THE HARTWELL
LAW OFFICES, LLP

JULY 2016 CASE LAW UPDATE

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Byfield v. W.C.A.B. (Philadelphia Housing Authority), ___ A.3d ___, (Pa. Cmwlth . July 26, 2016).

Issues: Whether a Petition to Review directly to the WCJ is appropriate after the WCAB failed to award counsel fees or whether that needs to be appealed to the Commonwealth Court.

Answer: It is not proper to file a Petition with the WCJ. The proper recourse is to appeal the determination to the Commonwealth Court.

Analysis: The claimant prevailed on a Suspension Petition for failure to undergo reasonable medical treatment. However, the WCJ did not award fees and costs associated with defending the Petition. The Employer filed a Petition to the WCAB to which the WCAB affirmed the Decision and Order of the WCJ. The WCAB again did not award costs and fees. Neither party appealed the case to the Commonwealth Court.

The claimant, in lieu of appealing the case to the Commonwealth Court, filed a Petition to Review requesting an award of costs and attorney's fees incurred by Claimant in successfully defending a suspension petition filed by the Employer.

The WCJ denied the claimant's Review Petition asserting that the proper recourse would have been to either file an Appeal to the Commonwealth Court or seek a rehearing before the WCAB.

The WCAB affirmed the WCJ Decision and the Claimant reviewed to the Commonwealth Court. The Commonwealth Court affirmed the WCJ Decision and concluded that the claimant's proper recourse was to Appeal or seek a rehearing.

Conclusion and Practical Advise: The instant case provides further credence to the notion that all issues need to be resolved and addressed via the appellate process. Take caution that collateral estoppel could be applicable on many issues.

Dorvilus v. W.C.A.B. (Cardone Industries), 2016 WL 4066900 (Pa. Cmwlth July 29, 2016) (please note this is an unreported determination).

Issues: Whether the WCJ properly utilized the correct standard for a Petition to Review a UR determination and whether the WCJ had substantial evidence to support the conclusion that the claimant's treatment was not reasonable or necessary.

Answer: Yes.

Analysis: Employer submitted a UR seeking a review of all treatment by Providers from January 4, 2013 and ongoing. In April 2013, the independent UR reviewer issued a UR Determination finding the physical therapy treatment provided at the frequency of two to three times per week was unreasonable and unnecessary. However, Reviewer indicated treatment at a frequency of two to three times per month as needed would be reasonable and necessary.

Providers filed petitions for review of the UR Determination. Claimant testified the treatment was necessary, and he believed it brought him relief. Providers each submitted a report recommending continued treatment at the current frequency. Reviewer opined Providers' treatments were unreasonable and unnecessary because Claimant received hundreds of treatments since 2010, and according to the treatment notes, his pain remained at a 9–10, indicating he did not experience relief. Reviewer recommended a trial period of no treatment to discern whether Claimant's condition would deteriorate.

The WCJ denied the petition to review the UR Determination and determined Employer was not responsible for paying the bills for Providers' treatment from January 4, 2013 and ongoing. The WCJ credited the opinion of Reviewer over that of Providers. She specifically rejected Claimant's testimony that he "feels better" because it was inconsistent with the treatment notes Providers recorded at the time of treatment. The WCJ noted that despite receiving treatment for more than two years, the treatment notes reflect Claimant did not experience significant improvement either subjectively or objectively as he continued to experience pain at the 9–10 level. Providers appealed.

The Board affirmed, reasoning the findings were supported by the record. The Board concluded the WCJ's opinion was well-reasoned and she explained her credibility determinations.

The Commonwealth Court in affirming the Decision of the WCJ provided a detailed assessment of the legal standard for a UR determination, the proper burden of proof and burden of evidence as well as the standard for a reasoned decision.

Conclusion and Practical Advise: The Commonwealth Court concluded that the WCJ did not err in relying upon the medical records as evidence that the claimant's condition did not improve with over two years of treatment. This case is not a reported Decision but the assessment of the legal standard is highlighted. This is another case for evidence to support that the subjective reporting of pain complaints that have not changed can support a UR determination that the treatment is not reasonable or necessary.

Rothgaber v. W.C.A.B. (Weaber, Inc.) 2016 WL 4066900 (Pa. Cmwlth July 29, 2016) (please note this is an unreported determination).

Issues: Whether the WCJ properly determined that the claimant was fully recovered and the treatment was no longer reasonable and necessary.

Answer: Yes.

Analysis: Claimant suffered work-related neck and left shoulder injuries in 2001. Claimant underwent cervical fusion surgery at C5–C6 in 2005. In 2007 the claimant was entitled to partial disability benefits based upon a light-duty position Employer made available to Claimant. The Employer successfully litigated one UR determination that mitigated the claimant's use of medication in 2011. In May of 2013 Employer filed another UR request for steroid injections, Theramine, OxyContin (20 mg) and Oxycodone (5mg) prescribed since April 23, 2013. However, the UR review for that treatment determined the medication was reasonable and necessary. Employer appealed that determination.

On or about August 1, 2013, Employer filed another request for utilization review (UR) of Claimant's prolotherapy treatments which the reviewer determined to be not reasonable or necessary.

On October 7, 2013, Claimant underwent another IME with Dr. Peppelman resulting in Dr. Peppelman's declaration that Claimant had fully recovered from his work-related injury, and that Dr. Blakemore's prolotherapy and Dr. Hartman's Theramine treatments, narcotics prescriptions and steroid injection referrals were not reasonable and necessary.

