Administering "Medical Only" Claims:
Confusing Guidance Offered by
Commonwealth Court in *Orenich* and *Brutico*

By: Andrew E. Greenberg, Esquire[1]
The Pennsylvania Self-Insurers Association

As reported in the November 2004 Pennsylvania Self-Insurers' Association monthly newsletter, on October 14, 2004, my office filed an *Amicus Curiae* Brief with the Commonwealth Court in the consolidated matters, Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming Valley Medical Center), 863 A.2d 165 (Pa. Cmwlth. 2004) and Brutico v. Workers' Compensation Appeal Board (US Airways, Inc.), addressing the merits of informal administration of "medical only" workers' compensation claims.

Subsequent to that submission, the Commonwealth Court issued an order[2] rescinding its consolidation of the two cases, following which it issued two separate rulings within one week of each other.

It is submitted that in doing so, the court has not clarified the proper means for administering minor work injuries, but has made the process even more confusing for employers, employees and counsel.

In the Orenich case, decided on December 14, 2004, the court ruled that the defendant's failure to issue a Notice of Compensation Payable or Notice of Compensation Denial, in the context of a "medical only" claim, violated Section 406.1 of the Act, thereby requiring the imposition of penalties[3] calculated on the basis those

---

[1] Mr. Greenberg is a founding member of The Chartwell Law Offices, LLP. For more information on the firm, please check its website at www.chartwelllaw.com. Mr. Greenberg can be contacted at agreenberg@chartwelllaw.com.

[2] By Order dated November 1, 2004.

[3] The claimant in Orenich did not file a Penalty Petition before the WCJ below and did not seek the imposition of penalties before the Appeal Board. In addition, claimant did not include a

medical bills the employer refused to cover, and an award of *quantum meruit* fees for an unreasonable contest.

In the Brutico case, decided one week later on December 20, 2004, the court refused to impose penalties, explaining that they were not awardable since the WCJ below had disallowed claimant's Claim Petition in connection with an undisputed work injury, and refused to award *quantum meruit* counsel fees because the employer had successfully contested the nature and extent of the work injury below.

In both cases, the court has reaffirmed its previous rulings in Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream Company) and Waldemeer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), insisting that Section 406.1 of the Act requires the employer to issue either a Notice of Compensation Payable or Notice of Compensation Denial within 21 days of becoming aware of the work injury, even where there is no resulting wage loss.

Perhaps even more troubling is the fact that from a practical standpoint, the two cases, when read together, send a conflicting message to Pennsylvania workers' compensation claims representatives charged with the responsibility for administering minor, "medical only" work injuries.

In Orenich, as noted, the court has instructed that the employer **must** file a Notice within 21 days of its becoming aware of the work injury under Section 406.1 of the Act or face the imposition of penalties and *quantum meruit* counsel fees.

---

request for penalties in the Statement of Questions presented in the Brief it filed with the court. Despite claimant's repeated waiver of the issue, the court, nevertheless, ruled that the WCJ should penalties on remand.

In Brutico, however, the court seems to have instructed, to the contrary, that the employer need **not** issue a timely notice in response to a "medical only" claim provided it has paid for all medical costs arising out of original work-related symptoms.

Before exploring how the court sought to distinguish the two cases, it is important to review the reasoning that led to the Orenich court's insistence that all claims in Pennsylvania must be administered formally.

The court's opinion cites three policy considerations in support of its construction of Section 406.1: (1) by filing a Notice of Compensation Payable or a Notice of Compensation Denial form, acknowledging the occurrence of the work injury within the 21-day period, the employer relieves the injured employee from having to hire an attorney for "unnecessary litigation"; (2) by filing a Notice of Compensation Payable acknowledging the occurrence of the work injury, the employer avails itself of the right to challenge future medical bills through utilization review; and (3) when the employer issues a Notice of Compensation Payable, the burden of proof is "properly on the employer to prove that the medical bills or benefits are no longer warranted rather than on the injured employee who would otherwise have to prove they were to be continued if the NCP did not exist."

