

WORKERS' COMPENSATION UPDATE:
WINTER-SPRING 2011

COURSE AND SCOPE OF EMPLOYMENT

Penn State University v. WCAB (Smith), 15 A.3d 949 (Pa. Cmwlth. Feb. 22, 2011).

Claimant worked in the Employer's Housing Department and he performed various housekeeping duties throughout the campus in this capacity. On the day of his injury, Claimant was cleaning dorm rooms and then left the dormitory to take his one-half hour unpaid lunch leave at an on-campus dining facility where Claimant had an employer-sponsored meal plan. Claimant was walking from the dorm to the dining facility and he intentionally jumped down a flight of approximately twelve steps. Claimant landed very hard, being subsequently diagnosed with fractures in both ankles. He filed a Claim petition.

Claimant testified that his decision to jump down the flight of stairs was a "whim," although he had thoughts of jumping down the steps prior to that date. The WCJ concluded that Claimant was within the course and scope of his employment at the time of the injury, reasoning that Claimant's actions in jumping down the steps was not such an activity that was outside the realm of Claimant's work activities or a direct, intentional violation of a positive work order against horseplay.

The Board affirmed the WCJ's decision and the Employer appealed. The Court found that Claimant was not within the course and scope of his employment at the time of his injury. A review of the pertinent case law demonstrated that employees who remain on an employer's premises for their lunch break and sustain an injury are generally considered to be in furtherance of the employer's business, unless the activity they are engaged in is so wholly foreign to their employment. The premeditated, deliberate, extreme, and inherently high-risk nature of Claimant's action was sufficient to remove him from the course and scope of his employment.

HEARING LOSS

Duncannon Borough Authority v. WCAB (Bruno), 8 A.3d 389 (Pa. Cmwlth. 2010).

Claimant was a police officer for Employer. He was a passenger in a patrol car that was rear-ended. Claimant was dazed upon impact, he felt dizzy, and he experienced a ringing in his right ear that he had not previously experienced. Claimant suffered a monaural (single ear) hearing loss of 31.88% and a binaural (both ears) hearing impairment of less than 10% as a result of the accident. Because this case involved a permanent loss of hearing due to a head injury, Section 306(c)(8)(ii), rather than Section 306(c)(8)(i) of the Act (relating to permanent hearing loss resulting from long-term exposure to hazardous occupational noise), was applicable. At issue was whether Section 306(c)(8)(iii) is also applicable under the facts of this case.

Section 306(c)(8)(iii) of the Act clearly states that if there is a level of binaural hearing impairment as calculated under the *Guides* that is equal to or less than 10%, no benefits shall be payable, “[n]otwithstanding the provisions of subclauses (i) and (ii)[.]” Claimant presented evidence that he had a 31.88% hearing loss in one ear. Utilizing the requisite formula to convert Claimant's monaural hearing loss to binaural impairment rating, Claimant's binaural impairment as stated by his own doctor was only 5.31%. This was below the 10% threshold set forth in Section 306(c)(8)(iii). Accordingly, the Commonwealth Court reversed the WCAB's decision and denied Claimant's benefits.

IRE GUIDES

Stanish v. WCAB (James J. Anderson Construction Co.), 11 A.3d 569 (Pa. Cmwlth. Dec. 7, 2010).

This case involves the Workers' Compensation Bureau's interpretation of its regulations regarding the notification to IRE physicians stating that, despite the issuance of the 6th edition of the AMA Guides in 2008, it would accept impairment ratings calculated under either the 5th or 6th edition of the AMA Guides through August 31, 2008. While the notification by the Bureau was not a regulation, the Bureau's interpretation of its own regulation had to be given deference. However, such notification may be disregarded if it is clearly erroneous or inconsistent with the statute under which the regulation being interpreted originated. Gardner v. WCAB (Genesis Health Ventures), 888 A.2d 758 (Pa. 2005). The Commonwealth Court held that the Bureau's instruction that it would accept impairment ratings calculated utilizing old Guides was contrary to Section 306(a.2)(1) of the Act that states “[t]he degree of impairment shall be determined based upon an evaluation by a physician . . . pursuant to the **most recent edition** of the American Medical Association Guides to the Evaluation of Permanent Impairment.” Section 306(a.2)(1) (emphasis added). The Court agreed that the Bureau's decision to phase in the use of the newest Guides may be reasonable, but the interpretation of the Act 57 Regulations in the notification was found to be inconsistent with the plain language the Act. The Bureau's interpretation of its regulation as expressed in its notification was, therefore, held to be invalid.

