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Weber Gallagher

Pennsylvania Workers' Compensation Update - 4th Quarter '09

PENNSYLVANIA SUPREME COURT CASES:

Diehl v. WCAB (IA Construction & Liberty Mutual Ins.), 231 WAL 2009 (Filed October 20, 2009)

Petition for Allowance of Appeal granted to determine the following issue phrased by the Court: "Whether the Commonwealth Court erred in its interpretation of 77 P.S. § 551.2 by holding that Respondents did not need to present evidence of job availability or earning power in order to change Petitioner's disability status from total to partial [in the context of a modification petition filed based upon IRE requested outside of 60 days after payment of 104 weeks of TTD], and whether the Court's holding conflicts with Gardner v. WCAB (Genesis Health Ventures), 888 A.2d 758 (Pa. 2005).

Riddle v. WCAB (Allegheny City Electric), 54 WAP 2008 (Filed October 22, 2009)

Issue: Whether Claimant's benefits can be modified based upon a Labor Market Survey (LMS) when Claimant does not live in Pennsylvania and the LMS is not based upon jobs available in the area in which the injury occurred?

Answer: No, and Supreme Court arguably eliminates Kachinski for post - Act 57 vocational placement in the process.

Analysis: Claimant lived in Wheeling, WV, but worked in Pittsburgh, PA, and injured himself there. Employer sought to modify Claimant's benefits with a LMS based upon work restrictions issued by Claimant's physician. Employer's vocational expert accounted for jobs in Wheeling, WV; Washington, PA; and parts of nearby Ohio. However, the LMS did not reference any positions in Pittsburgh.

In dealing with an Earning Power Assessment under the terms of the WCA, if the injured worker does not live in Pennsylvania, the WCA is clear that the LMS "shall" be based upon jobs in the usual employment area where the injury occurred. The Court was clear that the General Assembly used "shall", which is mandatory. Therefore, if the claimant lives out of the state,

Employer's vocational expert must use the usual employment area where the injury took place. Here, Employer's expert did not do so and the Modification Petition should not have been granted.

Conclusion: When the Claimant has relocated outside of Pennsylvania, the LMS must be based upon jobs in the usual employment area where the injury occurred, not the Claimant's current residence. In so holding, the Supreme Court utilized a literal reading of Section 306(b)(2) as amended by Act 57. The Court found the section very clear as to how job development should take place in a post Act 57 setting. By taking such a literal reading, the Supreme Court has at least arguably eliminated the ability to use Kachinski style vocational placement in post Act 57 cases. In footnote 8 of the majority's opinion, the Court stresses that an employer could meet both the Kachinski and the post-Act 57 test, but the key, at least by our reading of the decision, is that if you don't meet the Act 57 test, you can't succeed, unless the injury took place before June 24, 1996.

COMMONWEALTH COURT CASES:

Johnson v. WCAB (Sealy Components Group), 763 C.D. 2009 (Filed October 15, 2009)

Issue: Whether Claimant was required to present an IRE opinion of greater than 50% impairment to succeed on a Review Petition challenging the change in disability status based upon an IRE when that Review Petition was filed outside of the 60 day period following issuance of the Notice of Change in

Workers' Compensation Disability Status?

Answer: Yes.

Analysis: Claimant was injured in March 2004. Claimant's claim petition was granted in January 2006. On June 13, 2006 Employer issued a Notice of Change in Workers' Compensation Disability Status on based upon an IRE rating of less than 50%. In May 2007, Claimant filed a Review Petition alleging that the IRE should be set aside because the IRE physician was not appropriately qualified for her injury. The WCJ dismissed the petition, which was affirmed by the WCAB.

