PENNSYLVANIA WORKERS' COMPENSATION: SUPREME COURT AGREES TO ADDRESS THE *JEANES HOSPTIAL* CONUNDRUM

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On September 16, 2003, the Supreme Court of Pennsylvania granted allocatur in *Jeanes Hospital v. Workers' Compensation Appeal Board (Hass) 819 A.2d 131 (Pa. Cmwlth. 2003)* in order to determine whether a Review Petition is the proper instrument to file in order to seek an amendment of a Notice of Compensation Payable ("NCP") form, even if it is filed more than three years after the occurrence of the workplace injury, *expanding* the covered injury to include a physical or psychological condition that relates to the workplace injury, but that was not in existence at the time the work injury was accepted by the NCP.

The Court's treatment of *Jeanes Hospital* is being monitored closely by workers' compensation attorneys who have recently found themselves grasping for a bright line rule setting forth the rights of employees and employers once the injured worker seeks to expand the nature of his or her accepted work injury.

The issue is an important one because workers' compensation claims are inherently organic. They live and grow sometimes over the course of months and years, succumbing normally after a full recovery has been established or a settlement approved. Theoretically, a workers' compensation claim can survive for the worker's lifetime, so it is not unusual for employees and employers to find themselves quarrelling over the nature and extent of the original work injury years after its occurrence. Such disputes usually surface because of poor claims handling or because of the unforeseen development of a related physical or emotional condition months or years after the work incident.

Traditionally, such disputes have arisen in the context of an employer's effort to establish a full recovery of the original work injury through the filing of a Termination Petition – which obligates the employer to **both** pinpoint the compensable component of the worker's physical condition and convince the workers' compensation judge ("WCJ") that that condition has fully resolved, See *Beissel v. Workmen's Compensation Appeal Board (John Wannamaker, Inc.) 502 Pa. 178, 465 A.2d 969 (1983)* or the employee's Review Petition filed under Section 413(a) of the Act, which authorizes WCJs to "review and modify" the claim acceptance instrument " at any time," provided the worker demonstrates that it was "in any material respect incorrect". 77 P. S. §771; See *Commercial Credit Claims v. Workmen's Compensation Appeal Board (Lancaster), 556 Pa. 325, 728 A.2d 902 (1999*).

Traditionally, too, while claims administrators have sometimes presumed that the injury description reflected on the NCP controls employer liability, the courts have

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generally ruled otherwise - that inaccurate injury descriptions do not insulate employers from liability, particularly where the subsequent condition affects the same body part injured by the work incident. See *Gumro v. Workmen's Compensation Appeal Board*, 533 Pa. 461, 626 A.2d 94 (1993).

The traditional approach is not an unsatisfactory one because it is consistent with the humanitarian purpose of the Act, *Peterson v. Workers' Compensation Appeal Board (PRN Nursing Agency) 528* Pa. 279, 597 *A.2d 116 (1991*) and with the well-established principle that in workers compensation litigation, the substance of the evidence presented, rather than the form of the petition, controls what relief the WCJ may provide the moving party. *Coover v. Workmen's Compensation Appeal Board (Browning-Ferris Industries)*, 140 Pa. Cmwlth. 16, 561 A.2d 347 (1991).

The first indication that the Commonwealth Court was contemplating a new approach came in a stern footnote that one of its panels issued in the 1998 case of *AT&T v. Workers' Compensation Appeal Board (Hernandez), 707 A.2d 649 (Pa. Cmwlth. 1998*). The *AT&T* case involved an employee, who, more than four years after his work injury was accepted as a "back strain" by way of NCP, filed a Review Petition seeking to amend the NCP to include a left/right hip necrosis condition. Observing in dicta that no entity other than the employer issuing the NCP has the power to amend a unilaterally issued NCP form, the court cautioned practitioners that where the injured worker seeks to expand the nature of the compensable injury, he or she must file a Claim Petition.

The impact of the court's advisory comment was fairly minimal for three reasons: (1) the advice was dicta; (2) while offering the advice, the court conceded the traditional rule that in such procedural matters substance prevails over form and (3) one year later the Supreme Court seemed to lay to the Commonwealth Court's advice to rest when it reaffirmed the use of the Review Petition as the preferred instrument for seeking an expansion of the compensable injury in *Commercial Credit Claims, supra*.

