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Weber Gallagher

Pennsylvania Workers' Compensation Update - 4th Q '11

Given the obligation to consider Medicare's interests in settling workers' compensation claims, we recognize the need to remain apprised of the latest developments with Medicare set asides and the Medicare Secondary Payer Recovery contractor (conditional payments). Therefore, we will be including in our Quarterly Updates information regarding changes to the Medicare set aside submission and approval process as well as updates from the Medicare Secondary Payer Contractor regarding conditional payments. Our first Medicare Update appears at the end of this Update, following the case law summaries.

Should you have case specific questions or wish to receive additional general information regarding Medicare issues associated with workers' compensation claims, please contact Renee M. Porada Frazier at 412-281-4573 or rporada@wglaw.com.

I. Significant Commonwealth Court Cases October 1, 2001 - December 31, 2011

GMS Mine Repair & Maintenance, Inc. and Chartis Claims, Inc. v. W.C.A.B. (Way), No. 92 C.D. 2011 (Filed October 7, 2011)

Issue: Whether Employer is entitled to Supersedeas Fund Reimbursement when another employer was found liable to the employee?

Answer: No.

Analysis: Claimant filed a claim petition alleging an occupational disease against Employer. Employer filed a joinder seeking to add additional defendants but did not file an answer to the claim petition. Due to the lack of an answer, the Judge granted the claim against Employer. Employer appealed and requested supersedeas. The supersedeas request was denied. Subsequently, the Board reversed the Judge and found that the additional employer was the liable employer.

Employer filed an application for Supersedeas Fund Reimbursement. The Judge denied the petition. Employer appealed. The Court held that because the claimant was entitled to benefits, although from a different employer, Supersedeas Fund reimbursement was not available to Employer. The Court further noted that Employer A's proper cause of action was against the liable employer.

Conclusion: Supersedeas Fund reimbursement is not available to an employer if another employer is liable. Reimbursement must be sought from the employer found liable for the injury.

Miller v. W.C.A.B. (Peoplease Corp., Arch Insurance Co. and Gallagher Bassett Services), No. 204 C.D. 2011 (Filed October 11, 2011)

Issue: Is medical testimony unequivocal when it does not state that the Claimant's symptoms have resolved and acknowledges that the Claimant may have suffered permanent nerve damage?

Answer: No.

Analysis: Claimant suffered a compensable injury accepted via Notice of Compensation Payable. Employer subsequently filed a petition for modification, suspension and/or termination and presented the testimony of Claimant's treating physician, Dr. Wagner. Dr. Wagner testified he performed surgery and the surgery was a success because his pain was "largely resolved" but acknowledged the surgery could have caused permanent damage. Claimant testified that his symptoms had not resolved. The Judge granted the Termination Petition based upon the uncontradicted testimony presented by Employer. Claimant appealed but the Board affirmed the Judge's decision. The Commonwealth Court reversed and

found that the evidence did not support a full recovery. The Court acknowledged that medical experts need not use "magic words" in testifying as to full recovery. However, the Court noted that medical testimony is equivocal when it is vague, leaves doubt, is less than positive, or is based upon possibilities. The Court found Dr. Wagner's testimony equivocal, noting he could not state whether the procedure caused permanent nerve damage and did not state that the procedure relieved the Claimant's symptoms.

Conclusion: Medical testimony that is equivocal is insufficient. Generally using a treating physician to support a termination or modification of benefits is difficult since they may change their opinion and/or err on the side of caution for the claimant.

Lenzi v. W.C.A.B. (Victor Paving), No. 741 C.D. 2011 (Filed October 13, 2011)

Issue: Whether unemployment compensation benefits may be excluded from an average weekly wage calculation?

Answer: Yes.

Analysis:. Claimant argued that unemployment compensation benefits received in the year leading up to his injury should be included in his average weekly wage calculation. The Judge granted the claim petition but used Employer's wage calculation which excluded the unemployment benefits. Both parties appealed. The Board affirmed.

The Commonwealth Court rejected Claimant's argument to include unemployment compensation benefits in the calculation of the average weekly wage. The Court noted that the Supreme Court had concluded that workers' compensation was meant to protect the worker from the economic effects of a workplace injury not variants in the business cycle.

Conclusion: The average weekly wage of a long term employee is calculated without including the unemployment compensation received. During periods of unemployment, zero wages should be utilized in the AWW calculation.

CVA, Inc. and State Workers' Insurance Fund v. W.C.A.B. (Riley), No. 2658 C.D. 2010 (Filed October 14, 2011)

Issue: Whether a 50% penalty was properly assessed for Employer's unilateral refusal to pay medical bills?

Answer: Yes.

Analysis: Employer acknowledged Claimant suffered a work-related knee injury but refused to pay for most of the treatment (novel and not mainstream) from one particular medical provider. Claimant's unpaid medical bills from this provider totaled more than $140,000.00. This amount, did not include several bills that had been properly "downcoded" by the carrier without a fee review filed by the doctor.. Claimant filed a Penalty Petition alleging that Employer's refusal to pay these bills constituted a clear violation of the Act. The Judge agreed, resulting in the assessment of a 50% penalty, as well as an award of unreasonable contest attorney's fees. Employer appealed, and the WCAB affirmed.