MEDICAL BILLS

Dr. Jeffrey Yablon and Dr. Vincent Ferrara v. Bureau of Workers' Compensation Fee Review Hearing Office (PMA), No. 2042 C.D. 2010 (Pa. Cmwlth. Apr. 21, 2011).

The hearing officer concluded that the insurer did not lose the right to “downcode” charges because more than 30 days had passed after the providers' bill had been submitted. On appeal, the providers contended that exceeding the 30-day time limitation found in Section 306(f.1)(5) of the Act and its associated regulation, 34 Pa. Code § 127.208(d), was a bar to an insurer's ability to downcode. The Commonwealth Court disagreed and affirmed the hearing officer's decision. The carrier was properly penalized by having to pay the providers 10% interest payments on the unpaid balances, but said violation did not bar insurer's ability to downcode. The Pennsylvania Code allows for penalties to be assessed but not a bar to downgrading the codes.

MENTAL-MENTAL INJURY

Washington v. WCAB (Cmwlth of PA, State Police), 11 A.3d 48, 2011 WL 13929 (Pa.Cmwlth., Jan. 05, 2011).

Claimant was a field trooper with the Pennsylvania State Police and worked as part of the Forensic Science Unit, working specifically on numerous investigations of murder, burglaries, motor vehicle thefts, assaults, and some vehicular homicide investigations. Claimant went to a crime scene where he observed a deceased infant girl in a plastic bag sitting upon debris in a burn barrel. He took photographs of the burn barrel, the infant inside the bag, and the surrounding area. He saw that the top of the infant's head had soot on it, and that the infant's leg, heel and/or knee had been partially burned or charred. He also tilted the infant's head back by placing two of his fingers on her forehead, and saw that the infant's throat had been cut. He also attended and photographed the autopsy that was later conducted. Claimant later filed a Claim petition, alleging that he suffered from work-related post-traumatic stress disorder.

The WCJ found that Claimant's activities with respect to that case were normal and routine, related to his job. More specifically, the WCJ determined that “[t]he activities described by Claimant in this case, providing forensic and photographic services, [and] attending autopsies are drawn straight from his job description”. The WCAB and the Court affirmed, concluding that there were no abnormal working conditions, and denied Claimant benefits.

NOTICE

Hershgordon v. WCAB (Pepboy, Many, Moe, and Jack), 14 A.3d 922 (Pa. Cmwlth. Feb. 8, 2011).

Claimant worked as an assistant manager for Employer beginning on February 28, 2005. On October 23, 2007, Claimant was discharged from his employment due to his treatment of employees and customers. On November 26, 2007, Claimant filed a Claim Petition alleging that he injured his back and his right foot while working for Employer on June 13, 2005. Employer denied Claimant's claim, stating that Claimant did not timely report a work-related injury, and that he did not lose time from work as a result of a compensable work injury.

The WCJ denied Claimant's Claim petition due to the lack of notice to the Employer. The WCAB affirmed that decision on appeal. The Commonwealth Court also affirmed the decision, emphasizing that the question of whether Claimant complied with the notice requirements is a fact to be determined by the WCJ. Claimant had testified that he advised two different supervisors of his injuries in the days following June 13, 2005. However, he continued to work without treating with a medical provider, without restrictions, and without physical difficulty for that entire time. Claimant also tried to claim that the pain medication he took due to his pain from the alleged work injury caused him to change his personality, which later caused him to be fired from his job.

