

Pennsylvania Quarterly Update - 4th Quarter 2012

SUPREME COURT CASE

Department of Labor and Industry, Bureau of Workers' Compensation v. WCAB (Excelsior Insurance), 46 MAP 2011 (Filed November 21, 2012)

Issue: Whether an employer's weekly payment of pro rata costs and legal fees after a Third Party Settlement are "payments of compensation" that can be reimbursed from the Supersedeas Fund when the employer ultimately wins a petition?

Answer: Yes.

Analysis: Employer filed a Suspension Petition based upon a job offer and its request for supersedeas was denied. As a result it continued to pay claimant \$410 per week.

During the pendency of the litigation on the Suspension Petition, claimant settled his third party case that stemmed from the work injury for \$310,000. Employer received its full accrued lien reimbursement but since claimant was still receiving total disability benefits, the employer continued to pay claimant \$162.42 under the applicable "grace period". During the grace period, an employer has to reimburse its pro rata share of the legal fees and expenses attributable to the excess recovery.

The WCJ ultimately granted employer's Suspension Petition and the employer filed for Supersedeas Fund Reimbursement requesting reimbursement of the temporary total disability benefits and the grace period payments. The Bureau opposed the application, arguing that the grace period payments were not recoverable.

The WCJ, WCAB, and Commonwealth Court all rejected the Bureau's argument. The Supreme Court agreed and determined that the grace period payments were recoverable. It reasoned that these payments were made to claimant to satisfy employer's obligation to pay benefits pending the outcome of the Petition for Suspension.

Conclusion: Payments made during the grace period following a third party settlement constitute "payments of compensation" and can be recouped from the Supersedeas Fund following the successful litigation of a Petition to Modify, Suspend or Terminate.

COMMONWEALTH COURT CASES

Thomas Krushauskas v. WCAB (General Motors), No, 446 C.D. 2011 (Filed October 11, 2012)

Issues:

(1) Whether a WCJ is permitted to suspend claimant's benefits when a Penalty Petition is pending but a Suspension Petition has not been filed?

(2) Whether penalties are always payable when the employer unilaterally stops benefits?

Answers: (1) Yes. (2) No.

Analysis: Claimant, a UAW member, suffered a work injury and received workers' compensation benefits pursuant to a notice of compensation payable. Thereafter, Claimant executed a Special Attrition Plan Agreement confirming his separation from employment in exchange for a \$35,000 payment. The Agreement stated that the claimant was able to work and was not suffering from any disability which would preclude him from performing his job. As a result, the employer unilaterally stopped his workers' compensation

benefits. Claimant filed a Penalty Petition, asserting that the stoppage of benefits without a court order violated the Act.

The WCJ denied the Penalty Petition. Although the WCJ found that employer violated the Act by unilaterally stopping claimant's benefits, the WCJ concluded that penalties could not be awarded because no compensation was due. Instead, the WCJ suspended claimant's benefits, finding that claimant voluntarily retired from the workforce upon execution of the Special Attrition Plan Agreement.

Claimant appealed the WCJ's decision to the Board, which affirmed, without addressing the WCJ's authority to suspend benefits absent a pending suspension petition. The Commonwealth Court also affirmed, addressed the question of whether the suspension was proper without a petition and found that the suspension was proper, because claimant had notice that a suspension was possible and was given an opportunity to defend. It explained that case law does not require absolute and unreasonable strictness in workers' compensation pleadings.

Conclusion: A WCJ has the authority to suspend a claimant's benefits in the absence of a formal petition where the claimant has adequate notice that a suspension is possible and was given the opportunity to defend against it.

Caution: We typically recommend against a unilateral suspension of benefits. Although employer was not assessed penalties in this case, the safer path is to file a petition and request supersedeas.

Cleveland Brothers and its third party administrator, PMA v. WCAB (Hazlett), 68 C.D. 2012 (Filed August 24, 2012; Designated Opinion November 21, 2012)

Issues:

- (1) Whether penalties and unreasonable contest attorney's fees are appropriate when the employer only pays interest up to the last date of disability and not the date payment is issued?
- (2) Whether penalties and unreasonable contest attorney's fees are appropriate when the employer fails to pay the lien of a health carrier due to the lack of medical reports and billing forms?

