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Pennsylvania Workers' Compensation Update - 4th Quarter '08

Costa v. WCAB (Carlisle Corp.), 822 C.D. 2008 (Filed, October 14, 2008)

Issue: Whether claimant's testimony regarding the amount of unemployment compensation he receives meets employer's burden to assert a credit?

Answer: Yes.

Analysis: Claimant was employed as a truck driver and sustained an injury when he hit his head on the top door jam of his truck. Claimant was initially diagnosed with cervical and thoracic strains and placed on modified duty. Claimant filed a Claim Petition and a Penalty Petition. Employer did not specifically assert a credit for unemployment compensation benefits in its answer; however, claimant testified that after he went off of work he collected $422.00 in weekly unemployment compensation benefits. Employer raised the issue of a credit for the unemployment compensation benefits in its proposed findings of fact and conclusions of law.

The WCJ granted the Claim Petition without reference to the credit for unemployment compensation and both parties appealed. The matter was remanded for the WCJ to address the issue of credit for unemployment compensation. The WCJ awarded employer a credit for the unemployment compensation and claimant appealed.

The Board affirmed.

On appeal the claimant argued that the employer waived the unemployment compensation credit by not presenting documentary evidence. Employer argued that claimant's own testimony that he received unemployment compensation and the amount of such compensation was sufficient to meet its burden. The Court held that the employer had not waived its right to a credit and that the claimant's testimony was sufficient to meet employer's burden. Therefore, the Court affirmed.

Conclusion: When the claimant testifies that he received unemployment compensation benefits and testifies as to the amount of those benefits, and the employee does not challenge the amount of those benefits, the employer need not present additional evidence in order to obtain a credit for the unemployment benefits. However, the right to a credit must be asserted before the WCJ. The employer should be careful, however, not to rely on claimant's testimony, but should secure actual records, by subpoena or otherwise, to ensure it obtains the gross credit that it is entitled to under the law.

Jones v. WCAB (City of Chester), 621 C.D. 2008 (Filed November 12, 2008)

Issue: Whether a WCJ can review a collective bargaining agreement (CBA) when an employer is offsetting pension payments by the amount of workers' compensation benefits received per the CBA?

Answer: Yes. In limited circumstances.

Analysis: Claimant sustained a work related injury. Claimant received workers' compensation benefits as well as a disability pension governed by a CBA. Per the terms of the CBA, employer reduced the disability pension by 100% of the workers' compensation benefits received.

Claimant filed a Review Petition, asserting that the CBA impacted claimant's receipt of workers' compensation benefits even though it was claimant's pension benefits, not his workers' compensation benefits, that were reduced. The WCJ granted the Review Petition and held that any offset must be taken in accordance with the Act.

The Board reversed holding that the WCJ lacked jurisdiction to review the CBA and that since claimant's workers' compensation benefits were not reduced, there was nothing for the WCJ to review.

The Court reversed and remanded to the WCJ for creation of a proper record. The Court held that the WCJ would have jurisdiction to review the CBA under the facts as presented. The Court noted that the Act provides the WCJ with authority to review issues beyond the scope of the Act if such issues impact upon the claimant's right to workers' compensation benefits and opined that the reduction in the pension based upon the amount of the workers' compensation benefits received could be viewed as a reduction in workers' compensation benefits.

Conclusion: A WCJ is not precluded from reviewing the provisions of a CBA if those provisions impact upon the claimant's workers' compensation benefits.

Community Empowerment Association v. WCAB (Porch), No. 499 C.D. 2008 (Filed on November 25, 2008).

Issue: Whether religious discrimination can constitute an abnormal working condition?

Answer: Yes

Analysis: Claimant filed a Claim Petition alleging psychological injuries due to an abnormal working environment. Claimant testified the employer's president made unwanted sexual advances toward her, singled her out at weekly staff meetings for being non-Muslim, and discussed religious topics during those meetings. Co-workers would encourage her to engage in religious customs outside of her faith and a spiritual guide was hired to burn incense, chant and splash water on the premises. The WCJ granted the Claim Petition. The WCJ credited claimant's testimony over that of employer's witnesses based upon demeanor and inconsistencies in the testimony of the employer witnesses and also credited claimant's medical expert. Employer appealed.

The Board affirmed. Employer appealed.

The Commonwealth Court affirmed. The Court determined that being singled out for being non-Muslim at weekly meetings could be considered abnormal in a professional environment. In addition, the burning of incense, chanting and the splashing of water by a non-employee in the office was a departure from the normal business environment. However, in its conclusion that the claimant was exposed to abnormal working conditions, the Court specifically stated that the instances of "abnormal religious or cultural harassment in addition to the sexual harassment" constituted abnormal working conditions.

Conclusion: Harassment of any form, whether based on race, sex or religion, can create an abnormal working environment.

Weney v. WCAB (Mac Sprinkler Systems, Inc.), No. 678 C.D 2008 (Filed November 26, 2008).

Issue: Whether res judicata and/or collateral estoppel preclude Claimant from filing a Review Petition seeking to expand the description of injury to include additional injuries known to claimant at the time he signed a Supplemental Agreement resolving a prior Review Petition?

