New Enterprise Stone & Lime Co., Inc., and PMA Mgmt. Corp. v. WCAB (Kalmanowicz) - **1492 C.D. 2012 – December 6, 2012**

Issue: Whether the Workers' Compensation Appeal Board (Board) erred by determining that Claimant proved a physical/mental injury and was therefore entitled to compensation benefits?

Answer: No. A claimant's intimate involvement in a fatal accident is sufficient to constitute a "physical stimulus" to support a compensation award and the application of the physical / mental standard.

Analysis:

Claimant was employed as an equipment operator for Employer since April 2002.On June 1, 2009, Claimant was operating a tractor attached to a trailer for Employer along a roadway traveling fifty-five (55) miles per hour. While proceeding through a gradual turn, Claimant noticed a vehicle in the oncoming lane. The oncoming car's driver appeared to be putting something down or picking something up, then sat upright and veered into Claimant's lane. Claimant drove onto the shoulder in order to avoid impact, but the vehicle struck his trailer head-on. The driver of the oncoming vehicle was pressing himself toward the windshield of his car and looking at Claimant when the vehicle and the tractor trailer collided.The other driver died upon impact.

After nearly four hours at the accident scene, Claimant was taken to the emergency room by Employer's secretary where he was examined. Claimant was diagnosed with left-sided chest wall and right wrist contusions and left shoulder tenderness/discomfort, and was released. The claimant continued to work for Employer in the months following the accident and eventually was to resume his duties as a driver.

In March 2010, Claimant began treatment for post-traumatic stress disorder (PTSD). Claimant filed a Claim Petition alleging that he sustained the PTSD as a result of the June 2009 work-related accident. Employer denied Claimant's allegations. After a number of hearings, the WCJ awarded Claimant benefits for physical/mental injury manifested as PTSD resulting from the "triggering physical event" of the June 1, 2009 accident. Claimant testified that, during the accident, the other driver "had his hands on the steering wheel with his face pressed up against the windshield looking directly into my face at the point of impact. And I can't get that out of my head. I just can't."Based upon his observation of the other driver, Claimant stated that "he knew exactly what he was doing. . . The more I veered off the road the more he came at me." The Board affirmed the WCJ's decision. Employer appealed to the Commonwealth Court.

On appeal, Employer argued that the Board erred by applying the standard for a physical/mental injury, as opposed to a mental/mental injury, and that Claimant failed to prove either. Employer specifically contended that a physical/mental injury cannot be established based upon fear of serious injury and knowing that someone died, but Claimant must also have suffered physical injuries that required medical treatment.

In citing *Washington*, the Court explained that psychological injuries fall into three categories: (1) mental/physical—where a psychological stimulus causes physical injury; (2) physical/mental—where a physical stimulus causes a psychic injury; and (3) mental/mental—where a psychological stimulus causes a psychic injury. These categories require different standards of proof, the last being the most rigorous, requiring proof of abnormal working conditions.*Washington v. Workers' Comp. Appeal Bd. (State Police)*, 11 A.3d 48, 52 n.2 (Pa. Cmwlth. 2011) (quoting *City of Phila. v. Workmen's Comp. Appeal Bd. (Brasten),* 682 A.2d 875, 878 n.4 (Pa. Cmwlth. 1996),

The Court ultimately concluded that it was clear that Claimant suffered a significant physical stimulus in the form of the head-on collision causing the death of the other driver before Claimant's eyes, and disabling his loaded tractor-trailer causing it to descend an embankment. Claimant's intimate involvement in the fatal accident was sufficient to constitute a "physical stimulus" and to support a compensation award. As such, the Court held that the physical/mental analysis was properly applied. Thus, the Board did not err by affirming the WCJ's decision that Claimant proved a physical/mental injury.

Finally, the Court disagreed with Employer's contention that the mental/mental standard should have been applied because in mental / mental cases, the psychological injury is not caused by a physical stimulus or triggering physical event.

Conclusion and Practical Advice:

As the Court made clear, being intimately involved in an accident is likely sufficient to warrant the application of the physical / mental standard. While the claimant in this case did require medical treatment following the accident, based on the Court's discussion of the issue it is at least possible that a claimant who was intimately involved in an accident may be able to appeal to the physical / mental standard, even if the claimant did not require medical treatment.

***B. Walsh, D.O. v. Bureau of Workers' Compensation Fee Review Hearing Office (State Workers' Insurance Fund)* - 1023 C.D. 2012 – December 4, 2012**

Issue: Whether a postmark is sufficient evidence to rebut the presumption that a check for medical payments and, therefore, notice of the change of coding, was received close to the check's origination date when a Petitioner seeks to file an application for fee review?

Answer: Yes. The Court determined that a postmarkwas sufficient evidence to rebut the presumption that the check at issue, and therefore notice of the change of coding, was received closer to the check's origination date.

Analysis:

Following a February 16, 2009 work injury, Claimant sought treatment with Petitioner on five different occasions in early 2009. On March 3, 2010, Petitioner submitted a bill in the amount of $15,690.00 for services provided from March 2009 through May 2009. On March 29, 2010, the insurance carrier issued a payment of $240.00 based upon its determination of the proper coding for the services provided by Petitioner, however, the envelope in which the check was sent was postmarked June 15, 2010. A letter detailing the downgrade of benefits dated June 16, 2010, was also sent to Petitioner.

On June 23, 2010, Petitioner filed an application for review seeking an adjudicatory review of the payment. The application was denied by the Department because it determined that Petitioner's application was untimely because it was not filed within thirty (30) days of the payment of the reduced amount. Petitioner then filed an application for fee review which was dismissed by the hearing officer as untimely. The Petitioner again appealed.

