THE HARTWELL
LAW OFFICES, LLP

DECEMBER 2016 CASE LAW UPDATE

PREPARED BY RONALD VARGA

Beasley v. Workers' Compensation Appeal Board (Peco Energy Company), __ A.3d __ (Pa. Cmwlth December 22, 2016)

Issues: 1. Whether the parties are obligated to pursue a mutually acceptable IRE Physician before employer requests a unilateral designation of one by the BWC.

2. Whether Claimant can successfully challenge whether an IRE Physician designated by the BWC lacks the proper training as delineated in the regulations.

3. Whether Protz can be raised for the first time on appeal.

Answers: 1. No. 2. No. 3. Yes.

Analysis: Commonwealth Court vacated and remanded the matter back to the WCJ to determine whether the 4th and 6th Edition of the AMA Guides are different as to the injuries at issue in the case and, if so, to receive testimony as to the IR based upon the 4th Edition of the AMA Guides.

By background, Claimant sustained a work injury on April 3, 2009. On April 5, 2011, employer filed a Request for Designation of a physician to perform an IRE. Claimant objected, contending that the parties must first try to reach an agreement as to the selection of an IRE physician. Claimant was ordered by the WCJ to undergo an IRE. Dr. Daisy Rodriguez concluded that Claimant had a 28% Impairment Rating. Employer filed a Notice of Change of Status and Claimant filed a Petition to Review.

Dr. Rodriguez testified as to her clinical practice, her licensure and her attendance at a training course in IREs. She testified as to Claimant's 28% impairment and that Claimant had reached MMI. Dr. Rodriguez's testimony was the sole medical evidence presented.

On August 25, 2014, the WCJ granted Claimant's Petition for Review opining that: 1). there was no showing that Claimant had received 104 weeks of TTD (a prerequisite to an IRE); 2). Dr. Rodriguez did not adequately establish MMI; 3). Dr. Rodriguez, did not show he was adequately qualified to perform IREs as she did not prove her training courses were certified by the BWC; and 4). the parties did not make a good faith effort to agree on an IRE Physician.

The WCAB reversed. It found the IRE timely based on the pleadings. It found Rodriguez competently testified about MMI and that the parties were not obliged to try to agree to the choice of an IRE Physician before employer asked the BWC to designate one. It found Rodriguez was adequately trained in IREs.

Before the WCAB, Claimant raised Protz for the first time and suggested that Rodriguez's testimony was incompetent as she used the 6th Edition of the AMA Guides. The WCAB did not address the issue because Claimant was not the Appellant. Claimant appealed to Commonwealth Court on the following issues:

1). The timeliness of the IRE Request. In this regard, the Court noted that the pleadings, specifically the NCP versus the IRE Request, showed that the latter was made 104 weeks after the initial date that benefits began to accrue.

2). That Dr. Rodriguez incompetently testified as to MMI, which the Court specifically rejected based upon her testimony. The Court also flatly rejected Claimant's argument that Rodriguez did not prove her IRE training courses were certified by the BWC. It essentially suggested that as the doctor was on the BWC's list, that she met all qualifications to perform IREs.

3). Claimant contended that the WCAB erred in not applying Protz, as Dr. Rodriguez used the 6th Edition of the AMA Guides. Defendant suggested that Claimant should not be permitted to now challenge on this issue, as he did not do so before the WCJ. The Court noted that normally, failure to raise an issue at all stages of the proceedings constitute a waiver. However, the Court suggested that issues of the validity of a statute can be raised under the Appellate Rules at this time. Further, because the litigation itself began before Protz was decided, his appeal to Commonwealth Court involved the validity of a statute and he raised it at the first opportunity to do so.

Conclusion and Practical Advice: The WCAB's Order vacated the prior order with an ultimate remand to the WCJ to determine if the 4th and 6th Editions are different with respect to injury at issue, and, if so, to receive testimony as to the IR based on the 4th Edition of the AMA Guides.

County of Allegheny v. Workers' Compensation Appeal Board (Parker) __ A.3d __ (Pa. Cmwlth December 20, 2016)

Issues: Whether Employers and Insurers can recover Claimant's attorney fees assessed for an unreasonable contest.

Answer: Yes.

Analysis: The Workers' Compensation Act allows a Worker Compensation Judge (WCJ) to award Claimant attorney fees where there is an unreasonable contest of a petition. (See: § 440). The WCJ must make a finding as to the amount and the length of time for which such counsel fee is payable based upon the complexity of the factual and legal issues involved, the skill required, the duration of the proceedings and the time and effort required and actually expended. (See: § 440(b)).