On appeal to the Commonwealth Court, Claimant argued that Employer's actions and the WCJ's decision amounted to a due process violation. However, the Court noted that Claimant had numerous options as outlined in the Act. First, Claimant could have filed an appeal after receiving notice that the benefits would be changed to TPD after 60 days. Claimant chose to do nothing, which was not a due process violation. Second, the Bureau of Workers' Compensation requires employers to use a Bureau form to notify Claimants of the pending change and that they have a right to file a Petition to Review. Finally, even if a Claimant does not avail him or herself of the right to file an appeal within 60 days after the Notice of Change in Disability is sent, a Claimant can still file a Petition to Review within the 500 weeks of partial disability status as long as the injured worker has an opinion demonstrating an impairment rating equal to or greater than 50%. Claimant did not have such an opinion when the Review Petition was filed almost a year after the Notice of Change in Disability was sent to Claimant. Therefore, the Petition to Review was correctly dismissed.

In rendering this opinion the Court addressed a discrepancy between Section 306(a.2)(4) of the Act and Section 123.105(f) of the Regulations. The Act provides that in order to challenge the IRE outside of the initial appellate process, the Claimant must possess an IRE of 50% or greater. The Regulations provide for challenge of the IRE at any time without mention of the 50% impairment requirement. The Court held that the Act trumps the Regulations such that a challenge to the IRE outside of the original appeal must be based upon an IRE opinion of greater than 50% impairment.

Conclusion: In order for Claimant to succeed in a Review Petition filed outside the 60 day appeal period following issuance of the Notice in Change in Disability Status, the Claimant must present a medical opinion of impairment greater than 50% from a physician qualified to perform IREs.

This decision highlights the importance of a timely filed IRE which allows for the unilateral change of status with the filing of the change of status form. If the IRE is not obtained timely, then claimant can most likely raise all of the above raised issues in conjunction with our Modification petition to effectuate the change of status.

Reutzel v. WCAB (Allegheny General Hosp.), 448 C.D. 2009 (Filed October 20, 2009)

Issue: Whether Claimant's benefits for partial disability resulting from 2 separate injuries run concurrently for purposes of calculating the 500 week limitation on partial disability benefits.

Answer: Yes.

Analysis: Claimant suffered her first injury on February 24, 1996. She eventually returned to work with restrictions to the time of injury employer but then suffered a new injury involving a different body part on May 30, 1997. Claimant again returned to work with the same restrictions that stemmed from the initial 1996 injury. Both times that she returned to work, she earned less than her average weekly wage (AWW) and, as a result, received TPD benefits calculated based upon the 1996 AWW. On June 1, 2006, her TPD benefits reached 500 weeks and Employer stopped her TPD. Claimant filed a Reinstatement Petition

alleging that she only received TPD benefits for the 1996 injury and she should now receive another 500 weeks of TPD benefits for the 1997 injury. The WCJ granted the Reinstatement Petition in part and denied it in part. The WCJ found that Claimant's receipt of TPD benefits following the 1997 work injury constituted the concurrent receipt of benefits for both injuries and therefore, her entitlement to TPD benefits expired once she had received 500 weeks following he 1997 work injury. The WCJ did however, find that Claimant had been paid at an incorrect rate for the 1997 injury. The WCAB affirmed.

The Commonwealth Court determined that in factual scenarios as presented by this matter, the 500 week period of TPD runs concurrently for 2 separate injuries. It reached this conclusion based upon the fact that TPD is limited to 500 weeks for "any injury" and Claimant could not point to any case law or statutory provision that allowed for 500 weeks of TPD to run consecutively. Moreover, the Court stressed that the 1997 injury did not result in any additional wage loss for Claimant and that she was actually doing the same work after the 1997 injury as she was after the 1996 injury.

Conclusion: When a Claimant suffers two distinct injuries with the same employer but suffers no additional wage loss as a result of second injury, the 500 week period of TPD benefits runs concurrently.

Bentley v. WCAB (Pittsburgh Board of Education), No. 1560 C.D. 2008 (filed November 18, 2009)

Issue: Whether Employer "promptly" provided Claimant with a Notice of Ability to Return to Work, as required by Section 306(b)(3) of the Workers' Compensation Act, when an undated Notice may have been mailed almost two months following the physician's medical release but prior to the filing of a petition to modify benefits?

Answer: Yes.