For four years practitioners presumed that the Commonwealth Court had been disabused of its belief that a Claim Petition was the appropriate method of seeking an expansion of the accepted work injury. That presumption was firmly confuted in a series of rulings that found the court breathing new life into the advisory dicta it issued in *AT&T*. See *Zippo v. Workers' Compensation Appeal Board (Louser) 792 A.2d 29 (Pa. Cmwlth. 2002); Jeanes Hospital v. Workers' Compensation Appeal Board (Hass) 819 A.2d 131 (Pa. Cmwlth. 2003); Anderson v. Workers' Compensation Appeal Board (Pennsylvania Hospital), 836 A.2d 636 (2003)*

The court's four-year survey of the issue has yielded the following procedural regime: (1) where the subsequently alleged physical condition existed at the time of the original work incident, the claimant must file a Review Petition under Section 413(a) of the Act, alleging that the description of injury on the NCP constitutes a material mistake; (2) where the subsequently alleged physical condition is related to the original work incident contemplated by the NCP, but arose at a time subsequent to the work incident, and is not a "natural consequence" of the original injury, the claimant must file a Claim Petition within three years of the original work injury, But see *Westinghouse*

Electric Corporation/CBS v. Workers' Compensation Appeal Board (Burger), *838 A.2d 831 (Pa. Cmwlth. 2003)* and (3) where the subsequently alleged physical condition arises as a "natural consequence" of the original work injury, the claimant may file Review Petition seeking an amendment of NCP. See *Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital)*, 705 A.2d 503 (Pa. Cmwlth. 1998); *Villanova University v. Workers' Compensation Appeal Board (McElaney), ___ A.2d ___ (Pa. Cmwlth. 2004).*

Apparently, a physical condition will be considered as having developed as a *natural consequence* of the original work injury where it arises from treatment prescribed for the accepted condition. *See Villanova University v. Workers' Compensation Appeal Board (McElaney)*, *___ A.2d ___ (Pa. Cmwlth. 2004)(*the claimant develops a nephritic syndrome as a side effect of non-steroidal anti-inflammatory medication prescribed for work-related orthopedic shoulder injury).

Moreover, the Commonwealth Court has deferred to *Commercial Credit* in the context of consequent emotional conditions, agreeing most recently that the injured worker is permitted to file a Review Petition where the subsequently alleged condition is of a psychological character. *See Westinghouse Electric Corporation/CBS v. Workers' Compensation Appeal Board (Burger)*, *838 A.2d 831 (Pa. Cmwlth. 2003).*

There is certainly logic attached to the notion that a condition that did not exist at the time of the original work incident should be treated differently than a condition that **did** exist at the time of injury, but was not accepted by NCP. It certainly makes sense, for example, that the employer who could not have known about the newly disclosed condition at the time the original work incident was reported, should be afforded the protection that "notice" and limitations periods normally afford in the context of an original claim, and should be afforded the right to defend the etiology of the newly discovered condition without having to rebut any presumption of compensability. Thus the rule emerging from *AT&T, Zippo* and *Jeanes Hospital*, requiring that the claimant file a de novo Claim Petition under such circumstances has some appeal.

On the other hand, an employer who from the outset of the claim, fails to properly record the extent of injury or who intentionally seeks to minimize the injury should not be afforded protection from the presumption of compensability that should prevail under such circumstances. Indeed, the potential for requiring the injured worker to file a Claim Petition in order to assure coverage for a condition that should have been acknowledged in the first place, or for a condition that some might view as a "natural consequence" of the original work injury, is a danger brought on by the rulings in *AT&T, Zippo* and *Jeanes Hosptial,* particularly because it is not at all clear how to determine that a newly developed condition is or is not a "natural consequence" of the original work injury where the new condition is in fact related to the original work injury.

It would seem that the challenge the Supreme Court faces in *Jeanes Hosptial* to protect employers from being ambushed years after the date of injury by a physical or psychological condition that bears no intrinsic connection to the original claim, while assuring that injured workers are not barred from seeking compensation for conditions

that are so related, but were, for whatever reason, unforeseen from the outset of the claim.

In deciding *Jeanes Hospital*, the Court will have to determine whether the reasonable interests of employers are sufficiently important to sanction a regime that penalizes the employee where he or she develops an unusual work-related condition, not contemplated by the NCP more than three years after the precipitating work incident, thereby forcing the employee into a non-compensable disability, without medical coverage, despite having suffered a compensable work injury in the first place. In doing so, the Court will probably have to define with greater specificity when a subsequent condition represents a "natural consequence" of the original work injury, and will have to determine whether a distinction should exist between the administration of a subsequent *physica*l condition and a subsequent *psychological* condition.

One could see the Court taking a more liberal approach than the Commonwealth Court has taken. The Court might allow the use of the Review Petition in most instances for both consequent physical and psychological conditions, provided the Petition is filed within the three-year time frame set forth in Section 413 (a), but with the caveat that no presumption of compensability will prevail where the subsequent physical condition does not involve the same body part affected by the accepted work injury.