CASE LAW UPDATES
August 2008

Albert Einstein Healthcare v. Workers' Comp. Appeal Bd., (Stanford)
August 4, 2008
2008 Pa. Commw. LEXIS 341

Did the Appeal Board err in modifying a WCJ Decision by relying on claimant's testimony in place of expert testimony?

Claimant was employed as a psychiatric assistant by Employer. On December 19, 2002 she filed a Claim Petition alleging a July 2, 2002 injury to her "discogenic discs" when an elevator she was on dropped suddenly, tossing the claimant about the cabin. Claimant also alleged a later exacerbation when she was forced to restrain a patient for 2.5 hours.

At the hearing, Claimant testified and submitted expert testimony from Dr. Richard Kaplan, along with documentary evidence. Employer submitted testimony from Dr. Richard Levenberg, along with documentary evidence. The WCJ granted the Claim Petition accepting both the Claimant and her expert as credible. However, he awarded benefits only from December 17, 2003 onward because Dr. Kaplan testified Claimant was only disabled during his treatment of her, which began in December 2003.

On Appeal, the Board modified the WCJ Decision finding that claimant's testimony, coupled with that of Dr. Kaplan showed disability began in October 2002. The Employer appealed to the Commonwealth Court from this Order. Employer argued under Ricks v. WCAB (Parkway Corp.), 704 A.2d 716 (Pa. Cmwlth. 1997), that the WCJ, as finder of fact, correctly weighed the testimony of Dr. Kaplan and Claimant and made a factual determination as to the chronological length of disability. Employer argued because the WCJ made findings of fact and conclusions of law based that were consistent with her reading of the evidence, the Board had no basis for modifying the Order.

The Court found under Ricks, the WCJ had the authority to decide the chronological length of disability depending on competent evidence presented at the hearing, including claimant's testimony and claimant's experts. What constitutes competent evidence is dependent on the nature of the injury and the time frame in which disability arises. In this matter, Claimant sought to establish disability for a period of time in which she had presented no expert testimony to support her claim. The Court found Claimant was wrongly seeking to fill the "evidentiary void" with inferences drawn from her presented evidence. Based on this finding, the Board erred in modifying the WCJ's award, and the Board Order was reversed on that issue.

Crompton Corporation v. Workers' Comp. Appeal Bd., (King)
August 5, 2008
2008 Pa. Commw. LEXIS 344

Did claimant meet the notice requirements under Section 311 of the Act with respect to his claim resulting from exposure to hazardous noise during his employment?

The 120 day period for claimant to give notice began running only after he was informed by his health care provider that his hearing loss was work related.

In this matter, claimant filed a Claim Petition on April 2, 2004 alleging compensable hearing loss cause by long term exposure to hazardous loss based on a February 27, 2004 report

from his doctor connecting the hearing loss to his work. The filing was also claimant's notice to his Employer of the hearing loss. Following litigation on the Claim Petition, the WCJ found claimant's doctor, Dr. Turner to be credible and rejected Employer's expert, who had attributed the hearing loss to claimant's prior military service. The WCJ specifically found that claimant first knew, or should have known about the hearing impairment after he received Dr. Turner's report on February 27, 2004.

In denying Employer's Appeal, the Board relied on Socha v. WCAB (Bell Atlantic PA), 725 A.2d 1276 (Pa. Cmwlth. 1999)(Socha I), and found the WCJ was corrected in finding that the February 27, 2004 report triggered the notice period. The Court in Socha I noted that a claimant's belief as to the cause of his hearing loss does not, in and of itself, rise to the level necessary to trigger the notice period. The Board also cited to Socha II, noting that under Section 306(c)(8)(ix) "the date of injury for occupational hearing loss shall be the earlier of the date on which the claim is filed or the last date of long term exposure to hazardous occupational noise while employed by the Employer against whom the claim is filed. The Board found the date of injury according to Section 306(c)(8)(ix) would be April 2, 2004, the date the Claim Petition was filed.

On appeal to the Commonwealth Court, the Employer argued that under Section 311, claimant knew, or should have known of his work related hearing loss in 1999, or by May 7, 2002 at the latest. Employer noted that claimant had used hearing aids since 1999, and on May 7, 2002 claimant submitted a patient information chart to Dr. Turner stating his hearing loss was work related. Employer argued, based on this evidence, claimant's 2004 Claim Petition was untimely filed. Employer further argued that Socha I was wrongly decided because it unduly prejudices Employers who are unable to promptly investigate claims.