In cases where a Workers' Compensation Judge awards Claimant attorney fees for an unreasonable contest and the Employer/Insurer is successful on appeal to reverse that award - there was no clear legal precedent to require the Claimant attorney to refund the unreasonable contest attorney fees, to which they were no longer entitled.

A recent decision of the Commonwealth Court of Pennsylvania has determined that the Employer and Insurer may request a WCJ order directing the Claimant counsel to refund unreasonable contest fees, where Employer is successful on appeal to reverse that award. See: *County of Allegheny v. WCAB (Parker) No. 82 C.D. 2016 and No. 112 C.D. 2016* filed on December 20, 2016.

In the underlying litigation, the Employer filed a petition in 2007 for suspension of total disability benefits payable for a 1993 shoulder injury. The Employer argued that Claimant was offered and refused a job within his work restrictions. Employer also argued that Claimant had voluntarily withdrawn from the work force. In 2008, the Workers' Compensation Judge *granted employer suspension petition*, finding that Claimant, who was 80 years old at the time, had failed to follow through in good faith on a job referral within his physical limitations from his shoulder injury. He had completely withdrawn from the work force as a result of his age and medical conditions unrelated to his work related shoulder injury.

Claimant appealed the WCJ 2008 order of suspension. On appeal, the Workers' Compensation Appeal Board (WCAB) 2009 decision *reversed the suspension order* on the basis that Employer was barred by the legal doctrine of collateral estoppel from requesting a 2007 suspension as an earlier 2004 WCJ decision had denied a prior suspension petition. To add insult to injury, the WCAB held that Claimant was entitled to unreasonable contest attorney fees and remanded the case for the WCJ to determine the amount of those fees. [Employer petitioned for review to the Commonwealth Court, but the petition was deemed premature due to the remand nature of the WCAB order].

On remand, as directed, the WCJ 2009 decision awarded Claimant attorney fees for the litigation of the 2007 suspension petition. On Claimant and Employer cross-appeals back to the WCAB, the 2011 Appeal Board decision modified that WCJ order and directed the payment of

additional counsel fees for the work performed in the Claimant's appeal from the 2008 WCJ suspension decision, in addition to the counsel fees for litigation of the 2007 suspension petition.

Employer filed a Petition for Review of the WCAB 2011 decision to the Commonwealth Court. Employer argued that the WCAB reversal of the 2008 WCJ suspension order was erroneous as a matter of law. The direction for assessment of unreasonable contest attorney fees for litigation of the 2007 suspension petition was erroneous as a matter of law. The assessment of additional counsel fees regarding Claimant's appeal from the WCJ 2008 suspension order was erroneous as a matter of law.

In the Employer appeal to the Commonwealth Court from the WCAB 2011 order, the Employer requested a *supersedeas* of compensation payments to Claimant, including payment of attorney fees. The applications for supersedeas were denied by the Appeal Board and by the Commonwealth Court. On this basis, employer issued payments, including unreasonable contest attorney fees of $14,750.00.

In 2012 the Commonwealth Court reversed the WCAB 2009 and 2011 decisions. The Court ruled that the Employer's 2007 suspension petition was not barred by the legal doctrine of collateral estoppel as the 2007 factual and legal issues were not identical to the issues presented in the 2004 WCJ decision. *On this basis, the WCAB erred as a matter of law in reversing the suspension of Claimant's benefits directed by the WCJ 2008 decision.* Claimant filed an Application for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied.

After the denial of Claimant's petition for allowance of appeal, Employer filed an *application for supersedeas fund reimbursement* with the Bureau. Employer requested: reimbursement of the compensation paid to Claimant; attorney fees paid under the contingent fee agreement; the $14,750.00 paid in unreasonable contest attorney fees. The Bureau approved a limited reimbursement for the compensation paid to Claimant and the contingent attorney fee agreement. *The Bureau properly denied the employers reimbursement requests for the $14,750.00 in unreasonable contest fees, as such fees were not reimbursable under §443 of the Act.*

As reimbursement was not available from the supersedeas fund, Employer filed the petition which is the subject of this appeal, seeking an order from the WCJ to direct Claimant counsel to refund the $14,750 unreasonable contest attorney fees. *The WCJ denied Employer's petition, as there was no clear legal precedent for such an order requiring the return of unreasonable contest attorney fees.* The WCJ also denied Claimant's request for the imposition of *additional* unreasonable contest fees for the litigation of the employer petition, as this petition was filed in good faith, in regards to an unsettled legal issue.

The WCAB affirmed the WCJ decision. Employer appealed to the Commonwealth Court.
The Commonwealth Court reversed.

