08.05.09

Weber Gallagher

Pennsylvania Workers' Compensation Update - 2nd Quarter '09

Commonwealth Court Cases

Henkels & McCoy, Inc. and Liberty Mutual Ins. Co. v. WCAB (Barner), No. 1396 C.D. 2008 (filed April 15, 2009)

Issue: Whether the employer is entitled to Supersedeas Fund reimbursement for benefits paid pursuant to a denial of supersedeas, when the benefits ordered were retroactive benefits that should have been paid based on an open NCP?

Answer: No. Because employer did not utilize the proper procedure in suspending benefits, it could not recoup the benefits ordered from the Supersedeas Fund.

Analysis: Claimant suffered a work related injury, was paid wage loss benefits, went back to work without wage loss, and his benefits were suspended. The claimant never signed a supplemental agreement and the employer did not file a Notice of Suspension. Claimant filed a Penalty Petition, alleging that he had been laid off and was entitled to an automatic reinstatement due to the lack of a closing document. In reality, claimant was fired for violation of a company drug policy shortly after his return to work. Employer filed a Suspension Petition as a result. Employer voluntarily paid claimant beginning as of the Penalty Petition, but did not willingly reinstate the back benefits from September, 2001 through April, 2005 until the WCJ denied supersedeas. The parties ultimately entered into a compromise and release agreement for claimant's future entitlement to benefits and litigated employer's entitlement to a Suspension based on the firing for cause. The WCJ ultimately granted the Suspension Petition and the employer requested supersedeas refund for all benefits, including the four years of back benefits, that it was forced to pay by virtue of the supersedeas denial.

While the Bureau was willing to reimburse the employer for all monies paid for dates on or after the filing of the Suspension Petition, it denied employer's entitlement to retroactive benefits, even though the payment followed its request for supersedeas. The employer petitioned to the Judge who agreed as did the WCAB.

The Commonwealth Court agreed as well, explaining that if there is no bureau document that confirms the suspension status, and claimant leaves work, whether due to a firing or a lay off, then the employer must reinstate benefits and file a petition to suspend or terminate benefits along with a request for supersedeas. Here, the retroactive payments were not made in response to a denial of supersedeas but rather were made as a result of employer's wrongful withholding of benefits in violation of the Act.

Conclusion: This case once again highlights the importance of obtaining a closing document in every case. It seems unfair for a claimant to benefit from the violation of a company drug policy. However, PA law is clear that absent a closing document, a claimant is entitled to a reinstatement if he leaves work, unless he has removed himself from the workforce.

Diehl v. WCAB (IA Construction and Liberty Mutual Ins.), No. 1507 C.D. 2007 (filed April 22, 2009)

Issue: Whether employer must prove job availability in order to modify a claimant's disability status on the basis of an IRE requested more than 60 days after the claimant has collected 104 weeks of total disability?

Answer: No.

Analysis: Employer requested an IRE outside the 60-day window. The IRE physician found a 28% impairment. Employer filed a Modification Petition seeking conversion from TTD to TPD. The claimant did not challenge the impairment rating. Rather, claimant asserted that the Act mandated that job availability be

shown in order to effectuate a change from total to partial disability status, even if that change is pursuant to an IRE. The WCJ agreed and denied the Modification Petition.

The Board reversed, finding that because the modification petition sought a change in disability status only, a showing of job availability was not required.

Claimant appealed. The original panel of the Commonwealth Court reversed the Board and held that the employer must show job availability. The employer's request for reconsideration was granted. The panel decision was vacated and additional argument was directed. Ultimately, the Commonwealth Court affirmed the Board. The Court undertook a review of Section 306, particularly Section 306(a.2)(5), which provides, in part:

(5) Total disability shall continue until it is adjudicated or agreed under clause (b) that total disability has ceased or the employee's condition improves to an impairment rating that is less than fifty per centum of the degree of impairment defined under the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment." 77 P.S. §511.2(5) (emphasis added)

The Court held there can be a change in disability status where total disability has ceased, or the employee has an impairment rating of less than 50%. The Court noted that the use of the word "or" clearly denotes that there are two options for changing the disability status and evidence of earning power does not come into play when proceeding under an IRE. The Court also noted that to require evidence of earning power would render the IRE provisions meaningless as no employers would seek an IRE where earning power also needed to be established.

The Court further supported its holding by noting that the change in disability status does not change the amount of compensation and that an employer could further seek to modify benefits if a claimant does regain earning power. Accordingly, the Court concluded that proof of earning power is an option wholly separate from modification due to impairment rating.

Conclusion: Under the Act, an employer seeking to change a claimant's benefit status using the results of an IRE obtained outside the 60-day window is not required to prove earning power or job availability.

Sexton v. WCAB (Forest Park Health Center), 1225 C.D. 2008 (May 22, 2009)

Issue: Whether the URO may return medical records of the provider under review and not conduct a utilization review of treatment if the provider fails to provide the required signed verification form?

Answer: Yes.

Analysis: Employer requested a utilization review of myoblock injections from Dr. Kosenke. The URO requested claimant's records from Dr. Kosenke. The records were submitted without the requisite signed verification form The URO returned the records to Dr. Kosenke as incomplete. As a result of the provider's failure to submit the required verification form, the URO rendered a determination that the treatment was unreasonable and unnecessary.

