Pennsylvania State University v. Workers' Compensation Appeal Board

continued on page 18

PA Workers' Comp

continued from page 17

(Sox); 454 C.D. 2013, 455 C.D. 2013; filed December 19, 2013

This new Commonwealth Court decision has changed the law regarding communications between an employer and a panel physician when taking depositions. No longer is counsel for the employer able to meet with the panel physician prior to the deposition as to do so violates the injured worker's expectation of privacy.

In this case, the claimant sustained an initial work injury in 2006. After receiving benefits for that injury, the claimant went back to work for the employer. The claimant then sustained additional work injuries on July 19, 2009, and on October 18, 2009. The employer acknowledged the October 18, 2009, work injury by issuing a Medical Only Notice of Compensation Payable. Later, the claimant filed claim petitions, as well as a penalty petition, against the employer. The claimant also filed a reinstatement petition against the employer for his 2006 work injury.

During litigation of the petitions, the employer sought to depose the claimant's treating physicians, who happened to be employees of the panel facility. The claimant objected and sought an order from the WCJ precluding the depositions on the basis that the depositions of the physicians would be an *ex parte* contact by the employer's counsel.

In response to the claimant's objection, the employer asserted attorney/client privilege to justify the *ex parte* contact with the treating physicians. The judge, however, found that the claimant enjoyed a physician/patient privilege with the treating physicians and that, in the absence of consent, the employer was precluded from engaging in *ex parte*, non-disclosed communications. The judge further concluded that an attorney/client relationship did not exist between the employer's counsel and the treating physicians because of their status as employees. The judge permitted the employer to schedule the deposition of a treating physician, but prohibited counsel for the employer from having any *ex parte* contact with any physician to be deposed. The judge further permitted the claimant's counsel to cross examine a physician as to any *ex parte* contacts made.

The judge granted the claim petitions against the employer, who appealed to the Workers' Compensation Appeal Board. The Board affirmed and concluded that the issue of whether the judge's interim order was violative of attorney/client privilege was moot because the employer submitted the reports of the physicians into evidence, as is permissible under §422 (c) of the Act, where the period of disability involved is less than 52 weeks. The employer appealed to the Commonwealth Court.

The employer argued to the Commonwealth Court that the judge's decision prohibiting them from deposing the claimant's treating physicians was prejudicial. According to the employer, the judge may have decided the case differently if the employer's attorney had been allowed to consult and depose the treating physicians without restrictions. The employer further argued that the judge improperly limited the employer's counsel's contact with the treating physicians because the physicians were employees and *ex parte* communications were, therefore, subject to attorney/client privilege.

The Commonwealth Court rejected the employer's arguments and found that the judge's interim order was proper. In the court's view, although the physicians were employees, they acting in their capacity as the claimant's treating providers, not as the employer's employees. In other words, they were not "clients" of employer's counsel. The court concluded that the application of an attorney/client privilege in this context would be improper since it would confer upon the employer an unfair strategic advantage. The court also rejected the employer's argument that the Rules of Civil Procedure permitted counsel to engage in *ex parte* communications with the treating physicians because the case was in litigation. The court held that, although the privacy right against disclosing private medical information was waived, the Rules of Civil Procedure do not permit an employer's attorney to obtain information in any way he sees fit. Moreover, the court rejected the employer's argument that the employment relationship between the treating physicians and the employer circumvented the Rules of Civil Procedure.

The expansion of claimant's injuries by judge's decision granting a review petition does not negate the validity of a prior IRE that was not challenged within 60 days.

Gregory S. Wingrove v. WCAB (Allegheny Energy); 1151 C.D. 2013; filed 1/3/14; by Judge Leavitt

After the claimant sustained a work-related injury that was acknowledged by the employer, the employer issued a notice of change of workers' compensation disability status to the claimant, based on the results of an IRE which found the claimant to have a whole body impairment of 11 percent. Four years later, in an attempt to challenge the IRE, the claimant filed a review petition to amend the description of injury contained in the NCP issued by the employer. The claimant also filed a review petition challenging the results of the IRE because it did not take into account the additional injuries. Later, the claimant filed a third review petition, alleging that lumbar fusion surgery performed rendered him more than 50 percent disabled pursuant to the AMA Guidelines. The parties then agreed in a supplemental agreement that the claimant became totally disabled as of the date of surgery, but for a limited period. The parties also agreed that the execution of the supplemental agreement would have no effect on the pending petitions.