The Commonwealth Court rejected the employer's arguments. It found Employer's argument that the treatment in question was neither casually related to Claimant's injury, nor reasonable and necessary, to be without merit given that Claimant demonstrated that the treatment was for his injured knee, and because Employer failed to submit the disputed bills for a utilization review. And, in response to Employer's argument that the award was excessive and disproportionate under the circumstances, the Court confirmed that the Act provides Judges with the power to assess penalties up to 50% for delays deemed to be

"unreasonable or excessive."

Conclusion: Rufusal to pay for novel treatments is not the proper action, assuming the provider is a licensed practitioner. Instead, the insurer should file a UR or properly down code the bills, if relevant.

Kennett Square Specialties and PMA Management Corporation v. W.C.A.B. (Cruz), No. 636 C.D. 2011 (Filed October 19, 2011).

Issue: Whether an adverse inference alone was sufficient to support the Judge's finding that Claimant was an undocumented alien worker?

Answer: No.

Analysis: Claimant was injured in the course of his employment and filed a claim petition. At the first hearing on the claim petition claimant asserted his Fifth Amendment right against self incrimination and refused to answer questions about his citizenship or documented worker status.

Both medical experts agreed as to the nature of the work injury and the work restrictions. The Judge relied solely upon an adverse inference drawn from Claimant's refusal to answer questions about his citizenship or documented worker status to support the finding that he was an undocumented alien. Claimant appealed and the Board reversed the suspension on the basis that the adverse inference was not sufficient to find Claimant was an undocumented alien. Employer appealed.

The Commonwealth Court explained that adverse inferences, while supportive, do not constitute evidence. Accordingly, because the Judge's finding that Claimant was an undocumented alien was based solely upon the adverse inference that he drew from Claimant's refusal to testify, the Court held that his decision was not based on sufficient evidence; thus it affirmed the decision of the Board.

Conclusion: Claimant's refusal to answer questions about his citizenship or undocumented worker status is not sufficient on its own to support a finding that Claimant is an undocumented alien. In light of the above, the difficult question is how do you prove undocumented status if claimant pleads the Fifth? In the event the claim petition has no Social Security number on it or is all zeros this should be admitted into evidence. If claimant ever admitted to his employer or his supervisor his undocumented status, such evidence can also be admitted as an admission against interest.

Bureau of Workers' Compensation v. WCAB (Excalibur Insurance Management Service), No. 376 C.D. 2011 (Filed November 17, 2011)

Issue: Whether a self insured employer who has made payments under the Heart and Lung Act can recover indemnity compensation paid from the Supersedeas Fund after a Termination Petition is granted?

Answer: Yes.

Analysis: Claimant sustained an injury in the course and scope of his employment as a police officer for the City of Scranton. The City of Scranton was self insured for workers' compensation purposes. Claimant began receiving payment under the Heart and Lung Act in the amount of one hundred percent (100%) of his salary. Employer subsequently filed a Termination Petition, Supersedeas was denied, but ultimately the Termination was granted. Employer filed a Petition for Supersedeas Fund Reimbursement which was granted. The Bureau appealed to the Commonwealth Court, alleging that Employer was not entitled to reimbursement because the funds paid to Claimant were made under the Heart and Lung Act and did not constitute workers' compensation benefits.

The Court first noted that because the Employer was self-insured, two-thirds of the benefits paid to Claimant

pursuant to the Heart and Lung Act represented workers' compensation benefits. The Court then explained that had the employer been insured for workers' compensation purposes by a third-party carrier, the amounts paid by the carrier would have been payable to the Employer (since employer was paying full salary) and had the carrier sought and been denied supersedeas it would have been entitled to Sueprsedeas Fund Reimbursement under the facts of this case. Therefore, the Employer, because it was self-insured, is also entitled to Supersedeas Fund Reimbursement.

Conclusion: When an Employer is self-insured and there is a denial of supersedeas but the Employer ultimately prevails, two-thirds of the amounts paid pursuant to the Heart and Lung Act are subject to Supersedeas Fund reimbursement.

Comcast Corporation v. WCAB (Jones), No. 2208 C.D. 2010 (filed December 12, 2011).

Issue: Whether employer is entitled to supersedeas fund reimbursement based upon denial of supersedeas in conjunction with a Review Petition seeking to set aside the NCP?

Answer: Yes.

Analysis: Employer sought supersedeas fund reimbursement after a review petition was granted setting aside the NCP after finding that the claimant had concealed relevant medical information, which caused the employer to issue the NCP in error. The Judge held employer was not entitled to supersedeas reimbursement for compensation paid during the period of time that benefits were paid to claimant through the incorrectly issued NCP. The Judge found such payments were made voluntarily by employer and that an NCP remains in full force until properly set aside. The Board affirmed based on existing case law.

The Commonwealth Court reversed and permitted reimbursement from the Fund.

Conclusion: Supersedeas fund reimbursement is not limited to employer's success in a petition to modify, suspend, or terminate benefits and is also available in other proceedings, such as review petitions to set aside the NCP.