Answer: Yes.

Analysis: Claimant was injured in 2005 and a TNCP was issued recognizing a left shoulder strain. In March 2006, claimant filed a Review Petition seeking to expand the injury to include additional shoulder injuries. The Review Petition was resolved via Stipulation of Facts adopted by the Judge expanding the injury to include the additional shoulder injuries alleged by claimant. Neither party appealed.

Twenty days after the Judge's decision approving the Stipulation of Facts, claimant filed a Second Review

Petition to include cervical disc herniations. Employer's answer asserted the second Review Petition was barred by res judicata and/or collateral estoppel. The judge found the NCP materially incorrect and granted the second Review Petition. Employer appealed.

The Board reversed. The Board noted the claimant reported neck pain immediately after his injury, claimant's medical expert told him the neck pain was from his work injury in April 2006, and the MRI confirming the diagnosis was completed in April 2006. Therefore, the claimant was aware of the work-relatedness of the neck injury during the prior Review Petition litigation, March 27, 2006 to May 19, 2006.

Claimant appealed. The Commonwealth Court explained that "technical res judicata" requires that there be: (1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued. The Court stated that technical res judicata may be applied to bar "claims that were actually litigated as well as those matters that should have been litigated."

In this case, even though the claimant did not actually litigate the issue of his cervical injuries, he should have done so based on his knowledge of the existence of the work injury and since he previously litigated this initial Review Petition. Accordingly, the claimant was barred from litigating the second Review Petition.

Conclusion: Even though Section 413(a) of the Act allows an NCP to be amended at any time, a Review Petition can be barred by res judicata or collateral estoppel if the issue was previously litigated or should have been previously litigated.

Miegoc v. WCAB (Throop Fashions/Leslie Fay and ITS Hartford), No. 948 C.D. 2008 (Filed December 3, 2008).

Issue: Whether a Notice of Ability to Return to Work must be sent to claimants whose work injuries pre-date the adoption of Subsection 306(b)(3) in 1996?

Answer: Yes.

Analysis: Claimant sustained an accepted work injury in 1992. In 1996 the Act was amended to include section 306(b)(3) which requires the employer/carrier to issue Form LIBC 757, a Notice of Ability to Return to Work (Notice), upon receipt of medical evidence of a change in claimant's condition.

In May 2000, the employer filed a Suspension Petition alleging claimant refused available work within her medical restrictions. Claimant moved for dismissal of the petition based on the employer's failure to issue the Notice. The WCJ agreed with claimant and dismissed the Petition.

Employer appealed and the Board Reversed and Remanded. The Board held that section 306(b)(3) was a substantive provision that may not be applied retroactively and since the claimant's injury occurred before the Act was amended to include the Notice requirement, the requirement did not apply. Based on the Board's instructions on remand, the WCJ Granted the Suspension Petition, which was affirmed on appeal to the Board.

Claimant appealed to the Commonwealth Court, arguing that Section 306(b)(3) was a procedural provision and therefore should be applied retroactively. The Court agreed and found that Section 306(b)(3) did not affect the substantive rights of either party and, therefore, the provision was procedural in nature and could be retroactively applied. Therefore, the Court reversed the decision that had granted the employer's Suspension Petition.

Conclusion: A Notice of Ability to Return to Work should be sent to claimant in every case where there has

been a change in medical condition, regardless of the date of injury.

Delaware County v. WCAB (Browne), No. 788 C.D. 2008 (Filed December 22, 2008).

Issue: Whether the WCJ must find both full recovery and a change in condition in order to satisfy the Supreme Court's decision in Lewis v. WCAB in a subsequent Termination Petition?

Answer: Yes.

Analysis: Claimant sustained a low back strain and a right sided neck strain in 2002. In 2004 the WCJ denied employer's Termination Petition and expanded the injury to include a cervical disc herniation, cervical radicuolpathy and bilateral carpal tunnel syndrome.

In 2005, the Employer filed a second Termination Petition based upon an opinion of full recovery. The WCJ granted the second Termination Petition.

The Board reversed the grant of the Termination Petition. Employer appealed.

In Lewis v. WCAB (Giles & Ransome, Inc.), 919 A.2d 992 (Pa. 2007), the PA Supreme Court concluded that in a second Termination Petition, the employer must establish a change in condition from a prior WCJ decision to satisfy its burden of proof. In this case, the Commonwealth Court noted that under Lewis, a change in condition can be shown by evidence of full recovery; however, the employer in the subsequent Termination Petition must not only establish that the claimant is fully recovered but also that the claimant's physical condition has changed from the time of the last disability adjudication. In the present matter the WCJ made no findings as to change in condition and much of the medical evidence relied upon was evidence pre-dating the prior adjudication. Accordingly the matter was reversed and remanded.

Conclusion: In order to satisfy Lewis in subsequent Termination Petitions, the medical evidence must include opinions of full recovery from all previously adjudicated injuries and must show a change in condition from the prior adjudication. It may not be enough to rely on evidence of full recovery and definitely is insufficient to rely on medical evidence that pre-dated the prior adjudication.

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