Analysis: Claimant suffered a work related injury and Employer issued a Notice of Temporary Compensation Payable which subsequently converted to a Notice of Compensation Payable. Claimant's treating physician referred Claimant for a Functional Capabilities Evaluation (FCE), which was conducted on January 22, 2003 and revealed that Claimant was capable of at least light-duty work. Employer's vocational expert completed a labor market survey and located ten light duty jobs within 25 miles of Claimant's home, which were found to be available as of May 5, 2003. Employer filed a Petition to Modify Claimant's benefits to partial disability. The claims adjuster testified that she sent the Claimant a Notice of Ability to Return to Work (LIBC-757) "shortly after" receiving Claimant's treating physician's report in late January 2003, however the exact date was not known because the old LIBC-757 form did not have a space for recording the date of Notice. The WCJ granted Employer's Modification Petition.

Claimant appealed, arguing that Employer failed to prove that it sent the Notice of Ability to Return to Work in a timely manner, an issue not raised at the hearing. On remand, the WCJ noted that the Employer's Notice did not recite a date of mailing. However, based upon the record, the WCJ found that the Notice was mailed between the FCE on January 22, 2003 and the Employer's vocational interview on March 14, 2003. Accordingly, the WCJ determined that Employer provided Claimant with the Notice in a timely manner.

The Commonwealth Court cited to Melmack Home v. WCAB (Rosenberg), 946 A.2d 159 (Pa. Cmwlth. 2008) where it held that what constitutes "prompt" written notice under Section 306(b)(3) "necessarily requires an examination of the facts and timeline in each case to determine if Claimant has been prejudiced by the timing of the notice." The Court also explained that the Claimant must be given notice "before the employer attempts to modify benefits."

The Commonwealth Court stated that neither the Act nor Melmack Home require that a Notice be sent on a

specific date. The Court further held that Claimant failed to establish that he had been prejudiced by the timing of the Notice. The Court held that Claimant had more than seven weeks from his vocational interview, March 14, 2003, at which time he was aware of the release to modified duty until the effective date upon which his benefits were modified, May 5, 2003. Therefore, Claimant could not show prejudice and the WCJ Decision was affirmed.

Conclusion: The Notice of Ability to return to work must be issued prior to the filing of a petition to modify benefits; however, there is no specific filing timeframe to satisfy the "prompt" requirement of Section 306(b)(3). Claimant most likely must establish prejudice to successfully assert that an LIBC 757was untimely.

Leisure Line, Adventure Trails, Coach USA Company v. WCAB (Walker), Nos. 2174, 2230 and 2434 of 2008 (filed November 18, 2009)

Issue: Whether a claimant's commute to a job that pays more because of its undesirability furthers the employer's business, thereby constituting an exception to the "coming and going rule".

Answer: No.

Analysis: Claimant, a union employed bus driver, was injured in an automobile accident while driving to work. Claimant would drive his personal vehicle from his home in Wilmington, DE to Employer's bus yard in Coatesville, PA. He would then drive the bus from Coatesville to Atlantic City, NJ, picking up passengers at various points along the way. He would then have a layover, make the same trip back to Coatesville and then drive his personal vehicle back to his home in Wilmington. Claimant was injured while driving his vehicle from his home to the bus yard. Claimant testified that Employer paid more for Claimant's run between Coatesville and Atlantic City due to its undesirability. He further claimed that his commuting time was factored into his daily wage, although conceding that the collective bargaining agreement (CBA) did not provide a specific dollar amount of compensation for his commute.

The WCJ granted the claim petition, finding Claimant's testimony that the CBA compensated him for his commute to and from work credible, thereby satisfying an exception to the "coming and going rule." The WCJ did not award Claimant attorney's fees and both parties appealed.

The Board affirmed the WCJ's determination that Claimant was injured in the course and scope of his employment but on different grounds, concluding that Claimant was furthering his employer's business during his commute by driving a less popular run. Both parties again appealed.