It is respectfully submitted that the court's reasoning is somewhat misguided.

For example, with respect to the court's concern for "unnecessary litigation" it is submitted that the mere filing of a Notice of Compensation Denial form or the recently introduced Medical Only Notice of Compensation Payable,[4] will not relieve the injured

[4] Furthermore, the court's ruling in Orenich implicitly suggests that there is no substantive difference between a standard Notice of Compensation Payable, filed in the context of a lost time case, and the recently introduced "Medical Only Notice of Compensable," which some have suggested constitutes a reconfigured Notice of Compensation Denial form, that employers have been using recently in order to acknowledge the occurrence of the work injury while denying liability for any disability allegedly arising out of the work injury. If that suggestion becomes more explicit in future cases, the workers' compensation claims community will undoubtedly

worker from having to commence de novo litigation where he or she seeks additional benefits that the employer refuses to pay since there is nothing to indicate that those forms trigger **full** acceptance of the claim. Indeed, as evidenced by the Commonwealth Court rulings in Darrall v. Workers' Compensation Appeal Board, 792 A.2d 706 (2002) and Ginyard v. Workers' Compensation Appeal Board (City of Philadelphia), 733 A.2d 674 (Pa. Cmwlth. 1999) just the opposite appears to be true – an employer's decision to issue a Notice of Compensation Denial, admitting that a work injury occurred, but denying any resulting wage loss, does not relieve the employee from having to file a de novo Claim Petition in order to obtain formal recognition of the work injury.

It is respectfully submitted that the court's apparent presumption that formal administration of "medical only" claims is necessary in order to afford employers access to the Utilization Review regime, is similarly not accurate. In fact, Section 127.405 of the Medical Cost Containment Regulations specifically authorizes the employer to challenge the reasonableness and necessity of medical bills in any case where it has not formally accepted the "medical only" claim.

With respect to the court's observation that the issuance of a Notice of Compensation Payable - accepting a particular injury as compensable - is necessary in all cases in order to guarantee that the employer will continue to be responsible for all medical costs supposedly arising out of the work injury, it is submitted that the court's presumption that the mere issuance of an NCP or NCD or Medical Only NCP will relieve the claimant from having to prove a relationship between the work incident and the need for medical treatment, is also not accurate.

---

find the "Medical Only NCP" less and less palatable and prompting greater reliance upon the NCD form, and, in turn, the kind of litigation that Orenich seemingly wishes to discourage.

In fact, the kind of Notice contemplated by Section 406.1 is a unilateral instrument issued by the claims representative that oftentimes significantly limits the nature or character of the physical condition being accepted. Sometimes the Notice does so simply on the basis of the then-available medical information. Sometimes the Notice does so in an effort to convey the parameters of the employer's acceptance following the undisputed work incident. The Notice, therefore, will oftentimes necessarily exclude from coverage medical treatment that might ordinarily be expected to flow from the undisputed work incident. When that occurs, the burden is on the claimant to file a Review Petition and to prove that the work incident involved damage beyond that contemplated by the Notice.

Underscoring the confusion that the different results in the two cases seem to have engendered is the questionable distinction that the court has sought to draw between the facts in Orenich and the facts in Brutico.

The Orenich case involved the following uncontroverted facts: (1) the claimant suffered a work injury on November 29, 2000, that involved her neck, upper back and lower back, while she and three other nurses attempted to move a hospital patient; (2) one week later she reported her work-related neck/upper back/lower back symptoms to a supervisor and immediately thereafter sought emergency room treatment; (3) she continued to work with a lifting restriction, but without a loss of earnings; (4) her employer did not issue an NCP or NCD within 21 days of becoming aware of the work incident, but waited until six months later to do so; (5) when the employer refused to cover certain medical bills that it viewed as unrelated to the reported injury, claimant filed a Claim Petition seeking disability benefits and medical benefits for a cervical condition, an upper back condition and a lower back condition that included radiation

of pain down her legs,[5] and a diagnosis of lumbar disc herniation; (6) the employer filed an Answer denying all allegations contained in the Petition[6] and (7) at the first hearing conducted before the WCJ claimant withdrew that portion of the Petition seeking disability benefits, while the employer made clear to the WCJ that it was only challenging the nature and extent of claimant's work injury – not the occurrence of the work incident.