The decisions of the WCJ and WCAB erroneously concluded that Employer could not recover the award of unreasonable contest attorney fees - which were required to be paid by the underlying WCJ & WCAB orders – where Employer was successful to reverse that decision on appeal.

The Commonwealth Court relied upon its prior decision in *Barrett v. WCAB (Sunoco Inc.)*(Pa. Cmwlth. 2010) which held that an employer and insurer may request the reimbursement of *litigation costs* which were awarded and paid, where that award is later reversed on appeal. In *Barrett* the court concluded that allowing Claimant counsel to retain the legal costs to which he is no longer entitled, would result in an unjust enrichment. As the employer cannot recover the legal cost awards from the supersedeas fund, the employer would be deprived of any meaningful appeal form an erroneous cost award.

The reimbursement of legal costs would not impose a hardship on the Claimant, as the recovery was sought directly from Claimant's counsel, not from the Claimant. In review of its prior decision in *Barrett*, the court referenced two unreported decisions which reached similar results. *See: Daniels v. WCAB (Giancarli Constr. Co.) and Lewis-Briggs v. WCAB (DPW).*

Although the prior decision in *Barrett* involved litigation costs, the court believed the reasoning in *Barrett* is equally applicable to the unreasonable contest attorney fee issue. Where the employer has been erroneously ordered to pay litigation costs, the WCJ can order Claimant's counsel to refund that overpayment. The decision in *Barrett* compels the conclusion that the employer is entitled to an order requiring Claimant counsel to refund the $14,750.00 in fees that were erroneously awarded.

Each factor in *Barrett* was present in the instant case. The Commonwealth Court reasoned that the award of litigation costs and the award of unreasonable contest attorney fees are both pursuant to §440 of the Act. The § 440 language includes unreasonable contest attorney fees as one of the types of costs incurred in litigation.

Both costs are payments in addition to the award of compensation to the Claimant. To order a refund involves no payment of compensation benefits and denying a refund would result in unjust enrichment.

The court reasoned that the lack of any other remedy to the employer is the same for the unreasonable contest attorney fees as it is for other litigation costs. The supersedeas fund reimbursement is limited to "payments of compensation". Only indemnity wage loss benefits and medical expense reimbursements can be recovered by the employer from the supersedeas fund following a successful appeal. There is no recourse from the supersedeas fund for unreasonable contest attorney fees or other litigation costs.

The court rejected the Claimant and amicus curiae arguments that unreasonable contest attorney fees should be treated differently from other litigation costs. The court noted Claimant compensation payments were over $106,000 for a period when his benefits should have been suspended. Claimant counsel received a 20% contingent attorney fee payment and Claimant received over $84,000.00. The employer's petition for reimbursement of the $14,750 of unreasonable contest fees does not request or require Claimant or Claimant counsel to return any of the compensation benefits paid following the supersedeas denial.

The court rejected arguments that allowing retention of improperly awarded unreasonable contest attorney fees was necessary or appropriate for the protection of Claimant's rights to obtain compensation, to which they are entitled. "An order to return fees erroneously awarded

for unsuccessful litigation does not reduce (Claimant) counsel's ability to recover unreasonable contest attorney fees for successful Claimants who are entitled fees nor does it reduce the amount of the fees received where unreasonable contest attorney fees are validly awarded." (Slip opinion at p.10).

The court distinguished Claimant argument which referenced that Claimant's counsel are entitled to retain the 20% contingent attorney fees despite the fact the Claimants may ultimately be unsuccessful in litigation. These fees have a difference origin. They are paid out of Claimant's compensation. They are subject to reimbursement by the supersedeas fund, where unreasonable contest attorney fees are not.

Employer did not waive its right to seek a refund of unreasonable contest attorney fees in the 2011 appeal to the Court from the WCAB decision. Employer was not required to obtain an order from the Commonwealth Court before filing a petition to the WCJ for a refund of unreasonable contest attorney fees. "Until this Court reversed the Board's 2009 decision on September 18, 2012, Employer had no basis for filing a petition for refund". (Slip opinion p. 12). President Judge Mary Hannah Leavitt joined in this opinion.

Judge Cosgrove wrote a dissenting opinion. The decision in Barrett – to refund deposition costs paid to Claimant counsel – does not provide sufficient support for the reasoning to allow refund of unreasonable contest attorney fees.

Conclusion and Practical Advice: The Commonwealth Court affirmed the Boards determination that the Joinder Petition was untimely. This case serves as a reminder that the Act requires the timely filing of a Joinder Petition. Often the decision to file a Joinder can be delayed in either making the recommendation (as sometimes it is better to point at an empty chair) or getting authority to file the Joinder. It should be noted that if there is a basis to file a Joinder this needs to be done timely.

