Bowman v. Sunoco, 65 A.3d 901 (Pa. 2013)

Issue: Whether an employer's workers' compensation disclaimer releasing its customers from third party liability as a result of an injury to its employees violates Section 204(a) of the PA Workers' Compensation Act.

Answer: No.

Analysis: Claimant appealed from a Superior Court order that affirmed the Court of Common Pleas of Philadelphia County, which granted Sunoco's motion for judgment on the pleadings and dismissed Claimant's negligence claim. The Supreme Court of Pennsylvania affirmed.

Claimant was employed as a private security guard with Allied Barton Security Services. In exchange for employment, Claimant signed a Workers' Compensation Disclaimer whereby she waived her right to sue Allied's clients for damages related to injuries covered under the Workers' Compensation Act. She was later injured when she fell on snow or ice while providing security at one of Sunoco's refineries. She filed a workers' compensation claim and received benefits. Thereafter, she filed a negligence claim against Sunoco alleging its failure to maintain safe conditions caused her injuries.
Claimant made two arguments against the disclaimer: 1) it violated the public policy considerations in Section 204(a) of the Act; and 2) it constituted an improper waiver of a cause of action, namely, Sunoco's right to subrogation.

The PA Supreme Court considered the first sentence of Section 204(a) and found that it was ambiguous as written. The Court engaged in a fairly lengthy statutory construction analysis recalling the previous version of the Act when workers' compensation was not an exclusive remedy, but rather a dual system of recovery. The Court noted that Article II of the Act, as originally written, provided for an action at law and remains in the Act today, although considerably modified. The Court also referenced Section 305(d) explicitly providing for an action at law pursuant to Article II, which continues to be available to any employee whose employer is either uninsured or not an approved self-insurer.

The Court concluded, based on the legislative history that Section 204(a) applies only to agreements to bar a claim against an employer, not against a third party. Because the Act once provided for a dual system of recovery, which made it a violation of public policy for an employer to avoid both recovery tracks, and continues to provide for an action at law where the employer is uninsured, the Court found that public policy is not violated where the employee is absolutely covered under one of those two tracks.

In addition, the Court found that the employer may chose to waive the right of subrogation and that Allied, in this case, waived the right as a business decision affecting only itself. Allied's waiver of its subrogation right did nothing to prevent Claimant from receiving full and just compensation for her work-related injuries. Waivers of liability for actions not yet accrued at the time of the release are generally only valid if they involve future actions entirely *different than ones contemplated by the parties at the time of the release.* In this case, the purpose of the disclaimer was to release Allied's

customers from liability in the event an employee was injured on the job after the disclaimer was signed. The disclaimer was a condition of employment and the parties certainly contemplated that it would encompass future causes of action. Claimant was not forced to sign the release and the release did not in any way prevent her from receiving compensation for her work-related injuries as provided for the Act. Based on the foregoing, the PA Supreme Court affirmed the Superior Court.

Conclusion and Practical Advice:

A disclaimer that serves to benefit the employer's customers and in no way affects the employee's right to recover for work-related injuries does not violate public policy. So long as an employer's workers' compensation disclaimer is not an attempt to contract away liability for work-related injuries, it will likely be upheld.

Walsh, et al. v. WCAB (Traveler's Insurance Co.), 67 A.3d 117 (Pa. Cmwlth. 2013)

Issue: Whether the doctrine of collateral estoppel applies in matters of medical bill downcoding when there is no underlying determination that the carrier strictly complied with Pa. Code § 127.207.

Answer: No, the Regulations require a demonstration of compliance before an adjudicator may address the merits of downcoding and collateral estoppel will not apply to the downcoded treatment without a threshold showing of compliance in every case.

Analysis: This case involved eleven consolidated petitions for review filed by nine physicians represented by their billing and collection companies – East Coast TMR and WJO, Inc. The eleven petitions for review addressed sixty-one fee review applications filed by the providers. The fee review applications were filed after the insurance carrier, Traveler's Inc., downcoded claims submitted by the providers for therapeutic magnetic resonance (TMR) treatment.

The Bureau resolved the fee review applications in favor of the carrier and the providers requested a hearing. The carrier filed a motion to dismiss the applications arguing that the hearing officers had resolved the same coding issue in previous fee review applications involving the same parties – East Coast TMR and Traveler's Insurance. The Hearing Officer ("H.O.") issued eleven separate, but identical, decisions granting the carrier's motions to dismiss. In granting the motions to dismiss, the H.O. noted that under Pa. Code §127.207 an insurer generally bears the burden in fee review proceedings to demonstrate that it properly downcoded a treatment or procedure. However, the H.O. considered two decisions of another H.O. to have collateral estoppel effect with regard to the instant providers' fee review applications. The H.O. essentially concluded that because the ultimate downcoding issue was decided by another H.O. in the carrier's favor through earlier decisions, the providers were collaterally estopped from challenging future downcoding by the carrier for TMR services.