Despite the fact that the insurance carrier did not oppose the Petitioner's prayer for relief, the Court still addressed the merits of the case. In pertinent part, the Court explained that an application for fee review must be filed within 30 days of receipt of being notified of the downgraded payment. Where it is alleged that the notice was not received or, as in this case, received more than two months after being issued, application of the common law "mailbox rule" is appropriate.

In this case, Petitioner's application was deemed untimely because the check from the mail carrier was dated March 29, 2010. However, the envelope which contained the check was postmarked June 15, 2010. The Court determined that the postmarkwas sufficient evidence to rebut the presumption that the check and, therefore, notice of the change of coding, was received closer to the check's origination date.

Conclusion and Practical Advice:

In a fee review case, the Court can look to more than the date of payment reflected on the check when determining whether an application for review is timely. Further, the common law mailbox rule applies when assessing the timeliness of payments for medical treatment and the subsequent application for review of same.

J. Clark v. L&I - 2500 C.D. 2011 – **December 7, 2012**

Issue: Whether records relating to the identities of employers and claimants of unemployment compensation (UC) hearings must be disclosed when requested based on the interplay between Unemployment Compensation Law, the Right to Know Law (RTKL), and the Department of Labor and Industry's Regulations (Department or Regulations)?

Answer: No. The names of employers and claimants, along with other identifying information, are confidential and may only be disclosed pursuant to the provisions of the Department's Regulation. Therefore, such records are not presumed to be "public records" under the RTKL. Further, while UC hearings are open to the public, records of those hearings can remain confidential.

Analysis:

An attorney from Florida (Requestor) submitted a request to the Department of Labor and Industry for all records relating to the identity of employers and claimants of UC hearings held by the Department during a particular week. The Department denied the request.

On appeal to the Commonwealth Court, Requestor argued that the records sought: (1) should be disclosed pursuant to Dept. Regulation 61.25(a)(3) because Requestor seeks the information in order to ensure the proper administration of the UC Law and the records are disclosable under Federal regulations; (2) should only be redacted to exclude information that is confidential under Dept. Regulation 61.25, not withheld altogether; (3) are disclosable pursuant to Section 101.21(c) of the Department's regulations, which requires that UC hearings be open to the public thereby making the requested records public information; and (4) that the OOR erred in holding that the Request required the Department to create a record that did not already exist.

In response, the Department argued that, in addition to Dept. Regulation 61.25, the information sought by Requestor is also exempt from disclosure pursuant to Section 708(b)(28) of the RTKL, which exempts from disclosure the identities and information about individuals applying for social services.

The Court went on to explain that Section 305(a) of the RTKL provides that a record in the possession of a Commonwealth agency is presumed to be a public record, disclosable under the RTKL, unless the record is exempt from disclosure under any other State law or regulation. Dept. Regulation 61.25(a)(2)(i) provides that unemployment compensation information is confidential and may be disclosed only as permitted under the regulations.Regulation 61.25(a)(1)(i) defines the term "unemployment compensation information" as including information pertaining to the administration of the UC law which reveals the name or any other identifying particular about an employer, employee or claimant or which could foreseeably be combined with publicly available information to reveal any identifying particular. Thus, pursuant to Dept. Regulation 61.25, the names of employers and claimants, along with other identifying information, are confidential and may only be disclosed pursuant to the provisions of Dept. Regulation 61.25(a). Therefore,such records are not presumed to be public records under Section 305(a).

With regard to Section 61.25(a)(3)(vi), Requestor argued that Section 603.5 of Title 20 of the Code of Federal Regulations permits the disclosure of UC Referee decisions under Regulation 61.25(a)(3)(vi). Federal Regulation 603.5(b) states thatdisclosure of appeals records and decisions, and precedential determinations on coverage of employers, employment, and wages, is permissible provided all social security account numbers have been removed and such disclosure is otherwise consistent with Federal and State law. However, Federal Regulation 603.5 also provides that such disclosure is only permitted if authorized by State law. The Court explained that Requestor did not address this provision of the Federal regulation and identifies no provision of Pennsylvania law that authorizes the disclosure described in Federal Regulation 603.5(b).

The Court also stated that Section 102 of the RTKL, defines "social services" to include UC benefits. Thus, records identifying UC claimants, including a Referee's decision to grant, deny, reduce or restrict benefits, is exempt from disclosure under Section 708(b)(28). Section 102 defines a "public record" as a record of a Commonwealth agency that: (1) is not exempt under Section 708; or (2) is not exempt from being disclosed under any other Federal or State law or regulation.Because the records Requestor seeks are confidential pursuant to Regulation 61.25 and are exempt from disclosure under Section 708(b)(28), they are not public records and are not, therefore, subject to disclosure.

Because the requested records are confidential under Regulation 61.25, these records are notpresumed to be public records pursuant to Section 305(a) of the RTKL, and they do not fall within the definition of "public record" found at Section 102. Therefore, they are not subject to mandatory redaction pursuant to Section 706, which applies only to publicrecords.

Finally, the Court addressed Requestor's argument that, because the Department's regulations provide that UC hearings are open to the public, the information he seeks is public information that the Department may not withhold. The Department's Regulation 101.21(c) provides that UC Referee hearings shall be open to the public. In addition, Requestor argued that there is a public interest in the right to attend trials and other civil cases. Pursuant to this regulation, members of the public could have attended the hearings regarding which Requestor seeks records. The Court ultimately held that the regulations of the RTKL make the *records* of these hearings, although not the hearings themselves, confidential.

Conclusion and Practical Advice:

When attempting to request records pursuant to Federal Regulation 603.5(b), keep in mind that such a request is only enforceable if it is also authorized by State law. Further, the fact that a hearing is open to the public, during which the information requested may be disclosed and discussed, does not mean the records which contain that same information cannot be confidential.