J.D. Landscaping v. WCAB (Heffernan), 2011 Pa. Commw. Lexis 593 (December 2, 2011 Decided/Filed)

Issue:

Whether or not a Utilization Review determination that medication was not reasonable or necessary precludes a fatal claim petition when the claimant's death arises from medication that was deemed not reasonable or necessary.

Answer:

No. The Commonwealth Court concluded that the Utilization Review does not sever the causal relationship ties to the medication and the claimant's death and it is still therefore causally related.

Analysis:

The claimant sustained a work related lower back injury accepted through an NCP. Several years after the injury was accepted the employer filed a utilization review request. The utilization review determined that all treatment, including prescriptions for Sonata, Fentanyl, Oxycodone, Fentora, Docusate, and Lyrica, prescribed to the claimant were neither reasonable nor necessary.

Following receipt of the Utilization Review determination the claimant accidentally overdosed on the medication that was deemed not reasonable or necessary. Thereafter, the claimant's daughter filed her fatal claim petition, alleging that the claimant died of multiple drug intoxication.

At the lower courts it appears that a large part of the discussion related to whether or not the Utilization Review Determination was valid because of a late change of providers prescribing the medication.

However, this entire discussion was rendered moot when the Commonwealth Court determined that this inquiry is irrelevant because even a valid Utilization Review Determination does not sever the ties of causal relationship.

Conclusion and Practical Advise:

The Courts opinion that the Utilization Review Determination does not sever the ties of causal relationship has limited application based upon the above fact pattern. However, this case could have broader implications on more common scenarios. For example, would a claimant be entitled to a reinstatement if they are back to work but go back out of work following surgery which is deemed not reasonable or necessary? Claimant's counsel would likely make the argument that based upon this case, the disability would be related even if the Employer did not have to pay for the surgery.

Comcast Corporation v. WCAB (Jones), 2011 Pa. Commw. LEXIS 605 (November 16, 2011, Argued, December 12, 2011, Decided/Filed)

Issue:

Whether or not you are entitled to Supersedeas Reimbursement following the filing of a Petition to Review the NCP.

Answer:

Yes. The Commonwealth Court held that an Employer is entitled to Reimbursement from the SUpersedeas Fund following the filing of a Petition to Review because limiting reimbursement from the fund to only situations where the employer is seeking to reduce or end the payment of benefits due to some change in the claimant's status runs afoul of the express intent that reimbursement is available in any case. In doing so, the court specifically overturned the Determination in Home Insurance Companies v. Workmen's Compensation Appeal Board (Bureau of Workers' Compensation and Denny's Inc./C.B.R. Construction), 98 Pa. Commw. 249, 510 A.2d 1280 (Pa. Cmwlth. 1986) and its progeny.

Analysis:

The WCJ granted the Employer's Petition to Review the NCP, finding that claimant had concealed relevant medical information. The Judge held that the only remedy in such a case was "to nullify" the NCP. In the alternative, the WCJ held that if the NCP was correctly issued, Employer nonetheless satisfied its burden to show that the claimant had fully recovered from the work-related injury.

The Employer filed an Application for Supersedeas Fund Reimbursement pursuant to Section 443(a). Following challenge by the Supersedeas Fund, the reviewing Judge held that Employer was entitled to Fund reimbursement for compensation paid between the date Employer filed its Termination Petition (December 11, 2007) and the original WCJ Decision and Order (September 8, 2008). However, the reviewing Judge held that Employer was not entitled to reimbursement from the Fund for compensation paid during the period of time between the filing of the Review Petition (February 26, 2007) and December 11, 2007.

The Employer appealed to the WCAB who affirmed the Judge's Determination citing the Home Insurance line of cases.