Lee v. Unemployment Compensation Board of Review, No. 2085 C.D. 2010 (Filed December 21, 2011).

Issue: Whether signing a resignation of employment at the time of settlement of a workers' compensation claim precludes receipt of unemployment benefits?

Answer: Yes.

Analysis: Claimant, while released to light duty, agreed to resolve her workers' compensation claim. In consideration for the settlement, claimant agreed to execute a separate resignation/release and resign her light duty position. Claimant subsequently sought unemployment compensation benefits. Both the local job center and referee found she was forced to resign as part of the settlement and was therefore eligible for benefits because she remained able and available for continuing work in her modified duty position.

The Board reversed, finding that Claimant had voluntarily terminated her employment in order to settle her workers' compensation claim and that the settlement of her workers' compensation claim was not a necessary and compelling cause for the voluntary termination of employment.

The Commonwealth Court affirmed the Board, finding that when a claimant agrees to execute a resignation/release in order to settle a workers' compensation claim, the claimant terminates her employment voluntarily and is therefore not entitled to unemployment compensation benefits.

Conclusion: A resignation/release signed in conjunction with a settlement of claimant's workers'

compensation claim will preclude claimant from obtaining unemployment compensation benefits for that separation of employment. The desire to settle one's workers' compensation claim is not a necessary and compelling cause for the voluntary termination of employment. We suggest obtaining a voluntary resignation whenever possible in conjunction with a settlement to prevent claimant from receiving unemployment benefits thereafter.

White v. WCAB (City of Pittsburgh), No. 673 C.D. 2011 (filed December 29, 2011).

Issue: Whether "Social Security old age" offset provision violates the equal protection requirement of the Pennsylvania Constitution?

Answer: No.

Analysis: The claimant argued that the offset limited to "old age" benefits violated the Equal Protection requirement of the Pennsylvania Constitution because it bases the offset on age as only those over age 62 or 65 will receive the "old age" benefits. The Court rejected this argument and found no violation of the Equal Protection clause.

Conclusion: The Social Security old age offset does not violate the Pennsylvania constitution's equal protection requirements. Please also note that this offset can be taken when a claimant is receiving SSDI and the SSDI converts to SS Retirement.

Commonwealth of Pennsylvania, Department of Transportation and CompServices, Inc. v. WCAB (Clippinger), No. 1142 C.D. 2011 (filed December 30, 2011).

Issue: Whether installation of an aquatic therapy pool and home addition to accommodate the pool is an "orthopedic appliance" payable by the employer?

Answer: No, if claimant has an alternative means to receive the aquatic therapy.

Analysis: Employer refused to pay for the installation of an aquatic therapy pool and an addition to claimant's home to accommodate the pool. Claimant filed a prospective UR request, which found that the pool and home addition were reasonable and necessary, if alternative means were not available. Employer filed a Petition to Review the UR Determination and argued that claimant had access to aquatic therapy at a pool near his home supervised by trained therapist. The Judge nevertheless denied the petition. The Board affirmed.

The Commonwealth Court reversed in part and remanded. The Court held that the Supreme Court cautioned that the extent of an employer's obligation for payment of orthopedic appliances depends upon the specific facts of the case. The device in question must be "indispensably" necessary to accommodate the claimant's work injury and not constitute a windfall to the claimant as to the value of his home. Here, the claimant continued to perform full-time, modified duty work and was sufficiently mobile to travel to an alternative physical therapy facility to receive aquatic therapy. As a result, the Court remanded the case back to the Judge to issue a decision to determine if the pool was indispensable and whether there would be a windfall to the value of claimant's home if the employer paid for the addition to house the pool.

Conclusion: Employer's obligation to pay for home accommodations and other orthopedic devices/appliances depends on the specific facts of the case. The accommodation must be indispensably necessary to accommodate the claimant's work injury. In addition consideration must include whether claimant will receive a windfall.

II. Medicare Updates

The new Fixed Percentage Option for Medicare's Recovery Claim does not apply to Workers' Compensation cases.

On November 7, 011 Medicare announced that beneficiaries settling certain types of liability claims for $5,000.00 or less would be eligible to resolve Medicare's conditional payment lien for a fixed percentage of their settlement. Unfortunately, workers' compensation claims are specifically excluded from this resolution option. Workers' compensation claims must still be processed through the traditional conditional payment lien procedure including submission of the final settlement documents prior to obtaining a final conditional payment amount.

Life Tables for Set Asides

Effective with Workers' Compensation Medicare Set Aside proposals submitted on or after October 31, 2011, life expectancy must be calculated using the 2007 life tables.

Medicare Set Aside web portal is live effective December 7, 2011

Medicare has launched a web based submission program for Medicare set aside trust proposals. The program is to allow for electronic submission of the set aside proposal and all follow up documentation as well as to allow the submitter to track the progress of the set aside determination without contacting the reviewing office directly. Training and registration is underway and we will keep you updated regarding the progress of the system.

Editor
David G. Greene, Esq.

Co-Editors
Peter Weber, Esq./Renee M. Porada Frazier, Esq.