The Court chastised the Employer for confusing Socha I and Socha II. The Court noted Socha II was a plurality opinion with limited precedential value. However, taking the decision of Socha I into account, the Court noted that it rejected the argument that Section 306(c)(8)(ix) was determinative for the date of injury in hearing loss cases for the purpose of notice requirements. The Court found that a claimant could not be charged with knowledge of a compensable hearing loss unless and until the claimant is so informed by a health care provider.

Christopher Combine v. Workers' Comp. Appeal Bd., (National Fuel Gas Distribution Corporation)
August 14, 2008
2008 Pa. Commw. LEXIS 380

1) Does the Act require an IRE physician to determine an injured worker is at maximum medical improvement as a prerequisite to calculating the workers' impairment rating?

Claimant sustained a work related injury on December 4, 2000 in the nature of a medial meniscus tear. Employer acknowledged the injury in a Notice of Compensation Payable, and began paying benefits. On July 12, 2006, Employer filed a Modification Petition seeking to change Claimant's disability status from total to partial disability following a June 20, 2006 IRE finding that claimant had a 20% impairment. Claimant filed an Answer asserting the Modificaiton was inappropriate as he has not reached MMI. The WCJ disagreed with this argument and found claimant to be partially disabled as a result of the IRE. The Appeal Board affirmed this Order.

Claimant argued the Board erred by not following his original argument that the Act requires an IRE doctor to make a finding of MMI as a prerequisite to calculating an impairment rating. The Court noted this was an issue of statutory construction, and when the words of a statute are clear and free from ambiguity, it should be interpreted solely from the plain meaning of its words and the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. Gardner v. WCAB (Genesis Health Ventures), 888 A.2d 758 (Pa. 2005). It is only when the words of the statute are not explicit on the point at issue that resort to statutory construction is appropriate. Snizaski v. WCAB (Rox Coal Co.) 891 A.2d 1267 (Pa. 2006).

In the matter at hand, Section 306(a.2) of the Act notes that the 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," and for purposes of this clause, the term "impairment" shall mean an anatomic of functional abnormality or loss that results from the compensable injury and is reasonably presumed to be permanent. The Court noted that based on the AMA Guide prescribed by the Act, MMI is specifically to be determined prior to making an impairment rating determination.

The Court held there is no ambiguity in the term "shall," and the Court's finding is that the doctor was required to determine MMI prior to making an impairment rating evaluation. The Court noted that even with further statutory construction, their opinion remains the same, noting the prohibition on multiple IRE's in a twelve month period, along with the 104 week waiting period designated by the legislature.

The Court found that in this case, the IRE doctor was asked specifically about MMI and testified that he had not considered the issue prior to making his determination. As such, the WCAB finding was reversed.

Lori Jamison v. Workers' Comp. Appeal Bd., (Gallagher Home Health Services)
August 19, 2008
2008 Pa. Commw. LEXIS 385

Whether claimant must work for a single Employer to be a traveling employee?

Claimant was employed as a home health nurse by Employer. As part of her job, she was required to travel to visit one of eight of Employer's clients' per day. Claimant was not required to go to Employer's office before visits and she completed her paperwork at home. Claimant was paid a fixed wage for the time she spent with a patient, and for mileage incurred after she left the first patient's home to the mileage incurred returning home from the last patient visit. Claimant was not compensated for travel time, and she was allowed to run personal errands and take on other employment during the day between patients. Claimant also had two other jobs, one for PRN Health Services, training nurse aids and also as a loan office for AAA Mortgage, where she was paid for forty hours a week of work. It was possible for claimant to be working all three jobs on a given day.

On November 24, 2005, claimant was injured while traveling from her home to the first client's home for Employer. On May 10, 2006, Claimant filed a Claim Petition alleging a work related injury. Employer denied Claimant was a traveling employee, or that she was in the course and scope of her employment when she had her accident. The WCJ agreed with Employer saying that claimant was not a traveling employee because she could be working for any one of three Employers on a given day. Because she was not a traveling employee, her commute was not in the course and scope of her employment and she was not entitled to compensation. The Board upheld the WCJ Order.