The Commonwealth Court stated that Section 443a) of the Act could not be clearer and asserted that "i*n any case*" where (a) supersedeas is requested but denied, (b) payments are made as a result of the denial, and (c) it is determined that "such payments"—meaning, the payments that would not have been made had the supersedeas been granted—were not in fact payable, there shall be reimbursement from the Fund. The Commonwealth Court concluded that allowing the Board's decision to stand would mean that even where all of these elements are present, reimbursement from the Fund is available only in *certain* cases—*i.e.*, where the employer is seeking to reduce or end the payment of benefits due to some change in the claimant's status.

Limiting reimbursement from the Fund to these circumstances clearly runs afoul of the General Assembly's express intent that reimbursement be available "in any case."

Conclusion and Practical Advice:

The Commonwealth Court overturned long standing precedent to render this conclusion that reimbursement is entitled "in any case". Many attorneys are now interpreting this to mean that Supersedeas Reimbursement is permissible in all situations. However, the original claim in this case was still brought under Section 413 of the WC Act. The question still remains whether this application will apply to requests for Supersedeas brought under Section 306 of WC Act. There is a line of cases that state that Supersedeas is not warranted when originally brought under Section 306 (ie. Petition to Compel, or payment of medical following ultimately favorable UR determination by an appellate body).

School District of Philadelphia v. WCAB (Davis), 2011 Pa. Commw. LEXIS 612 (October 18, 2011, Argued, December 22, 2011, Decided/Filed)

Issue:

Whether or not a WCJ is permitted to deny a Pension benefit offset based upon "imprecision" in the testimony of the actuarial.

Answer:

No. The Commonwealth Court determined that the Employer sustained its burden that there was at least some aspects of the actuarial that were credible and the Judge needs to account for this fact.

Analysis:

Several years after the claimant sustained a work related injury, the employer filed its review offset petition. The employer asserted that as the claimant had retired from employment and was entitled to an offset of benefits reflecting her receipt of pension benefits. The WCJ denied the petition, and that result was affirmed upon review by the Board. The Commonwealth Court noted that the WCJ had found testimony by the actuarial regarding the employer's funding of some portion of the employee's pension benefits credible. However, the WCJ rejected the experts' testimony because of "imprecision" in calculating the amount of value of the pension benefit offset. The court reviewed judicial precedent with respect to requests for offset under § 71 involving defined benefit plans and found that the lack of precision with respect to actuarial evidence had been deemed acceptable. Accordingly, the WCJ and Board erred in rejecting the employer's claim for an offset.

The main focus of the case stemmed from the testimony relative to the contributions of non-vested employees who have terminated their employment. Essentially, the actuarial accounted for the contributions at a standard four percent rate of return but did not provide precise earnings from the non-vested employees. The Judge determined that this was not sufficient.

Conclusion and Practical Advice:

The court reversed the order of the Board, and remanded the matter with directions for the Board to remand the case to the WCJ. The WCJ was directed to issue an order directing the employer to take an appropriate offset based upon the credited actuarial evidence provided by the employer. From a practical standpoint, this case eliminates a potential all or nothing proposition. As such, the actuarial testimony will likely involve minor differences in interpretation of the employers contributions.

Edmondo Bemis v. WCAB (Perkiomen Grille Corp.), 2011 Pa. Commw. LEXIS 615 (June 10, 2011, Submitted, December 27, 2011, Decided/Filed)

Issue:

Whether the testimony by a medical expert that contains equivocal statement can be corrected by additional non equivocal assertions.

Answer:

Yes. The Commonwealth court concluded that the physicians testimony that contained statements such as "probably" and "likely" and "somewhat" will not render an opinion equivocal so long as the testimony read in its entirety is unequivocal and the witness does not recant the opinion or belief first expressed.