Claimant filed a Petition to Review the determination. Evidence established that the verification was not provided and the WCJ ordered further utilization reviews to be conducted on the merits. Employer appealed to the Board and the matter was remanded to the WCJ for a determination as to whether the URO followed the proper procedure.

The WCJ found that while a verification was required by law, the regulations did not direct a URO to return timely received records solely for lack of an executed verification and again directed a review on the

merits. Employer appealed and the Board reversed.

The Commonwealth affirmed the Board's decision. It stated that the Bureau regulations require that a signed verification be provided and that failure to do so is "the same as providing no medical records" because without the form the URO cannot say with certainty that the records are accurate and penalties for false attestation cannot be imposed if knowingly false records are submitted or other records are deleted.

Conclusion: The WCJ's ability to direct the URO to conduct a utilization review on the merits is limited. The provider under review's unexplained failure to supply records or the required verification form is not sufficient to vacate the determination and order a review on the merits.

Young v. WCAB (LGB Mechanical), 2395 C.D. 2008 (Filed June 4, 2009)

Issue: Whether attorney's fees constitute part of Employer's accrued subrogation lien?

Answer: Yes, so long as they are a percentage of compensation. Unreasonable contest attorney's fees are not part of a subrogation lien.

Analysis: In 2001, Claimant's Claim Petition was granted with approval of 20% fee agreement with counsel. In 2003, Employer filed a Modification and Suspension petition that was ultimately resolved via compromise and release agreement with claimant counsel receiving a fee. Claimant subsequently obtained a third party recovery. Employer filed a Review Petition seeking subrogation and both parties agreed that employer was entitled to subrogation; however, claimant sought to exclude those amounts paid in counsel fees.

The WCJ granted the Review Petition, including the counsel fees in the subrogation lien, reasoning that the fees were not unreasonable contest fees assessed but rather part of the compensation "payable" to claimant.

The Board affirmed and stated that both counsel fees and costs should be included in the lien.

The Commonwealth Court affirmed the Board in so far as it included the counsel fees but reversed the part of the decision including the litigation costs. The Court reasoned that the counsel fees, pursuant to the fee agreement, constituted compensation as the money was payment for claimant's work injury. The Court rejected claimant's argument that counsel fees should be excluded on the basis that claimant only retained counsel to defend against the Modification and Suspension Petition filed while the third party case was pending as a means to protect the third party case.

Conclusion: Counsel fees pursuant to a fee agreement between claimant and counsel are properly included in the employer's accrued subrogation lien; however, costs paid in addition to compensation benefits, such as unreasonable contest fees and litigation costs, are not.

The Boeing Company v. WCAB (Horan), 1466 C.D. 2008 (Filed June 24, 2009)

Issue: Whether an Employer can recoup from the Supersedeas Fund unemployment benefits and severance pay the WCJ inadvertently failed to discuss in her original decision following a successful appeal?

Answer: Yes, although the Supersedeas Fund has requested reargument.

Analysis: Claimant filed a Claim Petition seeking acknowledgement of a work injury and ongoing TTD benefits. At a hearing, claimant acknowledged receipt of employer funded severance and unemployment benefits following his work injury. The WCJ granted the Claim Petition and ordered employer to pay the

claimant TTD benefits but the decision was silent on the offset issue.

Employer appealed the omission of the offset and the WCAB denied supersedeas. As a result, the employer paid the full award, without the offset for unemployment compensation and the severance. The Board ultimately concluded that employer was entitled to an offset for the severance pay and unemployment compensation. Claimant did not appeal to the Commonwealth Court.

Employer filed a Request for Supersedeas Fund reimbursement. The Bureau challenged the request. The WCJ issued a decision granting reimbursement for the amount attributable to the offset. The Bureau appealed. The Board reversed the WCJ concluding the employer was not entitled to Supersedeas Fund reimbursement. The employer appealed and the Commonwealth Court reversed.

The Court reiterated the requirements for Supersedeas Fund reimbursement:

1. Supersedeas was requested;
2. Supersedeas was denied;
3. The request was made in a proceeding under Section 413 or 430 of the Act;
4. Payments continue because of the order denying supersedeas; and
5. In the final outcome of the proceedings, it is determined such compensation was not, in fact, payable.

The Court noted all parties agreed that supersedeas was requested, that the request was denied and that the employer paid benefits due to the denial of supersedeas. The Court rejected the Bureau's argument that the employer was not entitled to reimbursement because the request for an offset was not based upon Section 413, noting that the supersedeas request was not made under Section 413 (modification, suspension or termination) but rather upon Section 430 (appeal). The Court further found that the Board's determination that the employer was entitled to an offset for severance pay and unemployment compensation was a determination that the "compensation was not, in fact, payable."

As an aside, the Court noted that the employer had no option but to pay the amount sought in the offset as the WCJ had ordered payment at the TTD rate. The Court refused to advocate "self help" on the part of employers. The Court further noted that the claimant had returned to work and the Employer was unable to recover the offset via reduction of ongoing benefits.

Conclusion: An employer appealing a decision that fails to address an offset is not precluded from recovering from the Supersedeas Fund for those amounts paid pursuant to the denial of supersedeas on appeal. The Bureau has requested reargument of this decision and if denied, will most likely file an request for allocator with the Pennsylvania Supreme Court.

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