NOTICE OF DENIAL

Morrison v. W.C.A.B. (Rothman Institute), 15 A.3d 93 (Pa. Cmwlth. 2010).

Claimant appealed the decision of the WCJ that denied his Claim petition. He argued that Employer's Notice of Compensation Denial was not timely filed and therefore, Employer was estopped from denying that a work injury took place. The Commonwealth Court disagreed and found that Claimant failed to meet his burden of proof as to his Claim petition because his testimony was not corroborated by any other evidence. Accordingly, because Claimant did not prove that his injury was "disabling," as defined under the Act, his Claim Petition was denied. The Commonwealth Court, thus, affirmed the Judge's decision to deny Claimant's Claim petition.

REINSTATEMENT – ECONOMIC CONDITIONS

Trevdan Building Supply and Compservices, Inc. v. WCAB (Pope), 9 A.3d 1221, 2010 WL 5066679 (Pa. Cmwlth. Dec. 13, 2010)

Prior to his work injury, Claimant had been working eight hour shifts and frequently took advantage of working many overtime hours. Claimant then suffered a work injury, and returned to his pre-injury job. However, during the time that had elapsed since his work injury, Employer was no longer offering overtime hours to employees due to the economic downturn. Claimant filed a Reinstatement petition because, although he was earning his pre-injury hourly wage, he was not earning the same overall weekly amount as he was prior to his work injury because he was no longer working overtime hours. The WCJ granted Claimant's Reinstatement petition and the WCAB affirmed that portion of the decision. The Commonwealth Court reversed the WCAB's decision and found that Claimant was not entitled to disability benefits because of the economic downturn that his Employer had experienced.

SUBROGATION

Oliver v. City of Pittsburgh, 11 A.3d 960 (Pa. Jan. 28, 2011)

The Pennsylvania Supreme Court held that the repeal of the subrogation provision of the Motor Vehicle Financial Responsibility Act (MVFRL), insofar as it related to workers' compensation payments, did not afford public employers a right of subrogation for benefits paid under the Heart and Lung Act (HLA). Section 25(b) of Act 44 is unambiguous in its statement that it relates only to "benefits under the Workers' Compensation Act."

SUSPENSION NOTICE

Anderson v. WCAB (Penn Center for Rehab), 15 A.3d 944 (Pa. Cmwlth. Dec. 23, 2010).

Claimant injured her back while working for Employer on May 8, 2006. Employer accepted the injury per an NCP and Claimant began receiving benefits. Claimant worked in a light duty capacity until May 24, 2006, at which time Employer eliminated that job position.

Claimant's certification was, in fact, revoked, its Suspension Petition had to be denied. The Court, therefore, affirmed the underlying decision.

SUSPENSION – WITHDRAWAL FROM THE WORKFORCE

City of Pittsburgh and UPMC Benefits Managements Serv. Inc. v. WCAB (Leonard), 2011 WL 1486570 (Pa. Cmwlth. Jan. 21, 2011).

Employer appealed the decision of the WCJ that denied its Suspension petition on the grounds that Claimant accepted service-connected disability pension benefits as of April 1, 2006, and therefore, Claimant's workers' compensation benefits should have been suspended as of that date due to his voluntary withdrawal from the workforce. The workers' compensation benefits were instead suspended as of August 16, 2007, the date that the Notice of Ability to Return to Work was issued, which released Claimant to light-duty, full-time work. Employer argued that the WCJ also incorrectly placed the burden on the Employer to prove Claimant's restored work capabilities rather than placing the burden on Claimant to prove that he either was seeking employment or that his work-related injury forced him to retire and collect his pension. The Commonwealth Court affirmed the Judge's decision, finding that it was not until the time that the Notice of Ability to Return to Work was issued that Claimant was actually able to return to work. Accordingly, he did not voluntarily withdraw from the workforce until he was able to return to work and decided to receive his pension instead.