Analysis:

The claimant worked as a chef and manager and, while moving kegs of beer in the employer's walk-in cooler, experienced pain in his chest and cheeks. Two days later, while lifting a heavy pot of chili, the claimant again experienced chest pain. His wife took him to the hospital, where he stayed for two to three days. A few weeks later, he underwent quintuple bypass surgery. The claimant's medical expert had testified that the claimant's physical exertion resulted in a narrowing of his coronary arteries, which resulted in chest pain and myocardial damage. The WCJ accepted the testimony of the claimant and his medical expert as credible but concluded that the medical expert's testimony was equivocal and legally insufficient to establish a causal relationship between the claimant's lifting incidents at work and his subsequent heart attack. The Board affirmed the WCJ's Decision. The Commonwealth court held that the WCJ erred as a matter of law in concluding that the testimony of the expert was equivocal. The Commonwealth Court concluded that the claimant's medical expert did make several equivocal statements using qualifiers such as "probably", "likely", and "could have", but then later stated that the work incident "certainly appears" to have caused the condition. Then on cross the physician agreed that the claimant's plaque buildup was not caused by the injury, but the lifting caused an irritation of the arteries causing a decreased blood flow. The physician on re-direct finally stated that the physical excretion "certainly" resulted in the heart attack.

Conclusion and Practical Advise:

The Commonwealth Court stated that the entirety of the physician's statements as a whole need to be considered when assessing whether or not the doctor's testimony is equivocal and a few equivocal statements will not render the entire testimony to be equivocal. Practically, this could almost be a situation where the defense counsel asked too many questions and allowed the physician to organize his train of thought. It was not until re-direct that the physician truly clarified his opinion. This case serves as a reminder to have the IME physician, or defendant medical expert, clarify his opinion once again on redirect to resolve any potential equivocal statements.

Commonwealth of Pennsylvania, Department of Transportation and CompServices, Inc., v. WCAB (Larry Clippinger), 2011 Pa. Commw. LEXIS 627 (October 7, 2011, Submitted, December 30, 2011, Decided/Filed)

Issue:

Whether or not the Judge must consider all aspects of the statute including potential windfalls, alternative means and whether it is an indispensible devise when addressing the potential award of an "orthopedic appliance".

Answer:

Yes. The Commonwealth Court reversed the Determination of the WCJ because the Judge failed to consider whether the "orthopedic appliance" (in this case an in home therapy pool and an addition to the claimant's home to house the pool) would constitute an indispensible devise, a windfall or whether there were alternative means.

Analysis:

The claimant was seeking the installation of an in home therapy pool that contains a treadmill and a lift to get in and out of the pool. The claimant was treating at a Physical Therapy pool, but had difficulty changing, getting into the facility and did not feel safe on the pool surfaces. The claimant filed a penalty petition and alleged that the employer refused to pay medical bills related to the treatment of the injury. He also sought review of medical treatment and/or billing, and filed a UR request regarding a home aquatic therapy pool. The WCJ granted the employee's review and penalty petitions, and denied the employer's UR review request upon finding that at-home aquatic therapy was reasonable and necessary. The Board affirmed. On further review, the court found that the WCJ failed to make essential findings under § 306(1) of the Workers' Compensation Act, 77 Pa. Stat. Ann. § 531(1), regarding an indispensible device, windfalls, and alternative means, such that the "orthopedic appliance" portion of the decision could not stand. The Commonwealth Court determined that the claimant was working full time and was not home bound. The claimant was capable of getting to physical therapy and the potential for injury by being bumped or slipping in the parking lot was the same concern as many workers compensation claimants. There was nothing that specifically precluded the claimant from receiving this treatment. They also determined that the Judge summarily dismissing the potential windfall for the claimant was an error.

Conclusion and Practical Advice:

The Commonwealth court reversed the decision of the Board with respect to the "orthopedic appliance" portion of the award, and the matter was remanded for further fact-finding on that issue. This case could prove to be very beneficial if you are litigating cases that requires the installation of an "orthopedic appliance". This significantly impacts the claimant's ability to get a hot tub or potentially other electrical stimulation units. Please also note that the Commonwealth Court did affirm in part the WCJ's award of penalties and unreasonable contest fees for the failure to pay for medication. The case does contain some good language for penalty, unreasonable contest, and litigation cost issues.