Pennsylvania Workers' Compensation Update - 4th Quarter '10

Commonwealth of Pennsylvania, Dept. of Corrections v. WCAB (Wagner-Stover), 1133 C.D. 2008 (Filed October 1, 2010)

Issue: Whether an administrative adjudication by the Secretary of Corrections terminating a claimant's right to benefits as a prison employee precludes claimant from litigating her right to workers' compensation benefits for the same injury?

Answer: Yes.

Analysis: Claimant was employed at the State Correctional Institution at Camp Hill. On October 25, 1989, there was a prison riot. Claimant was not present at work that day but worked the next day and was subjected to verbal obscenities. She also discovered that she was on a prisoner "hit list." The employer accepted her psychological injury and issued a notice of compensation payable under the Workers' Compensation Act. The employer paid her full salary instead of workers' compensation because it was statutorily required to do so under Act 632 as claimant was a state employee at the Department of Corrections.

In 2004, the employer offered claimant a job as a clerk with a higher salary than she had earned previously. Claimant refused the job. The employer then commenced a proceeding to terminate claimant's Act 632 benefits, asserting that claimant had recovered from her post traumatic stress disorder and that any remaining problems were related to a non-work related personality disorder. The parties presented medical testimony and the hearing examiner found that the claimant had "fully recovered" from her post traumatic stress disorder and that she was no longer entitled to Act 632 benefits. Claimant appealed to the Commonwealth Court to no avail.

The employer then filed a petition to terminate claimant's workers' compensation benefits. Claimant again denied that she had recovered from her work injury. In support of the termination, the employer offered the administrative determination as its only evidence. The WCJ rejected the employer's argument that the Act 632 adjudication precluded further evidence on the factual question of whether claimant had recovered from her work injury. The WCJ denied the employer's petition for termination and imposed fees for unreasonable contest for not presenting competent evidence in support of its termination petition. The Board reversed the unreasonable contest fees but affirmed the denial of the termination.

The Commonwealth Court found that a factual finding in an Act 632 adjudication was entitled to a preclusive effect in a workers' compensation proceeding. Claimant argued that the standard for termination in each proceeding was different, but the Court found that the factual issue of whether claimant had recovered from her work injury was identical in both proceedings. The Court held that the Secretary, in adopting the findings of the Department's hearing examiner, had already determined that claimant had fully recovered from the work injury.

CONCLUSION: A finding of full recovery in an Act 632 Adjudication precludes further litigation in a claimant's workers compensation proceeding. This decision also reaffirms the fact that an administrative decision by a non-workers' compensation agency can have a preclusive effect on a claimant's entitlement to workers' compensation benefits.

Road Toad, Inc. v. WCAB (McLean) 2581 C.D. 2009 (Filed as Memorandum Opinion August 12, designated Opinion and reported November 1, 2010)

Issue: Whether U.S. Steel Corporation v. WCAB (Luczki), 887 A.2d 817 (Pa. Cmwlth. 2005), which held

that an employer who appeals a UR Determination without contrary medical evidence at that time of filing does not present a reasonable contest, renders incompetent any medical evidence obtained by employer after the UR Determination appeal has been filed?

Answer: No.

Analysis: In 1996, claimant sustained a catastrophic work-related injury which caused her to lose the use of her right arm, right leg, right eye and which caused her permanent disfigurement. After the injury occurred, the employer began to pay for home assistance at claimant's residence eight hours per day, five days per week. In 2002, claimant filed a request for utilization review, seeking to increase her home assistance to twelve hours per day. The reviewer found the increase reasonable and necessary and the employer filed a petition to review the utilization review determination.

In support of increased assistance, claimant offered the testimony of her treating physician, Dr. Laura Shymansky, who recommended home assistance for twelve hours per day. Employer offered the testimony of Dr. Brian Ernstoff, who had not examined the claimant prior to the petition to review the utilization review determination. Dr. Ernstoff opined that claimant's medical condition had not changed and that there was no reason for the increased assistance.

The WCJ found the testimony of employer's expert credible and determined that the requested increase was not reasonable or necessary. Claimant then appealed, relying on US. Steel Corporation v. WCAB (Luczki). Claimant argued that since Dr. Enrstoff had not examined her until after the petition had been filed, his opinion was not competent and could not be considered by the WCJ. The Board agreed with Claimant, finding that employer had failed to offer competent evidence which would support deviation from the recommendation of the reviewer.

The Commonwealth Court reversed, finding that the Board had misapplied its decision in Luczki. The Court distinguished the Luczki decision from the instant case because Luczki dealt with whether an employer had met its burden of proving a reasonable contest, not what evidence could be considered by a WCJ for a utilization review determination. Luczki did not apply to what evidence is competent to be considered by a WCJ on the merits. Dr. Ernstoff's testimony was properly considered by the WCJ, and the Board's decision was reversed.