In reversing the WCJ's denial of *quantum meruit* counsel fees and in directing that penalties should be imposed against the employer[7], the Commonwealth Court reasoned that the employer violated the Act by failing to issue an NCP or NCD within 21 days of the occurrence of the work injury; by failing to admit the occurrence of the work injury and that claimant had provided adequate notice of the injury, in its Answer to the Claim Petition; and by failing to cover certain medical costs supposedly arising out of the work injury.

The Brutico case involved the following uncontroverted facts: (1) claimant suffered a work injury on January 5, 2001 while loading a van with freight; (2) she reported the work incident to her employer three days later; (3) she did not miss time from work following the incident, but apparently continued to work with restrictions until March 20, 2001; (4) the employer did not file an NCP or NCD within the 21 day period, but did so more than eight months after following the work incident; (5) claimant filed a Claim Petition on January 28, 2002 seeking benefits for cervical and low

---

[5] The employer maintained before the WCJ that claimant's complaints of pain radiating down her legs developed approximately four months after her work incident.
[6] The employer in Brutico also included in its Answer a denial of the alleged work injury.
[7] As noted, when she appeared before the WCJ, claimant did not file for or request the imposition of penalties. Furthermore, she did not raise the penalty issue on Appeal before the Appeal Board and did not include the issue in her Statement of Questions Presented before the Commonwealth Court. Still, without addressing claimant's apparent waiver of the issue, the court ruled that penalties were awardable for the employer's failure to issue a timely NCP.

back injuries and *quantum meruit* counsel fees and filed a Penalty Petition alleging the employer's failure to issue a timely NCP and (6) in its Answer to the Claim Petition, the employer denied that claimant had suffered any of the injuries alleged.

In affirming the WCJ's refusal to impose penalties on the basis of the employer's failure to issue a timely NCP or NCD, the court reasoned that such relief was not awardable since the WCJ did not grant claimant's Claim Petition i.e. there was no "measure" against which the WCJ could attach a penalty amount under Section 435 of the Act. In affirming the WCJ's refusal to award counsel fees, the court explained that the employer was justified in proceeding as it did because the original complaints offered by claimant immediately following her work incident were different than those that eventually included in her Claim Petition: "Claimant would have had to hire an attorney regardless of whether Employer filed a timely NCP or NCD when she was first injured because the nature of her injuries had changed" from the early days following her work injury to the date she ultimately filed her Claim Petition.

The court has distinguished the two cases as follows: (1) in Orenich the WCJ granted the Claim Petition - in Brutico, the WCJ did not grant the Claim Petition, thereby disqualifying the Brutico claimant from recovering penalties; (2) in Orenich the employer failed to pay certain medical bills – in Brutico the employer did the same, but only with respect to injuries that were ultimately deemed not compensable; (3) in Orenich the claimant supposedly did not attempt to expand the nature of her work injury - in Brutico the claimant **did** attempt to expand the nature of the work injury, though unsuccessfully.

It is submitted that the distinctions drawn by the court are either inaccurate or constitute distinctions without differences.

In **both** cases, there was an undisputed work incident. In **both** cases the resulting work injury was administered informally. In both cases, the employer and employee came to dispute the severity of the original work injury. In **both** cases, the employer eventually refused to cover certain medical bills that it viewed as unrelated to the original work injury. In **both** cases, the employee felt it necessary to retain counsel and file a Claim Petition in order to obtain formal recognition of the undisputed work injury. And, in **both** cases, the assigned WCJ rejected the employee's effort to expand the nature of the undisputed work injury.