The providers argued that a non-waivable prerequisite to downcoding is that an insurer must comply strictly with the procedural requirements of Section 127.207. The providers contended that the H.O. erred because he did not conduct a hearing on the question of whether the carrier complied with the regulatory prerequisites for downcoding. It was the providers' position that an essential issue in the case is whether the carrier complied and that the issue of compliance will vary factually in every case; therefore, it was erroneous for the H.O. to apply the doctrine of collateral estoppel before considering the preliminary procedural issues.

The carrier argued that it does not need to demonstrate strict procedural compliance in every case involving the same providers and same treatment because the H.O. in the earlier decisions concluded that the downcoding was appropriate. In addition, the carrier contended that there is nothing unique about TMR billing and coding as is the case with some other treatments that would justify strict compliance in every case. The issue of proper coding was decided in a previous proceeding between East Coast TMR and the carrier, thus, according to the carrier, the Bureau (and/or H.O.) need not make an evaluation regarding compliance with the procedural requirements because the

ultimate outcome is the same once collateral estoppel applies to the merits of downcoding.

The Court sympathized with the carrier's unfortunate plight of defending repetitious challenges, but ultimately concluded that it was "hamstrung" by the plain language of the Regulation as written. Section 127.207 is a mandatory provision that requires a decision in favor of the provider if the carrier fails to strictly comply. That said, the Court expressly disapproved of the use of the Regulation as a sword by providers to unjustifiably upcode TMR treatment.

Conclusion and Practical Advice: The Bureau and hearing officers may determine not only the question of a carrier's compliance, but also if the hearing officer concludes that the carrier did comply with 34 Pa. Code § 127.207, then consideration may be given to whether collateral estoppel precludes an analysis of the merits of provider's downcoding challenge. Therefore, although time-consuming, it is worthwhile from a cost prospective for carriers to spend the extra time ensuring compliance with the Regulation in order to posture for a successful collateral estoppel defense when the specific downcoding was previously approved between the same provider and carrier.

(*See also*, Witkin v. WCAB (State Workers' Insurance Fund), 67 A.3d 98 (Pa. Cmwlth. 2013) decided just 5 days before Walsh, et al., holding similarly that a hearing must be held to determine whether the carrier strictly complied with Section 127.207 of the Regulations *and whether the proper CPT code was used.* This case also involved TMR downcoding. While the Witkin Court did not clearly address whether collateral estoppel could apply after a determination regarding strict compliance, the Walsh, et al. Court definitely found that a collateral estoppel defense could be considered after the threshold compliance issue is determined).

Jean Fitchett v. WCAB (School District of Philadelphia), 67 A.3d 80 (Pa. Cmwlth. 2013)

Primary Issue: 1) Whether Claimant's benefits were properly suspended based on a finding that she retired from the workforce when employer never filed a suspension petition or amended a pending petition to include a petition for suspension;

Answer: Yes.

Ancillary Issues: 2) Whether employer was entitled to an offset against Claimant's receipt of pension and Social Security retirement benefits when the employer did not issue a notice of workers' compensation benefit offset or introduce documentation of its calculations;

Answer: Yes.

3) Whether medical evidence from employer's physicians was capriciously disregarded when the WCJ declined to expand the NCP to include a right shoulder injury;

Answer: No.

4) Whether Claimant's benefits were properly suspended when she failed to return the LIBC-760;

Answer: Yes.

5) Whether Claimant was entitled to reimbursement under Section 314(b) of the Act for the cost of having a nurse attend an IME with her and draft a report when employer did not raise an objection to such costs;

Answer: Yes.

6) Whether Claimant's request for unreasonable contest attorney's fees was properly denied when employer presented a genuine dispute as to the recovery status of the work-related injury and whether Claimant received the LIBC-760 form.

Answer: Yes.

Analysis: Claimant filed a Petition for Review of an order of the Workers' Compensation Appeal Board that affirmed the decision of the WCJ granting Claimant's Penalty Petitions, dismissing the employer's Termination Petition, but suspending Claimant's benefits as of June 4, 2005 on the ground that she voluntarily left the workforce. The Commonwealth Court affirmed in part, and reversed in part.

Employer issued an NCP recognizing Claimant's injuries as a sprain of the left shoulder, left thumb, neck, and lumbar spine as a result of a student attack while in the course of her employment as an instructional aide.