The Commonwealth Court agreed with the employer and dismissed the claimant's appeal. The court held that the amendment to the NCP did not

render the original IRE invalid. The court further pointed out that once 60 days passed without a challenge from the claimant, the IRE became fixed and the burden, therefore, shifted to the claimant to prove that the addition of depression to the NCP rendered him at least 50 percent impaired. The court also rejected an argument made by the claimant that §306 (a.1) of the Act was unconstitutional.

Dismissal of claim petition based on claimant's delay in presenting medical evidence was improper because the delays were, in part, due to requests made by the employer.

David D. Wagner, II v. WCAB (Ty Construction Company, Inc.); 1202 C.D. 2013; filed 1/3/14; by Judge Leavitt

The claimant filed a claim petition alleging his small cell lung cancer was caused by exposure to paint chemicals while working for the employer. The matter was assigned to a WCJ. The first hearing was held on April 11, 2011, and the judge instructed the parties to complete their medical evidence. Claimant's counsel informed the judge he was waiting for a report from the claimant's treating oncologist, and it was agreed that the employer would not schedule an independent medical examination until receiving the report.

One month later, at another hearing, the employer requested dismissal of the claim petition since the claimant had not produced the oncologist's report. Claimant's counsel said that, just a week before, he learned that the claimant's oncologist refused to get involved in legal matters. He, therefore, began a search for an opinion from an industrial hygienist. The judge denied the employer's motion and instructed claimant's counsel to schedule a deposition within the month.

Thirty days later, the employer again moved for the dismissal of the claim petition. The judge gave the claimant another 30 days and issued a written order directing claimant's counsel to submit medical evidence by the end of the 30-day period or the claim petition would be dismissed. Two days before the expiration of the 30 days, a medical report was produced by the claimant. The deposition of the claimant's expert was also scheduled, but was subsequently canceled at the request of the employer so that they could first obtain an IME of the claimant.

At the next hearing, the employer again asked for a dismissal of the claim petition. Claimant's counsel again explained that he had been attempting to reschedule the deposition of his expert since receiving the employer's IME report but was having difficulty. He pointed out that the expert deposition that was scheduled previously was postponed at the employer's request. The judge granted the employer's motion to dismiss, and the Board affirmed.

The Commonwealth Court, however, reversed. Recognizing that it is within the judge's discretion to close the record and preclude the submission of evidence, nevertheless, the dismissal of a petition for lack of prosecution can be set aside for abuse of discretion. The court pointed out that the judge issued an order requiring the claimant to produce an expert report to the employer within 30 days and that the claimant complied with that directive. The court further pointed out that the claimant did schedule a deposition but that it was canceled at the request of the employer. The claimant was then forced to wait until the report from the employer's IME had been received to reschedule the deposition.

A C&R agreement that does not resolve an issue that is on appeal with the board does not preclude the employer from recovering from the supersedeas fund.

H.A. Harpersons, Inc. v. WCAB (Sweigart); 861 C.D. 2013; filed 1/3/14; by Judge Brobson

The claimant filed a claim petition, which was granted by the WCJ. In his decision, the judge established the claimant's average weekly wage and compensation rate, which the employer appealed. In connection with the appeal, the employer requested supersedeas, which was denied by the Appeal Board.

While the appeal was pending, the employer filed a termination petition. Thereafter, the parties settled the case by C&R agreement. The employer's termination petition was amended to a petition to seek approval of a C&R agreement. Later, the Board granted the employer's appeal as to the calculation of the claimant's average weekly wage and modified the claimant's AWW and compensation rate. The employer then filed an application for supersedeas fund reimbursement.

The application was challenged by the Commonwealth. The judge granted the application, but the Bureau appealed to the Appeal Board, which reversed. According to the Board, the C&R that was approved during the pendency of the employer's appeal resolved all litigation and/or liability.