Employer also argued that Claimant's benefits should not have been reinstated as of December 1, 2008, the date the Judge found that Claimant adequately proved that he had been seeking employment through job search efforts. Claimant testified that he inquired about job openings via word-of-mouth and various online job search websites. Because the Judge found Claimant's testimony in this regard to be credible, the Commonwealth Court affirmed the decision because his testimony supported the reinstatement of his benefits.

Note: There is a comparable Commonwealth Court decision which the Pa Supreme Court has agreed to Review on the issue of whether the employer bears the burden of showing that based on a totality of the circumstances, the claimant has chosen not to return to work. City of Pittsburgh & UPMC Benefit Management Serv. v. WCAB (Robinson), 2011 WL 1303770 (Pa. Apr. 6, 2011).

SUSPENSION - WITHDRAWAL FROM THE WORKFORCE

Keene v. WCAB (Ogden Corp.), No. 1421 C.D. 2010 (Pa. Cmwlth. May 19, 2011).

Claimant appealed the WCAB's order that reversed the WCJ's decision to deny Employer's Suspension Petition. Claimant suffered a right knee work injury in 1989. She was found to have reached maximum medical improvement, but only to be capable of working full-time sedentary work. She has a high school education, but no additional training or education. Claimant began looking for suitable work after her total knee replacement surgery. She applied for numerous jobs, including, but not limited to jobs with Budget, Avis, and Wal-Mart, but was never hired for any of them. Claimant testified that she never received any retirement benefits

Claimant was then released to full duty work on August 11, 2006 and Employer, therefore, filed a Notification of Suspension that same day. Claimant never filed a challenge to that Notification. However, Claimant filed a Reinstatement petition on March 19, 2007, alleging that her disability reoccurred as of August 11, 2006, and a Review petition, seeking to expand the description of her accepted work injury. Employer filed a Termination petition.

Claimant testified that she suffered a non-work-related injury on August 3, 2006 when she "hit her back on a door" at her home. Claimant presented the deposition testimony of both Dr. Stempler and Dr. Bowden in support of her petitions. Employer presented the testimony of Dr. Mandel. The WCJ denied Claimant's petitions and granted Employer's Termination petition, discrediting Claimant's testimony and that of her medical experts. The Appeal Board affirmed this decision.

On appeal, the Commonwealth Court also affirmed, finding that Claimant failed to actually challenge the Notification of Suspension, and, in effect, agreed to the return to work, her receipt of wages, and the suspension. With respect to Claimant's Reinstatement petition, it was her burden to prove a change in her status quo. Because the WCJ discredited her factual testimony as well as that of her medical experts, Claimant did not satisfy that burden. Additionally, the Court found that Claimant failed to establish that her alleged expanded description of injury was actually caused by the May 8, 2006 work injury.

SUSPENSION – REMOVAL FROM WORKPLACE

University of Pa. v. WCAB (Hicks), 16 A.3d 1225 (Pa. Cmwlth. Apr. 5, 2011).

Claimant was injured in the course and scope of his employment as a campus police officer on June 25, 2006. On December 12, 2007, Defendant filed a Suspension Petition, alleging that Claimant's loss of earnings was no longer due to his work injury.

Defendant presented the testimony of the Commanding Officer of the Staff and Administrative Services Unit, who was responsible for the hiring and certification of the Defendant's police officers. He testified that Defendant was governed by the Municipal Police Officers Education and Training Commission, which would prohibit the reemployment of Claimant following his incarceration for charges dealing with a disqualifying conviction. However, this employer witness could not answer as to whether Claimant had the opportunity to appeal his convictions and whether this would allow him to be employed by Defendant once again. Defendant also introduced Claimant's testimony from his criminal sentencing hearing, wherein he stated that he was aware that he would not be able to return to his work as a police officer. The WCJ also noted that the provisions of the Commission allow for, but do not require, revocation of one's certification upon criminal conviction. Accordingly, the WCJ denied the Suspension Petition. On appeal, the Appeal Board affirmed the WCJ's decision.

