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Pennsylvania Workers' Compensation Update - 2nd Quarter '10

SUPERIOR COURT CASES

Black v Labor Ready, Williamsport Steel Container and Rheem Manufacturing, 3122 MDA 2009 (Filed 4/26/10)

Issue: Whether Employer can successfully assert tort immunity in a civil action when the Employer is not liable for the workers; compensation injury and files an Answer in the compensation case denying it was the employer?

Answer: No.

Analysis: Claimant filed a claim petition against a staffing company (Labor Ready) and a separate claim petition against the staffing company's customer (Williamsport). Typically, there is a contract in place whereby the staffing firm agrees that it, and not the customer, is responsible for workers' compensation coverage and benefits. It is unclear if such a contract was in place in this case. Nevertheless, in the workers' compensation action, Labor Ready agreed that it was the employer and Williamsport stated in its answer that it was not. Ultimately, the parties stipulated that for workers' compensation purposes, Labor Ready was the employer and Labor Ready ultimately paid workers compensation for this serious injury involving an amputation to claimant's hand. Following the stipulation confirming that Labor Ready was the employer, claimant filed a civil lawsuit against Williamsport, which Williamsport defended base, in part, on the argument that it was immune from civil suit because of employer's immunity. It argued that it was entitled to this immunity since it controlled the manner in which claimant did her job. This argument does have legal merit in PA, and a customer can avoid civil liability even if the staffing firm pays the workers' compensation in the appropriate context. The problem here, however, was that Williamsport's answer in the workers' compensation case denied that it was the employer and instead asserted that Labor Ready was the employer. It was this answer that the plaintiff used against Williamsport and the Superior Court concluded that Williamsport was estopped from arguing that it was entitled to employer's immunity from this civil suit because of the position that it took in the workers' compensation case.

Conclusion: Assuming that there is a contractual relationship in place, and if a workers' compensation action is filed against the customer, then the customer should raise the existence of the contract in every paragraph of its answer, state that the contract is controlling, and not take a specific position on the employer/employee relationship issue. This will allow the customer to maintain all available defenses in any civil case that is filed. The answer still needs to deny the averments to be valid in PA, but if worded properly with the proper citation to the contract, then the customer will maintain all of its rights in any companion civil suit.

COMMONWEALTH COURT CASES

Lindstrom Co, Inc. v. WCAB (Braun), 1815 & 1970 CD 2009 (Filed 4/13/10)

Issue: Whether a toxicologist must use certain magic words in his causation opinion on the issue of whether claimant's intoxication caused claimant's injury?

Answer: No.

Analysis: On November 29, 2002, Claimant, an ironworker, fell 20 feet onto a concrete slab resulting in severe head trauma and loss of use of his arm and leg. Employer's investigation revealed that Claimant was highly intoxicated at the time of the accident. The parties stipulated that a work injury occurred, wages,

injuries, etc. The only issue was whether claimant was precluded from benefits based on his intoxication. Employer's toxicologist testified that claimant's "severe impairments due to his enormous alcohol burden were disabilities that caused this accident and catastrophe was a certainty in attempting to perform the job functions described on any construction job." The WCJ found the toxicologist's testimony credible and denied the Claim Petition. Claimant appealed and the WCAB reversed, stating that because the employer's expert did not testify that the injury would not have occurred but for the intoxication, the defense should have failed. The Commonwealth Court reversed and reinstated the WJC's decision. It found that the magic words but for were not required and the testimony of the employer's toxicologist, which was accepted by the WCJ, was sufficient.

Conclusion: The Commonwealth Court reiterates that when it comes to evaluation of medical experts, they need not use magic words or phrases. Rather, the totality of the evidence is what determines the competency.

Shaw v. WCAB (Melgrath Gasket Co., 187 CD 2009 (Filed 4/21/10)

Issue: Whether providing an encrypted CD Rom to a URO reviewer and not providing the password within the time frame for receipt of medical records results in a UR determination that the treatment was unreasonable and unnecessary for failure to properly supply records?

Answer: Yes.

Analysis: Claimant was injured in December, 1988. In November, 2007, Employer filed a UR Request and the reviewer found the treatment at issue to be unreasonable and unnecessary, because the provider did not provide records in a timely fashion. During the UR, correspondence was sent to provider, requesting that he send all medical records to the Bureau appointed reviewer within 30 days. Provider sent the records within 30 days as required, but the records, which were on a CD-Rom, were password protected, and provider did not provide the password. In conjunction with the Petition to Review UR Determination, the WCJ found this submission acceptable and the WCJ overturned the UR Determination that found treatment to be unreasonable and unnecessary. Employer appealed. WCAB reversed.