Conclusion: The Commonwealth Court cited to the well established principle that a review determination by the WCJ is a de novo proceeding and that either party may offer evidence beyond what was considered in the UR process to meet their respective burdens of proof. Medical evidence obtained after the review petition has been filed may be considered by the WCJ in reviewing the UR determination. However, if the petition is ultimately decided in claimant's favor, the employer is still subject to a finding of unreasonable contest under Luczki if it relied solely upon medical evidence obtained after it filed the review petition. In addition, we must be careful in offering post utilization review evidence in support of a petition to review UR. In the typical scenario, we are challenging whether a type of ongoing treatment was not reasonable or necessary. If the only evidence that we have is evidence that was obtained well after the UR Determination, the WCJ may very well find that we have not met our burden of proof and are subject to an unreasonable contest.

Joy Mining Machinery Company v. WCAB (Zerres), 485 C.D. 2010 (Decided November 19, 2010)

Issue: Whether an employer is entitled to argue inconsistencies between a claimant's testimony and the report of his/her treating physician if the physician is not deposed?

Answer: No.

Analysis: In the context of an otherwise typical hearing loss case, the Commonwealth Court addressed an employer's argument that a claimant was not entitled to an award of benefits due to inconsistencies between claimant's testimony and the medical report of his treating physician. The parties agreed to the submission of medical reports because this involved fewer than 52 weeks of benefits. The Court concluded that where an employer could have deposed a claimant's medical expert on any inconsistencies it believed affected the competency of his opinion, an employer's failure to depose that doctor precluded it from raising the issue at a later time.

Conclusion: An employer must depose claimant's doctor if it wants to argue that inconsistencies between the report and a claimant's testimony affect the competency of the report. In cases involving 52 weeks of benefits or less, we may proceed on reports. However, if we want to argue inconsistencies, we may need to depose claimant's physician.

Stanish v WCAB (James J. Anderson Construction Company), 1870 C.D. 2009 (Filed December 7, 2010)

Issue: Whether an IRE conducted pursuant to the 5th Edition of the AMA Guides, after the 6th Edition of the AMA Guides had been published but during the period when the Bureau had issued notice to IRE physicians that IRE's using either the 5th or 6th Edition would still be accepted, is valid?

Answer: No.

Analysis: Claimant sustained a work injury on August 5, 2005 and submitted to an impairment rating evaluation on April 14, 2008. The IRE physician found a 13% impairment and the employer changed the status of claimant's benefits from total disability to partial disability. Claimant filed a modification petition challenging the validity of the impairment rating, because it did not use the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment. The parties stipulated that the 6th Edition had been published in January 2008 and that the Bureau had issued notice to physicians performing IREs that the Bureau would accept IREs performed using either the 6th Edition or 5th Edition of the Guides until August 31, 2008.

The WCJ found that claimant failed to meet his burden of proof on the modification petition because he did not produce any evidence of impairment greater than 50% and further found that the IRE was valid based upon the Bureau's regulations permitting use of the 5th Edition until August 31, 2008. The Board affirmed.

The Commonwealth Court reversed and remanded for performance of an IRE using the 6th Edition. The Court cited to Section 306(a)(2) of the Act as well as Section 123.105 of the Act 57 Regulations which require that impairment rating evaluations be conducted using the most current edition of the AMA Guides to the Evaluation of Permanent Impairment. The Court noted that the Bureau's interpretation of the statute and Act 57 regulation as expressed in the notice to the IRE physicians was in direct conflict with the plain language of the statute and therefore invalid.

Conclusion: The plain language of the Act requires the use of the most current AMA Guides for impairment rating evaluations and the contrary Bureau notice permitting use of an earlier edition for a transition period is invalid.

City of Philadelphia v. WCAB (Butler), 1245 C.D. 2009 (Filed December 16, 2010)

Issue: Whether employer can allege full recovery and seek termination effective prior to the issuance of the Notice of Compensation Payable?

Answer: Yes.

Analysis: Claimant was injured on September 28, 1995 and began treatment for injuries described as a series of bruises and sprains. On October 19, 1995 her treating physician found her fully recovered and able to return to work; however, due to ongoing pain complaints she was referred for a second opinion which also found Claimant fully recovered. On November 7, 1995 Employer issued a Notice of Compensation Payable identifying the injuries as bruises to the head, neck and back and noting that Claimant had received salary in lieu of compensation pursuant to Philadelphia Civil Service Regulation 32. In December 1995 Employer filed a termination petition alleging full recovery as of October 20, 1995, a date before the issuance of the NCP.

After a long and complicated procedural history, the Commonwealth Court determined that prohibiting a finding of full recovery prior to the date of the NCP exalts form over substance and could result in employers refusing to issue NCPs when the claimant's work injury is of minimal duration.

Conclusion: The date of the NCP does not preclude an employer form obtaining a termination. However, careful wording of Bureau documents and stipulations can avoid this issue entirely. If you have a medical opinion that you want to use that pre-dates the NCP, put language in the "comments" section of the NCP that you reserve the right to use that medical opinion.