On appeal, Claimant challenged the finding she was not a traveling employee at the time of the accident. Claimant also argued there was not substantial evidence in the record to support the WCJ finding that Claimant was not a traveling employee. The Commonwealth Court noted that when determining if an employee is a traveling employee, each case is determined on a case-by-case basis. The Baby's Room v. WCAB (Ryan and Kathleen Stairs) 860 A.2d 203 (Pa. Cmwlth. 2004). The Court will look at whether the claimant's job duties include travel, whether the claimant works on the Employer's premises, or whether claimant has no fixed place of work.

The Court found that but for the multiple Employer issue, there would be little doubt Claimant was a traveling employee for Employer. To rebut the presumption Claimant was working for Employer at the time of her car accident, Employer must establish that Claimant's actions at the time of injury were so foreign from her usual employment that they constituted an abandonment of employment. The Commonwealth Court found there was no evidence Claimant had abandoned her job duties at the time of her injury or was engaged in work for another Employer. Thus the Court remanded the case back to the WCJ to establish Claimant's entitlement to wage loss or medical benefits.

National Fiberstock Corporation (Greater New York Mutual Insurance Company) v. Workers' Comp. Appeal Bd., (Grahl)
August 29, 2008
2008 Pa. Commw. LEXIS 388

1) Is Claimant's reinstatement barred by res judicata after her benefits were previously terminated?
2) Was the reinstatement supported by competent medical evidence?
3) Did the WCJ err in his award of penalties?

Claimant was working for Employer as a machine operator when she suffered a work related injury to her right fingers, wrist and hand. Employer filed a Termination Petition in 1997 alleging full recovery. The WCJ granted the Petition based on Employer's medical evidence in 2002. The Board affirmed the Termination.

In 2000, while the Termination was being litigated, claimant underwent repeat carpal tunnel syndrome release on her right wrist. Employer adjusted the medical bill for the surgery, but did not pay it. Claimant filed a Penalty in January 2004 over the non-payment. Claimant's Penalty was granted on January 31, 2005, and Employer was ordered to pay a 50% penalty.

In February 2005, Claimant filed a Reinstatement Petition alleging a recurrence of her work related disability in January 2005. Claimant filed a second Penalty Petition in August 2005 over non-payment of the award from the Judge's first Penalty. Both parties presented medical evidence, Claimant's was from Dr. Stempler, Employer was from Dr. Jaeger, and Employer presented evidence the Order was paid, but approximately eight months late, without interest. Interest was paid in March 2006. The WCJ reinstated claimant's benefits and awarded a 50% penalty based on the late payment. The Board affirmed the Order.

With respect to the res judicata issue, Employer argued that Claimant testified she continued to have the same symptoms since she stopped working for Employer in 1994, and because she was found to be fully recovered as of October 20, 1997, she was trying to relitigate the Termination Petition. The Commonwealth Court disagreed, holding that the important thing for the Court to consider is whether the ultimate and controlling issues have been decide in a prior proceeding in which the parties actually had an opportunity to appeal and assert their rights. Fiore v. Commonwealth of Pennsylvania (Department of

Environmental Resources), 508 A.2d 371 (Pa. Cmwlth. 1986). The Court noted that in a Termination Petition the controlling issue is whether claimant fully recovered from her work injury, in a Reinstatement Petition, the controlling issue is whether the injury recurred. These issues are not identical because they involve factual questions about Claimant's condition at two unrelated time periods.

In terms of whether there was competent medical evidence to support the WCJ's Reinstatement finding, the Court noted that a medical expert who bases his opinion on a factual assumption that is inconsistent with a previously decided material fact may be ruled legally incompetent. Taylor v. WCAB (Servistar Corp.) 883 A.2d 710 (Pa. Cmwlth. 2005). The Court noted that while Claimant made complaints of symptoms dating back to 1994, Dr. Stempler based his medical opinion on the previously litigated Termination Petition that claimant was fully recovered as of 1997, and he found that her condition had only recurred as of January 2005, the date in which she filed for Reinstatement.

Finally, with regards to the Penalty Petition, the Court found that the WCJ had the authority to award a second penalty of up to 50% after Claimant filed a second Penalty Petition, and showed that Employer was untimely in making payment on the award of the first Penalty. The Court noted that an Employer who fails to timely comply with an Order to pay benefits, whether it is a penalty or otherwise, runs the risk of a new 50% penalty. City of Philadelphia v. WCAB (Sherlock), 934 A.2d 156 (Pa. Cmwlth. 2007).