The Commonwealth Court affirmed the Board's decision, stating that the provision of the Commission's rules presented to the WCJ did not mandate the revocation of Claimant's certification; it simply allowed for it. Because Defendant failed to provide evidence that

from the Employer, but she did receive social security benefits. The WCJ credited Claimant's testimony and, therefore, denied Employer's Suspension petition on the grounds that Claimant had not voluntarily removed herself from the workforce.

On appeal to the WCAB, Employer argued that the WCJ erred in finding that Claimant had not voluntarily removed herself from the workforce. The WCAB agreed, thus reversing the WCJ's decision and granting the Suspension Petition, based on Claimant's testimony that she had not applied to any jobs for a period of about 2 years because, as Claimant testified, the job market was depressing. The WCAB found that this constituted Claimant's voluntary withdrawal from the workforce.

On appeal to the Commonwealth Court, Claimant argued that the WCAB erred in so holding. The Court emphasized that, under Kachinski, the employer must produce evidence of a referral to a then-open job. The Court also recognized the exception to this rule if Employer can prove that Claimant voluntarily removed herself from the workforce. However, the Court noted that, in a voluntary retirement case, Claimant's failure to seek employment is only relevant **AFTER** the employer initially proves that Claimant voluntarily retired. Because there was no additional evidence to prove that Claimant had voluntarily retired, the Court reversed the WCAB, again denying Employer's Suspension petition.

TERMINATION – MEDICAL EVIDENCE

Schmidt v. WCAB (IATSE Local 3), No. 1000 C.D. 2010 (Pa. Cmwlth. Dec. 15, 2010).

Claimant appealed the decision of the WCJ that granted him benefits for only a closed period of time. Claimant argued that the testimony of Defendant's medical expert could not suffice as the requisite unequivocal medical evidence to support a termination of his benefits, due to his opinion that Claimant will continue to have residual symptoms that will require future treatment. The Commonwealth Court affirmed the Judge's decision, finding that Defendant's medical expert's testimony that Claimant's work-injured back may cause him pain "with change in the weather" and that Claimant may have to purchase ibuprofen to treat such ongoing symptoms was not sufficient to render his opinion equivocal. When reviewed as a whole, the testimony was competent to support a finding that Claimant's benefits should be terminated due to his full recovery.

UTILIZATION REVIEW – EFFECT OF PRIOR UTILIZATION REVIEW

Gary v. WCAB (Philadelphia School District), No. 1736 C.D. 2010 (Pa. Cmwlth. Apr. 21, 2011).

Claimant appealed the order of the Appeal Board that affirmed the WCJ's decision to deny Claimant's Utilization Review petition, thus determining that Claimant's chiropractic care was unreasonable and unnecessary as of December 31, 2007. On appeal, Claimant argued that the WCJ's decision was not supported by substantial evidence for four reasons. First, Claimant contended that the WCJ erred in failing to address the 2003 UR Decision that ordered Employer to pay for the same chiropractic care after June 11, 2002.

Second, Claimant argued that Employer did not satisfy its burden of proof that Claimant's condition had changed so as to render the UR appropriate. Employer argued that there was sufficient evidence of record that Claimant's condition had changed and had, in fact, worsened following 8 years of the chiropractic care at issue.

Third, Claimant argued the underlying UR determination deeming the care unreasonable and unnecessary was not competent because it inaccurately stated that Claimant had treated with the chiropractor since December 2, 2005 when Claimant had actually begun said treatment in 2001.

Finally, Claimant argued that the WCJ erred because she did not need to demonstrate the improvement of her condition; instead, she only had to show unequivocal medical evidence supporting her continued need for chiropractic therapy. The Commonwealth Court noted that the chiropractic care that Claimant received was intended to be palliative, but it could not find that it was reasonable and necessary because the WCJ discredited Claimant's testimony and that of her doctors. Accordingly, the Commonwealth Court affirmed the Board's order that had affirmed the WCJ's decision.

