12.15.09

Weber Gallagher

Pennsylvania Workers' Compensation Update - 3rd Quarter '09

PENNSYLVANIA SUPREME COURT CASES:

Cinram Manufacturing v. WCAB (Hill), No. 37 MAP 2008 (Decided July 21, 2009).

Issue: Whether a claimant is required to file a Review Petition for to amend the injury description to include corrective conditions, injuries that were present at the issuance of the NCP?

Answer: No.

Analysis: In 2004, claimant sustained a work injury which was accepted via NCP as a lumbar strain/sprain. Employer then filed a Termination Petition alleging a full recovery. During the litigation of the Termination Petition, claimant presented medical evidence that the injury should be described as an aggravation of a pre-existing disc herniation resulting from nerve impingement. However, claimant never filed a Review Petition. The WCJ credited claimant's medical evidence and amended the injury description to include the aggravation of the pre-existing disc herniation. Employer appealed arguing that a change in the injury description was not warranted as claimant never filed a Review Petition. The Board affirmed citing to the provisions in section 413(a) that a WCJ can amend an injury at any time upon proof of inaccuracy.

On appeal, the Pennsylvania Supreme Court found that for amendments seeking to include consequential conditions (ones that were not present at the time of the injury), a Review Petition was required to be filed. For amendments seeking to include corrective conditions (injuries sustained at the time of the NCP, a Review Petition was not required. However, reasonable notice and fair opportunity to respond to the amendments was required and the burden was on the claimant to establish the additional injuries sought to be added to the NCP.

Conclusion: While a Review Petition is not necessary to correct an NCP to include injuries that existed when it was issued, the defendant must still be given the opportunity to defend against the amendments sought. A Review Petition must be filed when seeking to add consequential injuries that result from the original injury and it would follow that, under Jeanes Hospital, such Review Petition most likely must be field within three years of when claimant knew or had reason to know that the condition was possibly work related. Care should be given not to pay for medical treatment for any potentially unrelated consequential conditions as those payments could toll this three year statute.

COMMONWEALTH COURT CASES:

Braz v. WCAB (Nicolet, Inc.), No. 2226 C.D. 2008 (Filed March 31, 2009, designated a Reported decision July 6, 2009).

Issue: Whether employer is required to present medical evidence to support its Suspension Petition alleging that claimant unavailable for employment due to relocation to Portugal?

Answer: No.

Analysis: In 1986, claimant sustained a work injury and began receiving indemnity benefits. At some point thereafter, claimant moved to Portugal. After claimant lived there for more than a decade, employer filed a Suspension Petition on the basis that claimant was unavailable for employment. Employer did not present any medical evidence. The WCJ denied the Suspension Petition, finding that employer failed to present any evidence of a change in Claimant's medical condition. Employer appealed. The Board reversed, finding that since Claimant moved to Portugal it would be futile to find jobs for Claimant in Pennsylvania, and thus, the

move constituted a removal from the work force.

The Commonwealth Court affirmed, finding that medical evidence was not needed to support the Suspension Petition because employer was not asserting that claimant was recovered some or all of his ability. Rather, employer was asserting and the evidence established that claimant had removed himself from the workforce by moving to Portugal and was residing outside the country for more than a decade.

Conclusion: An employer seeking to suspend a claimant's benefits based on an allegation that he has removed himself from the workforce does not have to support same with medical evidence. A claimant may remove himself form the workforce by relocating to another country. This follows the Commonwealth Court's prior decision in Blong v WCAB where claimant moved to New Zealand. The question in these cases is for how long claimant intends or intended to move and whether or not a temporary suspension can be obtained if claimant only seeks to move out of the country for a fixed period of time.

Good Tire Service v. WCAB (Wolfe), No. 729 C.D. 2008 (filed July 15, 2009).

Issue: Whether employer's pro rata chare of third party counsel fees should be based upon the reduced fee accepted by third party counsel rather than the original fee agreement?

Answer: Yes. The employer pro rata share should be reduced by the reduction in fee taken by third party counsel.

Analysis: Claimant sustained a work injury in 2004 as a result of a motor vehicle accident. Employer and its carrier accepted the injury and issued indemnity and medical payments to claimant. Claimant then filed a third party lawsuit which was subsequently settled.. As of the date of the settlement, the employer had paid $48,259.32 in benefits, which it asserted as a lien against the settlement proceeds. Claimant and his counsel entered into fee agreement for forty percent of any amount received from the third party lawsuit. Claimant's counsel deposited the payment of his fee. Forty percent was then deducted from Employer's reimbursement amount. Claimant's third party counsel then reduced his fee. Employer filed a review petition seeking to reduce its pro rata share of the third party counsel fees since claimant's third party attorney had reduced his attorney's fee. The WCJ granted the petition for review finding that the appropriate percentage was the fee actually charged.

On appeal, the Board reversed, finding that the fee reduction by Claimant's counsel was a "gratuity". The Commonwealth Court reversed and reinstated the WCJ's decision, finding that the employer's statutory right to subrogation was "clear and unambiguous," and allowed for no exceptions equitable or otherwise to alter the calculation of subrogation amounts. Therefore, the Court held that the employer was entitled to subrogation rights based on the actual fee paid to the counsel fee actually paid and not some hypothetical amount which might have been paid.

Conclusion: In all cases of third party recovery, we should ask to see a settlement sheet or other documentary information to confirm how the third party proceeds were distributed to ensure that we receive maximum reimbursement.

Community Service Group v. WCAB (Peiffer), No. 90 C.D. 2009 (Filed May 5, 2009, Designated a Reported Opinion July 30, 2009)

Issue: Whether a cervical scar caused by surgery to treat a work related cervical injury is a separate and distinct injury allowing for the concurrent payment of benefits?