The Commonwealth Court reversed. It held that to satisfy the employment contract exception to the "coming and going rule", claimant must satisfy two elements: 1) that a travel allowance is related to the actual expense and time involved in the claimant's commute; and 2) that the employer provided or controlled the means of the commute. Here, Claimant did neither.

The Commonwealth Court also held that claimant did not satisfy the "furthering the employer's business" exception to the "coming and going rule" by commuting to a less popular run. The case of Williams v. WCAB (Matco Electric Company, Inc), 721 A.2d 1140 (Pa. Cmwlth. 1998), appeal denied, 559 Pa. 685, 739 A.2d 547 (1999), confirmed that there is no exception to the "coming and going rule" for a claimant injured while commuting to an unattractive job or location. The Court further stated that a claimant's commute universally benefits the employer and that it does not matter that the job pays more because it is unattractive. Here, Claimant did not show that his commute was ordered or controlled by Employer. Therefore, Claimant was not injured in the course and scope of his employment and his claim petition should have been denied.

Conclusion: The mere fact that a claimant's job pays more because of its unattractiveness is not enough to overcome the coming and going rule. A claimant's commute to work will always benefit the employer and there must be something about the commute which is furthering the business of the employer to satisfy the exception.

Southwest Airlines/Cambridge Integrated Services v. WCAB (King), 136 C.D. 2009 (filed July 30, 2009, amended December 4, 2009)

Issue: Whether a medical expert can render a competent opinion regarding causation when the expert has an incomplete or inaccurate knowledge of Claimant's relevant medical history?

Answer: No. A medical opinion rendered by a physician without a complete or accurate knowledge of Claimant's relevant medical history is not competent.

Analysis: Claimant filed a claim petition alleging that she was struck in the head by jetway doors slammed by a co-worker. Claimant further alleged that this incident resulted in headaches, dizziness, blurred vision, head and neck pain, blackouts and difficulty with memory. Claimant denied prior injuries involving her head or neck and further denied any prior history of headaches, migraines, dizziness, blackouts or memory loss. During the hearing, Claimant was confronted with treatment records and multiple reports of injury alleging head injuries resulting in these symptoms prior to the alleged work injury at issue.

Claimant's treating physician acknowledged a lack of personal knowledge of Claimant's condition prior to his treatment of her for the alleged work injury. He was unaware whether Claimant ever sought treatment for similar symptoms prior to treating with him and acknowledged that the questionnaire she completed denied any prior injuries or history of complaints.

The WCJ granted the claim petition and credited the testimony of Claimant over that of the Employer's witnesses regarding the occurrence of the incident. The WCJ further credited the testimony of Claimant's medical expert over the IME physician based upon the number of treatments rendered by each physician and the fact that the Claimant's medical expert's diagnosis was consistent with the initial treatment diagnosis. Employer appealed and the WCAB affirmed.

The Commonwealth Court reversed, finding that the testimony of Claimant's medical expert was not competent with regard to the cause of Claimant's disability. In rendering this opinion, the Court cited the case of Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.), 547 Pa. 639, 692 A.2d 1062 (1997), in which the Pennsylvania Supreme Court held that a medical opinion was incompetent when not supported by the medical records or factual history of the case. The Court found that because Claimant's medical expert had no knowledge fo claimant's prior head and neck injuries and history of headaches, dizziness, concentration problems, blurred vision and corresponding treatment his testimony regarding causation lacked a proper foundation and was therefore incompetent. The Court went on to state that the treating physician's opinion was not competent because it was based upon an incomplete or inaccurate history.

Conclusion: This decision is an important expansion of Newcomer which to this point had been interpreted as requiring a finding that the medical expert's opinion was based upon a completely inaccurate history provided by Claimant in order to be deemed incompetent. Under this expanded interpretation, a medical opinion can be found to be incompetent when based upon an incomplete or inaccurate history.

Editor
David G. Greene, Esq.

Co-Editor

02.01.10

Weber Gallagher

Renee M. Porada, Esq.

Contributing Authors
Timothy Yunker, Esq. | Kevin Harcher, Esq. | Renee M. Porada, Esq.