Employer issued a notice of suspension as of September 5, 2003 for failure to return form LIBC-760. Claimant filed a Penalty Petition in this regard alleging that her employer unilaterally suspended her benefits in violation of the Act. Claimant testified that she never received the LIBC -760 prior to receiving employer's suspension notice and that she ultimately returned the suspension notice along with the completed form to employer.

In November 2004, the WCJ issued an interlocutory order reinstating Claimant's benefits as of November 2, 2004. The WCJ indicated that although the employer properly suspended Claimant's benefits for failure to return the LIBC -760, Claimant presented the completed form at the November 2, 2004 hearing. Therefore, the employer had no factual or legal basis to continue the suspension. The WCJ also ordered that employer was entitled to a credit for pension and social security retirement benefits based upon Claimant's testimony that she began receiving pension benefits of $699.00 per month in April 2002 and social security retirement benefits of $1,101.00 per month as of October 2004.

Ultimately, the WCJ found Claimant's allegations that she did not receive the LIBC-760 prior to September 2003 to be unpersuasive and not credible, but accepted her testimony that she later forwarded it to employer by certified mail on September 23, 2003. In the final Decision and Order, the WCJ granted Claimant's Penalty Petition.

Claimant testified that she did not look for work following her 2001 work injury and when asked whether she considered herself retired, stated "Well, I'm collecting retirement." Claimant later clarified that if not for her work injuries, she planned to continuing working. When Claimant testified again at the conclusion of the proceedings, she was asked if she was retired and answered "yes." Again, she later clarified that she meant she had to leave her employer due to her injuries. Claimant indicated that she would still be working if not for the work injury, unless her employer told her she could not work.

Employer did not file a Suspension Petition, but did file a Termination Petition alleging that Claimant was fully recovered from the compensable work injuries as of September 15, 2003. The WCJ accepted the medical opinions of employer's two medical experts to the extent that her work-related left thumb, neck, and back injuries were fully resolved. However, the WCJ rejected employer's expert testimony that all of Claimant's left shoulder work-related pathology was resolved. In addition, the WCJ rejected all allegations that Claimant's right shoulder was affected by the work injury and found that Claimant's testimony of work-related headaches was unpersuasive and not credible.

Based on Claimant's ongoing left shoulder injury, the WCJ dismissed the Termination Petition. However, the WCJ suspended Claimant's benefits as of June 4, 2005 finding that she was essentially retired and had voluntarily withdrawn from the workforce.

After the WCJ denied the employer's request for supersedes pending the litigation of the Termination Petition, Claimant filed another Penalty Petition contending that the employer failed to pay attorney's fees in accordance with the order denying

supersedeas. In the Decision and Order, the WCJ listed the reasonable, related, and necessary litigation costs incurred by Claimant and order employer to pay those costs. The WCJ specifically rejected Claimant's request for reimbursement of costs related to her nurse's attendance at an IME and the nurse' medical report regarding same.

The WCAB affirmed the WCJ's Decision and Order and Claimant appealed to the Commonwealth Court.

1) Claimant argued that the WCJ erred in suspending her benefits on the basis that she retired from the workforce because employer never requested a suspension of benefits, either by amending its Termination Petition or issuing a suspension notice; therefore, Claimant was unable to file an answer and was deprived of due process.

The Commonwealth Court relied on Krushauskas v. WCAB (General Motors), 56 A.3d 64 (Pa. Cmwlth. 2012), to note the WCJ's authority to suspend a claimant's benefits in the absence of a formal petition where doing so would not prejudice the claimant. A claimant is not prejudiced, according to the Court, where she is put on notice that a suspension or termination is possible and she is given the opportunity to defend against it. Whether the claimant has adequate notice depends on the totality of the circumstances of a particular case.

Here, the Commonwealth Court found that Claimant was on notice that employer was seeking a termination of benefits effective September 2003, a suspension of benefits from September 2003 until November 2004, and a retirement pension/social security offset against her benefits effective November 2004. Therefore, the Commonwealth Court concluded that the initial proceedings put Claimant and her attorney on notice that her application for and receipt of social security old age benefits and retirement pension benefits would be at issue in the ensuing WCJ proceeding even though a formal suspension petition based on a voluntary withdraw from the workforce was not filed. In addition, the Court noted that the parties fully litigated the issue of whether Claimant voluntarily retired from the workforce.