The Commonwealth Court reversed, holding that the C&R agreement did not settle the issue of the average weekly wage calculation. They noted that, following approval of the settlement, the employer did not withdraw the appeal of the average weekly wage issue pending before the Board. According to the court, the agreement did not settle the exact issue raised in the appeal, which was a dispute as to the average weekly wage.

An employer is not required to issue a notice of ability to return to work after a notice of denial has been issued and before a claim petition has been filed.

School District of Philadelphia v. WCAB (Hilton); 598 C.D. 2013; filed 1/7/14; by Judge Leadbetter

A WCJ granted a claim petition and awarded the claimant benefits. However, the judge found that the claimant was entitled to benefits for a closed period. Therefore, he suspended the claimant's benefits, finding that there was work available to the claimant that she was capable of performing despite her work injuries. On appeal, the Appeal Board reversed.

continued on page 20

PA Workers' Comp

continued from page 19

The employer appealed to the Commonwealth Court, which reversed decision of the Board. In doing so, the court accepted the employer's argument that the claimant only established disability for a limited period of time. The court further held that the employer was not required to provide the claimant with a notice of ability to return to work during the time period after it issued a notice of denial, but before the claimant filed a claim petition, since the claimant was not receiving benefits at the time the alternate job offer was made and while no litigation was taking place.

Injuries sustained by claimant who, through a state-funded program, was employed by her son as his caregiver, are compensable pursuant to the "bunkhouse rule" in that her presence on the premises was required by the nature of her employment.

Laura O'Rourke v. WCAB (Gartland); 1794 C.D. 2012; filed 1/8/14; by Judge McCullough

Through a state-funded program, the claimant was employed by her son to provide care for him at her residence in exchange for an hourly wage. The claimant filed a claim petition, alleging that she sustained multiple injuries when, while she was sleeping in her bed, her son (employer) cut her throat with a butcher knife and inflicted three other stab wounds. The claimant later filed a review petition, alleging she needed medical treatment and was unable to work due to post-traumatic stress disorder.

During litigation of the petitions, testimony was presented that: (1) the employer had not lived with his mother since he was 15 years old; (2) the employer had significant health issues, from a history of drug problems; (3) the employer underwent an amputation of his leg in 2007 and spent six months in a rehabilitation center; (4) the claimant agreed to care for the employer in her home until he got better and could live independently; and (5) the employer moved into the claimant's residence. The care that the claimant provided included assistance with bathing and dressing, doing laundry, preparing meals and providing transportation. Although the care did not include 24-hour or nighttime care, the employer could request care during the evening or nighttime hours, but the worker had to be awake and providing care during those hours. Evidence was also presented that, on the night of the injury, after the claimant returned home at around 10:00 p.m., the employer and the claimant argued about preparing the employer something to eat. After getting the employer something to eat and fixing the couch up as his bed, the claimant went to bed at 11:30 p.m. Around 1:30 a.m., while asleep in her bed, the employer attacked her.

The WCJ granted the claimant's petition. In doing so, the judge concluded that the claimant demonstrated that her employment required her to be on the employer's premises at the time she sustained her injuries. He also concluded that it was the employer's burden to prove that the attack occurred due to personal animosity and that the employer failed to meet his burden. The Appeal Board, however, reversed.

The claimant appealed to the Commonwealth Court, and they reversed the Board. On appeal, the claimant argued that her injuries were compensable under the "bunkhouse rule," which stemmed from a 1924 Supreme Court case which held that a claimant was considered to be in the course of employment while sleeping on premises, even though not actively favoring the interests of the employer at the time of the injury. Based on this opinion, the court construed the language of §301(c) of the Act to include those situations where the evidence establishes that an employee lives on the premises because he or she is "practically required" to do so. According to the court, under the circumstances of the case, the only feasible way for the claimant to provide the employer with attendant care was to do so in her home. The court also held that, under the "bunkhouse rule, "it was immaterial that the claimant was not sleeping and not furthering the interests of the employer at the time of the assault.