The court's suggestion that the claimant in Orenich did not seek to expand the nature of her original work injury is not accurate. In fact, she first reported nothing more than a neck injury, but sometime later alleged that the incident had caused her to develop pain radiating down her right arm, i.e. a cervical radiculopathy. That is similar to what occurred in Brutico. Originally, the claimant reported low back pain following her work incident, but eventually claimed to have developed pain radiating down her legs as a consequence of the work-related trauma.

The court's observation that the employer in Orenich refused to cover certain medical bills is true, but fails to consider that the employer's refusal was based upon its insistence that the treatment was related to a physical condition that it did not view as having resulted from the original work injury. Moreover, it appears that the same scenario was presented in Brutico – the employer refused to cover certain medical bills because it viewed them as being unrelated to diagnoses that were initially attributed to the undisputed work incident.

Ultimately, the two rulings have created more confusion for those practitioners seeking guidance as to how "medical only" claims should be administered, since on the

one hand the court has insisted that all claims be administered formally under Section 406.1, while on the other hand has instructed that no formal Notice need be issued provided the employer covers all medical costs that it believes are related to the undisputed work injury.

Indeed, Orenich and Brutico are inherently problematic because they require the claims administrator to guess how the WCJ will view the nature and extent of the undisputed work incident. The WCJ may ultimately agree with the administrator that the work incident involved nothing more than a certain diagnosis, thereby endorsing the administrator's informal treatment of the claim. Or, the WCJ may ultimately disagree with the administrator's assessment of the nature and extent of the work injury, thereby requiring, in retrospect, that a formal administration of the claim be undertaken, and that counsel fees and penalties be imposed.

It is respectfully submitted that the claims administrator should not be forced to engage in the kind of guess work that the combined reading of Orenich and Brutico seems to require.

Pursuant to its role as amicus curiae in the Orenich and Brutico cases, the Pennsylvania Self-Insurers' Association maintained before the Commonwealth Court that when faced with the kind of minor claim presented in both Orenich and Brutico, the claims administrator should be free to administer the claim on an informal basis.

The PSIA has urged that informal administration of minor claims is not only consistent with the plain language of the Act, but comports with traditional policy espoused by the courts that encourages informal resolutions of disputes and the regulatory guidance promulgated by the Bureau that does the same. The PSIA has urged that informal administration of small claims benefits the injured worker by removing

any disincentive for employers to immediately compensate an alleged work injury and relieves the employer or insurer from having to maintain a staff large enough to treat every claim as a lost time claim. The PSIA has further argued that *quantum meruit* counsel fees should not be awarded automatically where formal a Notice is not issued in response to the filing of a "medical only" claim, but should be awarded only where the WCJ determines that the employer has failed to reasonably contest a claim for benefits – indemnity or medical – made following the initial administration of the claim, and that penalties should only be awarded where the claimant can demonstrate at some point that a true violation of the Act has resulted from the employer's actions, to the detriment of the injured worker.

It is respectfully submitted that had the Commonwealth Court endorsed the regime advanced by the PSIA, both employers and employees would now be subject to a system that encourages expedited payment of medical benefits and discourages litigation designed primarily to allow for recovery of *quantum meruit* fees and penalties.

Instead the workers' compensation community faces even more questions than it faced before the Orenich and Brutico cases were adjudicated.

Perhaps clarification is on the way, however, since the employer in Orenich has filed a Petition for Allowance of Appeal with the Supreme Court[8]. Hopefully, a proper disposition will be forthcoming in the next few months.

Stay tuned.

---

[8] The claimant in Brutico has filed a request for reconsideration with the Commonwealth Court. Telephone Interview with claimant's counsel, Edward J. Abes, Esquire, Allegheny County, February 21, 2005.