The Commonwealth Court further found that the WCJ gave Claimant an adequate opportunity to defend against the allegation that she voluntary removed herself from the work force. Claimant's testimony, however, was not persuasive to the WCJ, who noted that despite testimony that she only applied for social security and pension benefits because she was impoverished by lack of funds coming in, Claimant actually applied for such benefits before Employer suspended her benefits in 2003 (for failure to return LIBC – 760). In addition, Claimant continued to receive her pension and social security in 2005 after her indemnity benefits were reinstated.

The Commonwealth Court also emphasized the WCJ's finding that nearly all of Claimant's work-related injuries, mostly strains/sprains, were resolved (thus, the work injury certainly did not force her to retire), yet Claimant did not look for any type of work

The Commonwealth Court considered the well-settled principle that the mere possibility a retired worker may, at some future time, seek employment does not transform a

voluntary retirement from the labor market into a continuing compensable disability. Ultimately, Claimant accepted a retirement pension and social security old age benefits, and thus was presumed to have voluntarily retired. As such, Claimant bore the burden of proving that she was seeking employment. Claimant did not testify about looking for any other type of work in the labor market and the WCJ did not believe Claimant's testimony that she intended to return to the workforce. The Commonwealth Court declined to disturb the Judge's credibility determination.

Accordingly, the Court found that the suspension of Claimant's benefits was not erroneous.

President Judge Pellegrini filed a 6-page dissenting opinion finding that the issue of whether Claimant voluntarily retired from the workforce was not properly before the WCJ based on the "totality of the circumstances" test. Therefore, it was P.J. Pellegrini's opinion that the WCJ lacked the authority to suspend benefits. In addition, P.J. Pellegrini would hold that to properly raise an issue not raised in the formal proceeding, a petition to amend has to be made in accordance with 34 Pa. Code § 131.35.

2) In response to Claimant's allegation that the WCJ erred in ordering credits and offsets against her pension and social security retirement benefits, the Commonwealth Court reviewed Section 204(a) of the Act acknowledging that a claimant must have an opportunity to contest the amount of a credit claimed by the employer and to have a hearing on the disagreement. Additionally, the Board's Regulation at Pa. Code §123.4 allows employer to take the credit unilaterally, but requires that notice be given to the claimant so that she can challenge the amount and basis for the credit. However, where the claimant's testimony establishes the amount of the benefits subject to offset, the WCJ is required to reduce the claimant's award by the amount of such benefits regardless of whether the employer requested an offset because the mandate of Section 204(a) cannot be waived. In the instant case, Claimant's unchallenged testimony established the amount of her pension and social security retirement benefits. The employer took the offset pursuant to the WCJ's Interlocutory Order, not unilaterally; therefore, it was not required to provide Claimant with notice. Consequently, the credit and offset were upheld by the Commonwealth Court. (Claimant also raised several constitutional challenges to the offset, which the Court quickly disposed of in a footnote citing to precedential authority addressing such challenges).

3) Claimant asserted that the WCJ capriciously disregarded medical testimony from employer's physicians indicating that Claimant suffered a right shoulder injury as a result of the February 2001 work incident. As such, Claimant claimed that the WCJ erred in finding her right shoulder injury was unrelated to the 2001 work incident and not amending the NCP to include that injury. The Court acknowledged that a WCJ may amend an injury description even when the claimant does not file a petition to review the NCP. While the WCJ could have modified the NCP to include a right shoulder injury, it remained Claimant's burden to prove the NCP was materially incorrect when issued and that her right shoulder injury was work-related. The Court found that Claimant simply failed to meet her burden as she did not present any medical evidence to support a causal connection and relied only on employer's expert testimony, which the WCJ

specifically found not credible to the extent it suggested Claimant's right shoulder injury resulted from the February 2001 trauma. Again, the Commonwealth Court declined to disturb the WCJ's credibility determination and the WCJ's Decision was affirmed in this regard.

4) Claimant argued that once she challenged service of the LIBC-760, the burden should have shifted to employer to prove that she received the form and because employer failed to produce such evidence, the WCJ should have ruled in her favor. Moreover, Claimant asserted that the WCJ disbelieved her uncontroverted testimony on the issue and provided inadequate reasons for that finding. The Commonwealth Court reviewed Sections 311.1 and 406 of the Act noting that an employer may automatically suspend benefits when a claimant fails to return the completed verification form and where a party alleges non-receipt of a notice, that party bears the burden of proof. While Claimant testified that she did not receive the LIBC -760, the WCJ, as the ultimate finder of fact, specifically rejected her testimony as unpersuasive and not credible. Again, the Court declined to disturb the WCJ's credibility determination and affirmed the Decision.

