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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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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 Workers' Compensation Judge granted the claimant's review petition to expand the description of the work injury in the NCP, and those conditions were added. But, the Judge also concluded that the expansion of the injuries did not negate the validity of the IRE performed in 2005. Furthermore, the Judge found that the supplemental agreement did not render the 2005 IRE a nullity simply because it reinstated total disability benefits for a closed period. According to the Judge, it was the claimant's burden to prove that the additional injuries established a whole body impairment in excess of 50 percent. The Appeal Board affirmed the Judge's decision.

On appeal to the Commonwealth Court, the claimant argued that the supplemental agreement proved that he was at least 50 percent disabled following his surgery and that, although the agreement placed him back on partial disability status, this was based on the original NCP that was later expanded by the Judge's decision. According to the claimant, once that was established, it was up to the employer to prove that he is less than 50 percent disabled in order to change his status. The employer responded by arguing that the 2005 IRE determination remained binding notwithstanding the supplemental agreement.

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. II

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 Workers' Compensation Judge. 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. **II**

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 Workers' Compensation Judge. 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 modifyed 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. **II**

Side Bar

C&R agreements should be drafted with specificity. If there is an issue before the Judge or on appeal that the parties want to remain open, language to that affect should be included in the agreement. Conversely, if the parties want all issues to be resolved, including those on appeal, this should be set forth in the agreement as well.

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 Workers' Compensation Judge 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 which she was capable of performing despite her work injuries. On appeal, the Appeal Board reversed the Judge's decision to suspend the claimant's benefits.

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. **II**

Side Bar

The court has been carving out exceptions to the notice of ability to return to work form as of late. Take no chances. If a release to return to work has been received, send the form.

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 Workers' Compensation Judge 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 wherein it was 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 sleeping and not furthering the interests of the employer at the time of the assault. **II**

Side Bar

As mentioned, the "bunkhouse rule" comes from a 1924 opinion of the Pennsylvania Supreme Court that the Commonwealth Court cited in its decision. That case (*Malky v. Kiskimintas Valley Coal Co.*, 278 Pa. 552, 123 A. 505 (1924)) involved a coal mine that built a bunkhouse on its premises for workers who were unable to secure lodging in neighboring villages and towns because of the circumstances surrounding a strike at the mine. Three miners were killed when a bomb was thrown into the bunkhouse during the night, after the employees had completed that day's shift. Their deaths were found to be compensable.

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- "On the March: Insurers Brace For Increased Costs Due To Returning United States Veterans," *Best's Review*, February 11, 2014 by James E. Pocius, Esq.

Delaware Workers' Compensation

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Paul V. Tatlow

The claimant does not qualify as a displaced worker where his inability to obtain work is not due to the work injury but rather to his inability to furnish the employer with a valid Social Security number and thereby get rehired.

Jose Campos v. Daisy Construction Company, (Superior Court – C.A. No. N13A-07-002-ALR - Decided 1/16/14)

This case was before the Superior Court on the claimant's appeal from the Board's decision which granted the employer's petition for review, terminating the claimant's total disability benefits and also finding the claimant ineligible for partial disability benefits. The Superior Court affirmed the Board's decision and rejected the claimant's argument that errors of law had been committed.

The facts show that the claimant had been employed as a heavy equipment operator. On June 3, 2011, he sustained a work injury to his left shoulder and low back when he was working as part of a traffic crew and was thrown off the back of a truck that suddenly stopped. The claimant underwent shoulder surgery and was placed on total disability status. It was determined during the processing of the claim that the claimant's Social Security number did not match his name and that, although the employer requested that the claimant provide a correct Social Security number, he failed to do so. On December 16, 2011, the employer terminated the claimant's employment based on their inability to employ him due to immigration requirements and due to his failure to provide a valid Social Security number. The employer did indicate that they would offer the claimant work within his restrictions if he were able to supply a valid Social Security number.

In the litigation on the employer's petition for review, the Board accepted the medical testimony, which showed that the claimant was capable of doing sedentary work on a full-time basis, and the Board thereby terminated the total disability benefits. The Board next addressed the issue of whether the claimant was a displaced worker and entitled to partial disability benefits. The Board concluded that the claimant did not qualify as a displaced worker since his loss of earnings was not causally related to the accepted work injury. Rather, the Board found that the employer was willing to hire the claimant and have him return to work, but absent the valid Social Security number, they could not legally do so.

On appeal, the Superior Court found that there was no question that the claimant was physically capable of returning to work at modified duties. The court rejected the claimant's argument on appeal that the Board had erred as a matter of law by terminating his benefits since he was unable to provide the valid Social Security number, which the claimant argued was contrary to prior case law as well as public policy. The Superior Court found that the undisputed evidence showed that the claimant was capable of gainful employment but that his inability to produce the valid Social Security number barred him from obtaining that employment, resulting in his loss earning capacity. They further reasoned that this condition was not causally related to the accepted work injury and, therefore, did not qualify the claimant as a displaced worker. The court concluded that the Board did not commit any legal error in its decision terminating total disability benefits and finding the claimant ineligible for partial disability benefits. ||

Side Bar

One lesson to be gained from this case is that employers should carefully screen both new hires as well as current employees to verify that the Social Security numbers that they have on file do, in fact, match with the employees' names. If they do not match and the employee is not able to furnish a correct Social Security number, the employer is then not legally allowed to employ them. If such an employee has a work injury and is able to do modified work that the employer would otherwise provide to him or her, the employer then has a valid basis for contending that the loss of earnings is not related to the accepted work injury and thereby any claim for partial disability benefits is legally precluded.