The Commonwealth Court determined that sending a password protected CD-ROM without the password was an insufficient supply of medical records and hence the UR that found the medical treatment at issue to be unreasonable and unnecessary because of the improper supply of medical records was upheld.

Conclusion: While this case may have limited applicability, it reinforces that a provider's failure to turn over medical records in the time allotted is sufficient for a finding that the treatment is unreasonable and unnecessary.

Kleinhagan v. WCAB (KNIF Flexpak Corporation), 2009 CD 2009 (Filed 4/22/10)

Issue: Whether providing LIBC 757 to claimant 1.5 months after the IME and during his vocational interview bars the Modification Petition from being successful?

Answer: No.

Analysis: Claimant sustained a worked related low back injury in 2005 which was accepted via NCP. Subsequently, Employer obtained an IME that found Claimant capable of gainful employment and initiated a Labor Market Survey (LMS). In September, 2007, Employer filed a Modification Petition based on the LMS. Employer's Modification Petition prevailed before the WCJ and WCAB. Claimant raised 2 issues before Commonwealth Court:

First, Claimant argued that the LIBC 757 (Notice of Ability to Return to Work) was not sent "promptly" as

required by Section 306(b)(3) as it was provided to Claimant 1.5 months after his IME.

The Commonwealth Court properly cited the Melmark Home case, which confirmed that "promptly" under Section 306(b)(3) means that the LIBC 757 must be sent such that there is no prejudice/impact on the claimant as there is no fixed requirement. The Court focused on the fact that relief was sought after the day that the LIBC 757 was issued, so there was no prejudice.

The Court also discussed the recent vocational regulations and acknowledged that the employer did not send the required disclosure letter and further did not provide the requisite documents, but found that claimant did not raise these issues before the WCJ and therefore waived those issues. As a result, the Commonwealth Court affirmed the granting of the modification.

Conclusion: There is no set time limit for provision of the LIBC 757 to be considered promptly provided; however, it must be supplied prior to the filing of the modification or suspension petition, and claimant cannot be prejudiced by any delay.

Scranton School District v. WCAB (Carden), 1567 CD 2009 (Filed 3/12/2010, designated reported opinion 5/14/2010)

Issue: Whether an employer is entitled to maintain nonpayment of medical bills following an adverse UR Determination, because it filed a Petition to Review UR Determination?

Answer: No.

Analysis: Claimant suffered a work injury and benefits were paid pursuant to an NCP. Employer then filed a UR Request. The URO found the treatment at issue to be reasonable and necessary. Employer filed a Petition to Review UR Determination and continued nonpayment of the medical treatment at issue. Claimant filed a Penalty Petition. The WCJ denied Employer's UR Petition and granted the Penalty Petition. Employer appealed and the WCAB affirmed. Before the Commonwealth Court, Employer argued that the Medical Cost Containment Regulations (Sections 127.208(e) and (g) and 127.479) were invalid and inconsistent with the Act (Section 306 (f.1)(5) and that the Act permitted the ongoing non-payment status during the pendency of the litigation. The Court disagreed. The Court found that the Regulations were not inconsistent with the Act but rather provided an explanation of the Act's provisions regarding when payment must be issued, and that payment must be made upon the finding of reasonableness and necessity.

Conclusion: Filing a Petition to Review UR Determination does not suspend the employer's obligation to pay for treatment found by the URO to be reasonable and necessary.

Milner v. WCAB (Main Line Endoscopy Center), 2331 CD 2009 (Filed 5/18/2010)

Issue: Whether a WCJ may terminate a claimant's benefits when the claimant's expert testifies that claimant's condition is permanent?

Answer: Yes.

Analysis: Claimant filed a claim petition alleging injury resulting from repetitive use and sought ongoing disability benefits. Claimant's medical expert testified that claimant's job duties resulted in her repetitive use injury and that her condition was irreversible. Employer's medical expert testified that Claimant's work related injury had been successfully treated via surgical intervention and that her current symptoms were unrelated to her work injury. The WCJ credited Claimant's testimony regarding her job duties, Claimant's medical expert regarding her work related diagnosis, but also credited the testimony of Employer's medical expert that as of the date of the IME, Claimant had fully recovered from her work injury. Therefore, the WCJ granted the Claim Petition for a closed period followed by a Termination. Claimant appealed and the WCAB

affirmed. Before the Commonwealth Court, Claimant argued that the WCJ erred in granting the termination petition because he had credited Claimant's medical expert who had opined that the work injury was irreversible and therefore pursuant to Hebden, the Employer had the burden of proving that the condition was not irreversible. The Court rejected Claimant's arguments. First the Court held that Hebden was an occupational disease case involving a termination petition and therefore did not apply to a Claim Petition in which the burden remained on the Claimant to establish the extent and duration of disability. Secondly, the Court found that the WCJ did not credit claimant's medical expert's opinion that the condition was irreversible in that he specifically credited Employer's medical expert's opinion that Claimant had recovered.