UTILIZATION REVIEW – ADMISSION OF INJURY

Securitas Security Services USA, Inc. v. WCAB (Schuh), 16 A.3d 1221 (Pa. Cmwlth. Apr. 4, 2011).

Claimant suffered a work-related back injury on November 30, 2004 and Defendant accepted liability of her "lower back strain." By October of 2005, Matthew Berger, M.D. diagnosed Claimant with a major depressive disorder and recommended psychotherapy and other medications. Employer filed a Utilization Review on May 5, 2006 regarding all past and future treatment by Dr. Berger. The UR determination found all of the reviewed care to be reasonable and necessary.

Claimant filed a Petition to Review to amend the description of the accepted work injury to include depression and anxiety. However, Claimant failed to present any evidence, factual or medical, to support her petition, relying only on her argument that Defendant was estopped from denying liability for the psychological injuries due to the unappealed UR determination. The WCJ granted Claimant's Review petition, stating that Defendant could not avoid the effect of the adverse UR determination without appealing it. On appeal, the Appeal Board affirmed the WCJ's decision, finding that all of the elements of collateral estoppel were satisfied by Defendant failing to appeal the UR determination.

The Commonwealth Court, however, reversed the WCJ's decision. The Court referred to the Code, wherein it specifically states that a UR determination does not decide the causal relationship between the treatment under review and claimant's work-related injury. See 34 Pa. Code § 127.06. Along with this, the Court noted that Defendant's voluntary payment of Claimant's medical expenses is not an admission of liability. Because Claimant did not satisfy her burden of proof as to her Review petition by submitting no evidence whatsoever, the Commonwealth Court reversed the underlying decision.

UTILIZATION REVIEW - EVIDENCE

The Road Toad, Inc. v. WCAB (McLean), 8 A.3d 922 (Pa. Cmwlth. 2010)

The Court held that the fact that a doctor's examination of Claimant did not take place until after Employer filed its Petition for Review of a Utilization Review determination did not mean that the doctor's opinion was not *competent* to support Employer's burden of proof to justify a deviation from the recommendation of the UR reviewer. It was undisputed that the doctor examined the Claimant after Employer filed the Petition for Review of UR Determination, but before it filed the Petition to Review Medical Treatment. Claimant argues, and the WCAB agreed, that under United States Steel Corporation v. W.C.A.B. (Luczki), 887 A.2d 817 (Pa.Cmwlth.2005) (en banc), the testimony of the doctor should not have been considered by the WCJ. The Court found that this was a misapplication of Luczki.

Luczki dealt only with a "reasonable contest" dispute and not with what evidence is competent to be considered by the WCJ on the merits. The Commonwealth Court has held that a WCJ review of a UR determination is a de novo proceeding, where either party is free to offer evidence beyond that considered in the UR process. Seamon v. W.C.A.B. (Sarno & Son Formals), 761 A.2d 1258 (Pa. Cmwlth. 2000). The WCJ properly considered the doctor's testimony and it was, therefore, an error for the WCAB to reverse the WCJ. Accordingly, the Commonwealth Court reversed the WCAB's decision.

WAIVER OF THIRD PARTY RIGHTS

Bowman v. Sunoco, Inc., 2011 WL 1467726 (Pa. Apr. 19, 2011).

The Pennsylvania Supreme Court granted the Petition for the Allowance of Appeal as to the issue of whether the Superior Court, in a decision of first impression and of statewide substantial significance, disregarded the public policy of the Commonwealth and the plain meaning of the Workers' Compensation Act when it decided that a third party release in the form of a "Worker's Comp Disclaimer" signed in consideration for employment and receipt of compensation benefits, which further required the waiver and eternal release from any and all rights to make a claim, commence a lawsuit, or recover damages or losses, is valid and not against public policy.