DECEMBER CASE LAW UPDATE

Casne v. WCAB (STAT Couriers, Inc.), No. 801 C.D. (Pa. Cmwlth. December 4, 2008)

Essential Facts:

Claimant petitioned for review of the WCAB's order affirming the order of the WCJ terminating benefits for a work related neck injury. The WCJ granted the employer's termination petition by finding the testimony of the claimant credible in part, and not credible in part. The WCJ also found the employer's expert medical witness more credible than the claimant's expert medical witness. Claimant appealed the WCJ's order, arguing that the employer's medical expert's opinions were insufficient to support the WCJ's conclusion of full recovery because claimant testified that employer's medical expert did not examine the neck. Claimant's appeal was also based upon her argument that the Board erred in affirming the WCJ's finding discrediting her testimony in part.

Issue:

1. Whether the employer's doctor's testimony that he reviewed records pertaining to the neck and palpated the muscle surrounding the neck, but did recall whether he performed range of motion testing of the neck renders his opinion of full recovery incompetent.

2. Whether a WCJ's credibility determination that "based upon my personal observation of the claimant's demeanor, as well as some contradictory evidence of record" is sufficient to satisfy the standards outlined in Daniels v. WCAB (Tristate Transport for credibility determinations.

Holding:

1. Even despite the employer's doctor's testimony that he did not recall performing range of motion testing in the neck, the WCJ was free to accept the employer's doctor's testimony that he did, in fact, examine the neck, and that based upon his exam and his review of records, he was able to render a judgment as to her recovery.

2. The WCJ's statement that his credibility determination was based upon his personal observation of the claimant would have been adequate to satisfy the standard enumerated in Daniels. Here, the WCJ not only cited this as a reason to find claimant not credible, he further noted specific inconsistencies in the testimony. Therefore, the credibility determination could not be deemed arbitrary or capricious.

Delaware County v. WCAB (Browne), No. 788 C.D. (Pa. Cmwlth. December 22, 2008).

Essential Facts:

Claimant's injuries were accepted via NCP as low back and right-sided neck strains, and later expanded by judicial decision to include cervical disc herniation, cervical radiculopathy, and bilateral carpal tunnel syndrome. Per that decision, the WCJ also denied the employer's Termination Petition. A subsequent Termination Petition was filed by the employer and granted by a different WCJ (prior to the Commonwealth Court's decision in the Lewis v. WCAB (Giles & Ransome, Inc.) case. In so doing, the second WCJ concluded that the employer had met its burden of proof based upon the full recovery opinions of its medical expert, who, based his opinions in part upon medical records dated **prior** to the first adjudication which denied the first termination petition, and who felt the herniations were attributable to pre-existing degenerative problems. The WCJ also made no finding as to whether there had been a decrease (other than the full recovery opinion of the employer's doctor) in claimant's physical disability.

Issue:

Whether the employer can satisfy its burden in light of the Supreme Court's determination in Lewis on successive termination petitions with an opinion of full recovery alone as appears to be permitted by the Act.

Holding:

The Act provides that the employer's burden in a termination proceeding is satisfied by a medical opinion of full recovery, however, under Lewis, if there has been an adjudication of ongoing disability, a simple finding of full recovery is not sufficient. The employer is obligated to present proof and the WCJ must render a finding that claimant's physical condition changed from the time of the last disability adjudication (i.e., if the employer based its last termination petition upon a full recovery opinion rendered on January 1, 2008, loses the petition on September 1, 2008 and obtains a new opinion of full recovery on January 1, 2009, there must be proof of a decrease in disability between January 1, 2008 and January 1, 2009). In addition, by accepting the employer's doctor's testimony which essentially disregarded the previously adjudicated work-related injuries (herniations), the WCJ erred in relying upon his testimony to find full recovery. The matter was remanded to the WCJ to consider the record in light of Lewis.

Miegoc v. WCAB (Throop Fashion/Leslie Fay), No. 948 C.D. 2008 (Pa. Cmwlth. December 3, 2008)

Essential Facts:

Claimant's work injury occurred after the Act was amended to include Section 306(b)(3), which requires that a Notice of Ability to Return to Work be submitted to the claimant in order for evidence to be considered in support of a Suspension Petition based upon available work. The WCJ denied the Suspension Petition, because the Notice of Ability to Return to Work was not issued or submitted into evidence; but the Board reversed stating that 306(b)(3) was a **substantive** provision, and therefore, could not be applied retroactively.

Issue:

Whether 306(b)(3) is a procedural provision, thereby allowing application to injuries occurring prior to its enactment.

Holding:

Legislation that merely alters procedure generally will be applied to pending proceedings. A statute affects substantive rights if it alters a cause of action, such as altering the factual basis for a claim. The court held that the notice provisions in 306(b)(3) do not alter the facts that an employer must prove in order to obtain a suspension of benefits, citing the Kachinski standards. The court felt that 306(b)(3) merely requires an employer to share new medical information concerning the claimant's capacity to work and to notify the claimant that this new information could affect the claimant's entitlement to benefits – this, to the court, did not affect the substantive rights of either party. The court then went on to find that "compliance with 306(b)(3) is a prerequisite for the presentation of evidence offered in support of a suspension petition." Thus, arguably, the court's determination that such a "prerequisite" does not alter the bases for the claim appears inconsistent.