Conclusion: In a claim petition the burden remains on the claimant to establish the extent and duration of disability and credible medical evidence that the claimant has recovered from the work injury is sufficient for a WCJ to terminate benefits in the context of a Claim Petition.

Forbes Road CTC v. WCAB (Consla), 919 CD 2009 (Filed 5/27/2010)

Issue: Whether an employer may issue an NCD to accept claimant's work injury for medical purposes only?

Answer: Yes.

Analysis: Claimant sustained a work injury. Employer issued a Box #4 NCD stating that although an injury occurred the Claimant was not disabled. Subsequently a Medical only NCP was issued followed by an Agreement for Compensation. In the interim, Claimant had filed a Claim and Penalty Petition. The WCJ found that the Employer did not violate the Act by issuing the NCD, although other actions taken by the Employer did warrant a penalty. Both parties appealed and the WCAB affirmed. Before the Commonwealth Court, Claimant argued that the Employer should not have been permitted to accept the work injury for medical purposes via NCD. The Court rejected Claimant's argument and held that because the NCD still contains Box #4 it remains an acceptable means of accepting an injury for medical purposes only.

Conclusion: A qualified box #4 NCD stating that an injury occurred but the claimant is not disabled remains a viable method to accept a work injury for medical purposes only. However, we caution that the specific work injury for which medical benefits will be paid must be clearly identified on the NCD.

Moberg v. WCAB (Twining Village), 1767 CD 2009 (Filed 12/24/2009 and designated reported decision on 5/25/2010).

Issue: Whether an injury occurring during the application process occurs within the course and scope of employment?

Answer: No.

Analysis: Claimant filed a Claim Petition alleging an injury which occurred while she was undergoing a tuberculin test required by Employer before she could start working. Following testimony by Claimant and Employer representatives regarding whether the test occurred prior to hiring or after hiring, the WCJ found that the test was a prerequisite to employment and therefore Claimant was not an employee at the time of her injury and denied her Claim Petition. Claimant appealed and the WCAB affirmed. Claimant argued to the Commonwealth Court that for all intents and purposes she was hired at the time of the test and that the test was a mere formality required before she could start working. The Court rejected this argument. The Court noted that although the record could be read to support the Claimant's interpretation of the facts, the WCJ had made credibility determinations and interpreted the facts in a contrary manner that was also supported by the record. As such the factual findings of the WCJ would not be disturbed.

Conclusion: Injuries that occur while applicants are completing tests required before hire are not

compensable as there is no employment relationship.

However, whether a test is truly pre-hire is dependant upon the particular facts of the case.

Phoenixville Hospital v. WCAB (Shoap), 2188 CD 2009 (Filed 6/30/10)

Issue: Whether a claimant's application to various jobs identified in a labor market survey (LMS) without obtaining employment defeated the employer's modification petition?

Answer: No.

Analysis: Claimant sustained a left shoulder injury and began receiving TTD benefits. Employer filed a Modification Petition alleging that work was generally available within claimant's physical restrictions based upon five jobs found through an LMS. Claimant testified that she applied for three listed positions, but was never offered a job. The WCJ denied the Modification Petition, finding that Claimant had "established in good faith, she followed through on all the jobs referred to her by Employer and that none of the referrals resulted in an offer of employment." The WCAB affirmed. The Commonwealth Court reversed and modified Claimant's benefits. In so holding it determined that the employee's good faith efforts were not relevant to an LMS case post-Act 57. It added that the fact that the worker applied for the jobs and did not obtain an offer of employment was immaterial as similar employment opportunities would become available that fit within her residual earning capacity that corresponded to her earning power.

Conclusion: In a Modification Petition based upon a LMS, the employer must show that jobs are available to claimant, not that the claimant was offered a job. Importantly, claimant applied for the positions identified at the time of the labor market survey, not at the time they were located. It remains an unanswered question as to whether claimant's application at the time the jobs were offered would affect the situation.

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