Our Recommendations:

1. Review litigation files where an adverse decision is reversed on appeal.

- **a) If supersedeas was denied, prepare an application for reimbursement to the Bureau.**
- **b) If litigation costs were paid to Claimant counsel – request a refund.**
- **c) If unreasonable contest attorney fees were paid – request a refund.**

2. If Claimant counsel will not voluntarily issue a refund – file a Petition to Review Compensation.

Salvadori v. Workers' Compensation Appeal Board (Uninsured Employers Guaranty Fund and Farmers Propane), -- A.3d -- (Pa. Cmwlth December 5, 2016)

Issues: Whether the WCJ erred in granting the Claimant's Claim Petition against both the Board and the UEGF.

Answers: No as to the Employer; Yes against the UEGF.

Analysis: The Claimant sustained a work related injury in February of 2013 while performing his duties as a truck driver in the Commonwealth of PA. The Claimant filed a claim against the Employer. The UEGF was later brought into the case as the Employer did not have PA WC insurance. The Employer did have insurance in OH.

The WCJ granted Claimant's claim petitions against both Employer and the UEGF. The WCJ concluded that Claimant had successfully proven that he sustained disabling work-related injuries. The WCJ also concluded that the UEGF was secondarily liable for payment of the award because the evidence of record established that Employer did not maintain workers' compensation insurance in Pennsylvania at the time of Claimant's work injury.

The Board affirmed the decision of the WCJ as to the grant of Claimant's claim petition against Employer, but reversed the decision of the WCJ as to the grant of Claimant's claim petition against the UEGF.

In reversing the WCJ's grant of Claimant's claim petition against the UEGF, the Board held that the WCJ erred in finding that the UEGF was secondarily liable for payment of the award. More specifically, the Board concluded that the section 305.2 certification submitted into evidence established that Employer was not uninsured, that Employer had secured the payment of compensation under Ohio law, and that Claimant was entitled to benefits under said law.

There is no dispute that Employer did not maintain workers' compensation coverage in PA. The lack of coverage did not preclude the grant of Claimant's claim petition. The Board affirmed the WCJ's grant of Claimant's claim petition against Employer. In such cases, section 305.2(c) of the Act simply permits an out-of-state employer to file a certification form with the Pennsylvania Bureau of Workers' Compensation in order to access its Ohio coverage for payments. The benefit of this legislative enactment is clear, that the responsible employer, and not the UEGF is liable for the payment of compensation benefits.

Because the certification form submitted into evidence by the UEGF conforms to the requirements of section 305.2(c) of the Act, the Board properly held that Employer was deemed to be insured as a matter of law.

Conclusion and Practical Advice: The Commonwealth Court affirmed the Boards Decision to let the UEGF out of the case as the Employer had insurance in Ohio which would be responsible for the claim. This is a unique case with a unique fact pattern. However, having a broad understanding of the interplay of the UEGF is beneficial in the event that circumstances arise.

Whitmoyer v. Workers' Compensation Appeal Board (Mountain Country Meats) __ A.3d __ (Pa. Cmwlth December 1, 2016)

Issues: Whether the Employer is entitled to subrogation on both medical and indemnity benefits paid under the WC Act.

Answer: Yes.

Analysis: The Commonwealth Court held the right of subrogation extends to both medical and indemnity benefits. Although this issue has already been decided, new arguments were raised in reliance on recent Supreme Court decisions.

Craig Whitmoyer (Claimant) argues the workers' compensation authorities erred in granting the Employer's petition to modify a compensation agreement reached after a third-party negligence claim was resolved. The modification reflected additional medical expenses Employer paid for Claimant's 1993 work injury. The third-party settlement agreement contemplated that, after payment of the employer's accrued (past) workers' compensation lien, the $189,416.27 balance of the Claimant's third-party negligence recovery would constitute a fund for credit against "future workers' compensation payable." The primary issue is whether the term "compensation" in Section 319 of the Workers' Compensation Act (Act) (relating to subrogation of employer to rights of employee against third persons) encompasses medical expenses in addition to indemnity benefits.

Following a detailed assessment of the caselaw in this matter, the Commonwealth Court again reiterated that the right of subrogation under Section 319 does include medical in addition to indemnity benefits.

The Commonwealth Court further addressed several alternative arguments relative to waiver of the right of subrogation. The Court concluded that the Employer did have a right of subrogation.

Conclusion and Practical Advice: This case is significant in that it reaffirms prior precedent that the right of subrogation is absolute and that "compensation" is considered both medical and indemnity benefits under Section 319.