Answer: (1)Yes. (2) Yes.

Analysis: The WCJ granted claimant's claim petition and ordered employer to pay two closed periods of temporary total disability benefits with statutory interest on all unpaid amounts. Employer was also ordered to repay two health care insurers for their payment of claimant's medical bills during the pendency of the claim petition.

Claimant filed a Petition for Penalties alleging employer failed to pay all interest and failed to reimburse the health care providers. Employer argued that it utilized the Bureau's interest calculation worksheet which calculated interest only to the last date of benefits due not to the date of payment. Employer also argued that the health care providers had not been paid because medical bills and reports had not been provided.

The WCJ granted the Petition for Penalties, awarded a 50% penalty for all unpaid interest due through the date of payment, and a 50% penalty for the failure to reimburse the health care providers. In addition, the WCJ awarded unreasonable contest attorney fees. The WCAB affirmed and employer then appealed to the Commonwealth Court.

The Commonwealth Court affirmed on all grounds. It found that interest accumulates through the date that compensation is paid. Therefore, the Court concluded that the WCJ was correct in awarding a penalty for failure to pay the full amount of interest due up to the date of payment, regardless of what the Bureau

worksheet might have indicated.

In addition, the Court explained that the rules for payment of medical bills are different from the rules regarding repayment of a medical subrogation lien, and that once the petition was granted; the employer had an obligation to repay the lien of the healthcare provider. Because the Court did not believe that the employer had a reasonable basis for contest on these issues, it also affirmed the award of counsel fees.

Conclusion: Following an award of past due benefits, interest must be calculated up to the date of payment. In addition, when a subrogation lien of a health care provider is raised during the course of litigation, a decision ordering payment of the lien must be honored.

Caution: Reliance on the calculation sheet provided by the Bureau did not protect the employer from the award of penalties. Employers and insurers must be careful when acting on information provided by the Bureau.

New Enterprise Stone & Lime Co., Inc., and PMA Management Corporation v. WCAB (Kalmanowicz) No. 1492 C.D. 2012 (Filed December 6, 2012)

Issue: Whether a physical disability must be established to successfully prove a physical/mental injury?

Answer: No.

Analysis: Claimant was involved in a motor vehicle accident which resulted in the death of the other driver. The other driver left a suicide note suggesting the accident may have been deliberate. Claimant remained at the accident scene for four hours, was then taken to the emergency room where he was diagnosed with left-sided chest wall and right wrist contusions and left shoulder tenderness/discomfort. These injuries were not disabling.

Claimant then began treatment for post-traumatic stress disorder (PTSD) and filed a claim petition alleging that he sustained the PTSD as a result of his work related MVA. The WCJ awarded benefits for the PTSD, finding a physical/mental injury that stemmed from the "triggering physical event" of the MVA.

After the WCAB affirmed, the employer appealed to the Commonwealth Court, arguing that claimant could not establish a physical/mental injury unless a physical disability caused the mental disability. The Court noted that the case law requires that a physical event cause the mental injury. The Court clarified that a claimant need only show that a physical stimulus resulted in a mental disability. It explained that claimant's involvement in the fatal accident was sufficient to constitute a physical stimulus to support a compensation award.

Conclusion: A Claimant must only show that a work-related physical stimulus resulted in a mental disability to be successful on a physical/mental claim. Claimant need not show a physical disability.

Medicare Update

On December 17, 2012, the Centers for Medicare and Medicaid Services placed notice on its WCMSA website that CMS will begin referencing the 2008 Total Population Life Table for WCMSA life expectancy calculations. Therefore, any set aside submitted or re-opened after January 19, 2013 must base life expectancy on the 2008 Total Population Life Table.

WCJ Retirement

Effective January 8, 2013, Workers' Compensation Judge Nathan Cohen has retired. Judge Cohen served as a Judge in Pittsburgh Workers' Compensation office. All cases assigned to Judge Cohen at the time of

02.14.13

Weber 
Gallagher

his retirement are still in the process of being reassigned.

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