Answer: No.

Analysis: In 2002, Claimant sustained a work injury to her neck, arms, knee, and low back. As a result of

the neck injury Claimant underwent neck surgery which resulted in a cervical scar. The parties entered into several agreements which included agreeing that claimant was entitled to 57.5 weeks of specific loss benefits when claimant ceased receiving total disability benefits. Employer then filed a modification petition based on an impairment rating of 28%. The WCJ granted the modification petition and ordered the employer to pay to claimant the 57.5 weeks of specific loss benefits concurrently with the partial disability benefits. Employer appealed to the Board which affirmed, except for a modification to the date of the conversion to partial disability benefits.

On appeal, employer argued that the WCJ erred in requiring payment of specific loss benefits during the time period when claimant was also receiving partial disability payments at the total disability rate. The Commonwealth Court agreed, finding that while a claimant can obtain specific loss benefits concurrently with the payment of partial disability benefits, this is only in situations where claimant has a specific loss that is separate and apart from the partial disability. In this case, because the scar resulted from a medical procedure performed to treat the original work injury and not a separate and distinct injury, payment of specific loss benefits were not payable until disability payments were no longer due and owing.

Conclusion: A disfigurement resulting from a medical procedure performed to treat the work injury is not a separate and distinct injury, and thus, any specific loss benefits awarded are not payable concurrently with payment of disability benefits.

McLaurin v. WCAB (SEPTA) – No. 40 C.D. 2009 (Filed June 5, 2009, Designated a Reported Opinion August 26, 2009)

Issue: Whether employer evidence of previous life threatening incidents to bus drivers, as well specific training and preparation for such incidents, was sufficient evidence for finding that bus driver being threatened with a gun was not an abnormal working condition?

Answer: Yes.

Analysis: On October 9, 2006, claimant, while employed as a bus driver, was confronted by a man who pulled a gun out of his pocket. Believing he was to be shot, claimant pleaded with the gunman who eventually put away his weapon and disembarked. Claimant filed a Claim Petition alleging he suffered work-related post-traumatic stress disorder, anxiety, chest pain/angina and impotence as a result of the incident. It was undisputed that claimant suffered a psychic injury; however, the issue was whether such incident constituted an abnormal working condition. Employer presented testimony and evidence of numerous assaults on bus drivers including confrontations involving guns. Additionally, employer offered evidence of training that was provided to bus drivers, specific to these types of incidents, based upon past incidents

The WCJ concluded that based upon the testimony and exhibits offered by employer, the October 2006 incident was not an abnormal working condition. The Workers' Compensation Appeal Board affirmed, noting that the WCJ found employer's witnesses credible as to the frequency of operator assaults and training provided.

Claimant appealed, arguing that life threatening assaults are extremely rare and thus, are not normal work conditions for bus drivers.

The Commonwealth Court affirmed, noting that the WCJ's finding that dangerous conditions are commonplace for employer's bus driers was supported by the credible testimony of record, including incident reports documenting the assaults, robberies and threats, to which bus drivers are exposed on a daily basis. The Commonwealth Court relied on the standard that such incidents are foreseeable or could

have been anticipated by the claimant, based upon the specific work conditions. In this case, the evidence clearly supported that because of the history of such incidents and training provided to drivers that these incidents were foreseeable. The Court gave deference to the WCJ who had reviewed all the evidence provided therein. The Court relied in particular on claimant's own testimony regarding a prior incident wherein someone from outside his bus was shooting in the direction of his bus and he used his training to escape physical harm.

Conclusion: Abnormal working condition cases are highly fact specific. Where there is a documented history of similar events or training for such events, those events, even if life threatening, may not be found to be abnormal working conditions.

Equitable Resources v. W.C.A.B. (Thomas), No. 80 C.D. 2009 (Filed September 2, 2009).

Issue: Whether the employer is responsible for repairs to claimant's work-related modified accommodations, when the repairs were necessitated by substandard construction?

Answer: Yes, if the repairs were performed by the employer's contractor. The result is unclear if the repairs were performed by claimant's contractor.

Analysis: Claimant was a paraplegic as a result of a work injury and needed modifications to his bathroom to accommodate his wheelchair. The modifications were negligently performed by the contractor hired by employer and water leaked in the bathroom causing mold damage. The employer refused to pay for the further repairs due to this negligence and the claimant filed a penalty petition. The Court held that pursuant to Rieger v. W.C.A.B. (Barnes & Tucker, Co.), 521 A.2d 84 (Pa. Cmwlth. 1987), modifications to a bathroom are considered an orthopedic appliance, which the employer is obligated to pay under 306 (f.1)(1)(ii) of the Workers' Compensation Act. The employer is also subject to pay for any repairs to these "orthopedic appliances" under Zuback v. (Paradise Valley Enterprise Lumbar Co.), 892 A.2d 41 (Pa. Cmwlth. 2006).

The employer argued that under Bomboy v. W.C.A.B. (South Erie Heating Co., 572 A.2d 248 (Pa. Cmwlth. 1990), the requirement that an employer provide home modification at the employer's expense is limited to a one-time expenditure. However, the Court opined this case was more similar to Zuback, in that claimant was not asking for additional accommodations but rather repair of the poorly constructed accommodation.

Conclusion: Although the holding in Bomboy still is good law, there are exceptions to the one-time expenditure where the modification needs to be repaired or replaced due to normal wear and tear or where the modification is negligently constructed. However, the Court noted that the outcome may have been different had the negligent modifications been performed by claimant's own contractor rather than the contractor selected by the employer.

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