

MEMORANDUM

Neff v. WCAB (Pennsylvania Game Commission), No. 130 C.D. 2014 (Cmwth Ct. January 8, 2015)

Issue(s):

- (1) ***Is an IRE premature and invalid as a matter of law when there is a reasonable potential for the Claimant to undergo future surgery that could cause a change in her condition?***
- (2) ***Is Claimant at MMI in such a scenario?***

Answer:

Maybe. Whether a Claimant has reached MMI is an inherently medical determination, which must be subject of medical testimony. Provided that the medical expert considers the appropriate factors required by the Guides when rendering a determination that the Claimant has reached MMI, a WCJ may rely on the expert's determination that a Claimant has reached MMI. If the medical expert finds that the Claimant was at MMI, and then concludes that the Claimant's degree of impairment is less than 50%, the IRE is valid (obviously the Claimant must have received 104 weeks of TTD as well in order for the IRE to be appropriate).

Analysis:

Claimant had chronic lateral epicondylitis of the right elbow. An IRE was performed, and, after finding the injured worker had reached MMI, the examiner found a 1% whole body impairment (WBI). Defendant filed a Petition to Modify, to change the status of the injured worker to partial disability from total. The Petition was granted by the WCJ and later affirmed by the WCAB.

In appealing the case to the Commonwealth Court, Claimant argued that she could not be found to be at MMI because the IRE examiner "agreed that surgery for Claimant's elbow condition would 'be a reasonable treatment option' and . . . he did not disagree that there was a 25% chance that the surgery would help with Claimant's problems."

The Court disagreed and affirmed the decision of the WCJ largely based on the underlying credibility determinations made by the WCJ. The IRE examiner testified that the injured worker had reached MMI, and that was found by the WCJ as credible. The examiner had considered the possibility of surgery in determining whether MMI had been reached and he still found that MMI had been reached. The Court refused to disturb a determination of MMI or otherwise second guess the weight of the medical evidence – the evidentiary weight and credibility are solely up to the WCJ as fact-finder.

Conclusion and Practical Advice: When litigating a Modification Petition based on an IRE it is important to elicit testimony from the examiner regarding Claimant's MMI status and how that is determined. The Court relied heavily on the examiner's medical opinions and the WCJ finding of credibility when determining whether or not MMI had been properly established.

Mayo v. WCAB (Goodman Distribution, Inc.), No. 683 C.D. 2014 (Cmwlth Ct. January 8, 2015).

Issues: Is a Claimant's former counsel entitled to a fee, based on quantum meruit, out of Claimant's settlement proceeds?

Answer: No. Former Counsel was discharged prior to the C&R hearing and was not entitled to any portion of the settlement proceeds because his fee had been adequately protected.

Analysis:

Claimant filed a claim for workers' compensation against his employer, Goodman Distribution Inc., after injuring his right knee and lower back in February 2009. A WCJ granted the claim petition and awarded benefits with a start date of March 6, 2009. A contingent fee agreement was also approved at that time under which Claimant's former counsel would receive 20% of all compensation payable to Claimant as long as he was receiving compensation.

In February 2012 a petition for approval of a compromise and release agreement was filed.

Two to four months before the hearing regarding that agreement, Claimant discharged Former Counsel and hired New Counsel.

A WCJ approved the agreement, but declined to address Former Counsel's challenge to the attorney fees. In a later decision, the WCJ upheld Claimant's fee agreement with New Counsel, noting that Former Counsel received 20% of the Claimant's benefits from the date of injury through the compromise and release hearing, despite being terminated 2-4 months prior to the hearing.

In his appeal, Former Counsel argued that he should get part of the fee for the agreement because he represented Claimant for the majority of the case, completed most of the work on the claim and was negotiating a settlement when he was discharged.

That decision relied on a Superior Court ruling in *Mager v. Bultena* which said once a contract has been severed, recovery must be based on the work performed on the contract up to that point.

The court looked to an affidavit from Former Counsel that itemized his time spent on the case, which reasoned that he had spent 36.6 hours compensated at a rate of \$300 per hour, and thus was owed \$10,980. However, because he already received more than \$14,000, his fee was adequately enforced and protected.

Conclusion and Practical Advice:

Fee agreements between Claimant's and their counsel should not be taken for granted by Defendants in settlement proceedings. Fee agreements that are not clear about what happens to fees after a termination of counsel can cause significant litigation after a case is settled. Such litigation is highly fact specific and Defendants should be aware of the possibility for a need for representation in such litigation, as Defendant's could be on the hook to pay additional counsel fees after a settlement.