5) Regarding Claimant's request for reimbursement of costs for her nurse's attendance at the IME and report following same, the Commonwealth Court reviewed Section 314 of the Act relating to examinations of injured employees noting that costs for a nurse to attend an IME were not recoverable as a "witness cost." While costs incurred in obtaining testimony from a witness are recoverable, there is no authority for awarding as costs time spent by a witness observing and preparing to testify to facts. Therefore, Claimant's costs in this regard were not recoverable.

Nevertheless, employer never objected to the bill of costs or argued that the nurse was not a witness whose costs were reimbursable. Because the issue was not raised by employer before the WCJ, it was deemed waived. Once the issue was waived, the WCJ erred in raising his own objection to reimbursement for such costs. The Court reversed the WCJ on this issue and modified the Order to reimburse Claimant's costs.

6) Claimant alleged that employer's contest was unreasonable because employer's counsel refused to acknowledge the certified return receipt as proof of service that Claimant returned form LIBC-760 and argued it did not have to reinstate benefits until a judge ordered it to do so. The Commonwealth Court found that in opposition to Claimant's Penalty Petition, employer submitted its suspension notice for Claimant's failure to return the form. Although Claimant testified that she never received it, there was a genuinely disputed issue as to whether she actually received the form making employer's contest reasonable. It was, however, noted that the WCJ found employer's contest initially reasonable, but then unreasonable when it delayed the reinstatement of Claimant's benefits following the WCJ's order. The WCJ declined to award counsel fees since the record was void of any efforts by Claimant's counsel to have benefits reinstated in a timely fashion. The WCAB affirmed further noting that there was no evidence indicating the actual date on which the employer resumed paying Claimant's benefits; thus, the record did not support an award of counsel fees. The Commonwealth Court agreed and affirmed the Decision of the WCJ and WCAB.

With respect to the termination petition, Claimant argued that because employer's experts at all times either related her right shoulder injury to the work incident or did not opine that it was an unrelated or fully recovered condition, employer, could not, as a matter of law, have been granted a termination of benefits. The Commonwealth Court found that a genuinely disputed issue existed based on employer's experts' testimony that Claimant fully recovered from her work injury, while Claimant's expert testified that her injuries remained unresolved and prevented her from returning to her job with employer. Claimant's contention that employer could not possibly be granted a termination of benefits because of its experts' opinions regarding the right shoulder was without merit because the right shoulder was not recognized by employer in the NCP and was not at issue. The Commonwealth Court affirmed the WCJ's Decision.

Conclusion And Practical Advice:

1) The totality of the circumstances test to determine whether a claimant has sufficient notice that her benefits may be suspended is fact-specific and will be different in every case. Although, the best practice is to file or amend a petition, if the evidence of record supports an alternate basis upon which a WCJ could suspend benefits it should be raised in the brief even if it was not formally raised in the pleadings. As noted by the dissenting opinion, this decision has the potential to undermine the well-engrained protection against unfair surprise and the predicament of defending against matters of which a party has no notice. Ultimately, the decision is favorable to employers, but should be relied upon with caution.

2) During the litigation of any petition in which indemnity benefits are at stake, it is helpful to ask the claimant during cross-examination exactly how much she receives in various benefits since the offsets of Section 204(a) are mandatory and the WCJ is required to reduce an award by the amount of such benefits. If there is no evidence of record as to the amount of benefits subject to offset, the WCJ will still award the offset, but it is almost certain that the claimant will then challenge the amount and pursue a subsequent round of litigation.

3) The arbitrary and capricious standard of review typically applies when a party presents uncontested evidence in support of its position and that evidence is rejected by the WCJ. When a party bears the burden of proof, it should not rely exclusively on the evidence of the opposing party since it is clear that the WCJ is free to reject such evidence without running afoul of the arbitrary and capricious standard.

4) Once a notice is issued, its receipt is presumed. The recipient bears the burden of proving that the notice was not received. To avoid a determination based solely on witness credibility, it is recommended that the recipient present documentary evidence in addition to testimony to support the burden of proof.

5) It is crucial that all bills of costs submitted by claimants' counsel, in connection with both settlement and litigation, are carefully reviewed for error and non-reimbursable expenses. Often times the bills of costs are submitted with claimant's brief after the record has closed. In order to avoid liability for reimbursement of non-payable

expenses, it is essential to be mindful of the receipt of Claimant's costs and raise a timely objection prior to the issuance of a decision since it is clear that the WCJ cannot raise this issue on his own motion.

6) A genuinely disputed issue will support a reasonable basis for contest. Even where the contest is potentially unreasonable, if Claimant's counsel has not made any effort to rectify the situation, the WCJ may, within his discretion, decline to award attorney's fees.