On November 14, 2013, Employer filed its Termination Petition, averring that Claimant had fully recovered from his May 2001 work injury as of October 7, 2013, and was able to return to work without restriction.

Employer's UR Petitions and Termination Petition were consolidated for purposes of litigation and decision. The WCJ granted Employer's UR Petitions and Termination Petition. Claimant appealed to the Board which affirmed the WCJ's decision. Claimant appealed to the Commonwealth Court who affirmed the Decision as well.

Conclusion and Practical Advise: The Commonwealth Court concluded that evidence existed to justify the determination of the WCJ. This is essentially a Universal Cyclops Decision and really makes no changes to a large body of existing cases. However, this case serves as a great reminder that persistence can prove fruitful. Ultimately, this was a case where the court determined that the claimant was fully recovered 12 years after the original injury and 8 years after the cervical fusion.

City of Williamsport v. W.C.A.B. (Cole), 2016 WL 3909591 (Pa. Cmwlth July 18, 2016) (please note this is an unreported determination).

Issues: Whether the Claimant established that Decedent had direct exposure to a known carcinogen classified as a Group 1 carcinogen by the International Agency for Research on Cancer (IARC) as required by Section 301(f) of the Act.

Answer: No.

Analysis: Claimant filed a claim petition, alleging that Decedent's death from gastric cancer in October 2011 was causally related to his employment with Employer as a firefighter from 1980 until the time of his death.

Claimant testified that she saw Decedent approximately 15 times after a fire when he smelled smoky. Claimant presented the testimony of an expert witness, Jonathan L. Gelfand, M.D., who opined that Decedent had exposure to a variety of carcinogens during his career as a firefighter, including asbestos, and that his work as a firefighter and these exposures were a substantial contributing factor to his death from gastric cancer.

Employer presented the testimony of David Prince, M.D., who testified it was his opinion that Decedent's development of gastric cancer was not related to firefighting. Dr. Prince testified that epidemiologic evidence does not support a proven risk of gastric cancer for firefighters.

The WCJ granted the fatal claim petition under Section 108(r), concluding that Claimant had established that Decedent contracted gastric cancer as a result of direct exposure to smoke from municipal fires that contained Group 1 carcinogens as recognized by the IARC. The WCAB affirmed the WCJ Decision. Employer petitioned to the Commonwealth Court.

The Commonwealth Court addressed that in Act 46 of 2011, the General Assembly enacted Sections 108(r) and 301(f), creating a new occupational disease provision to provide a new presumption of compensable disability for firefighters who suffer from cancer. Section 108(r) recognizes the occupational disease of "cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer." 77 P.S. § 27.1(r). Section 301(f) provides, in relevant part, that:

> Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties, who can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and have successfully passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer. 77 P.S. § 414.

Employer argues that Claimant did not present evidence sufficient to satisfy the first requirement of Section 301(f) that she establish Decedent had "direct exposure" to a carcinogen recognized as Group 1 by the IARC.

In finding that Claimant had established that Decedent's gastric cancer was causally related to his workplace exposure to Group 1 carcinogen, the WCJ credited the testimony of Claimant and the testimony of Dr. Gelfand and found the testimony of Dr. Prince to be not credible. The WCJ also found credible the IARC monograph cited by Dr. Gelfand.

The Board affirmed concluding that Claimant's lay testimony was sufficient to establish exposure to smoke and that Claimant was not required to show consistent exposure to a Group 1 carcinogen but only direct exposure under Section 108(r). The Board further concluded that Dr. Gelfand properly relied on his knowledge of the firefighting occupation and Claimant's testimony regarding Decedent's exposure to smoke and that the WCJ did not err by considering the IARC monograph as it related to Dr. Gelfand's testimony.

The Commonwealth Court in reversing the WCJ and WCAB concluded that the record is devoid of competent evidence that Decedent had any direct exposure to a known Group 1 carcinogen as required by Section 301(f) of the Act. The sole evidence before the WCJ regarding Decedent's fire department exposure was Claimant's testimony that Decedent came home from fires smelling of smoke and with an ashy appearance. While such testimony would be sufficient to show that Decedent was exposed to smoke and ash while working for Employer, by itself it was insufficient to show exposure to asbestos or any other specific Group 1 carcinogens within the smoke. Claimant did not admit into evidence any Employer fire department logs, incident reports or building inspection records relating to fires Decedent fought. Nor did Claimant attempt to introduce the testimony of any fire department personnel or any other individuals familiar with the construction of buildings in Williamsport upon which the WCJ could presume carcinogens in the fires extinguished by Decedent.

While Dr. Gelfand did testify that Decedent was exposed to Group 1 carcinogens, his testimony clearly lacks a proper foundation upon which that conclusion could be based. Dr. Gelfand did not meet with or examine Decedent, speak with Claimant, review Decedent's medical or employment files or speak with anyone at Employer's fire department regarding the type of fires that were fought.

The evidence presented did not establish direct exposure to Group 1 carcinogens. The question of whether a worker has been exposed to hazardous material in the workplace for the purpose of Section 108 of the Act is a question of fact for the WCJ and the claimant may rely on lay testimony. However, Dr. Gelfand had no knowledge of the facts of Decedent's career.

The Commonwealth Court concluded Claimant did not present substantial, competent evidence that Decedent had "direct exposure" to a known IARC Group 1 carcinogen as required by Section 301(f) and therefore the WCJ improperly granted the claim petition under Section 108(r).

Conclusion and Practical Advise: The Commonwealth Court concluded that the Claimant failed to sustain her burden. The best advice is to be aware that these cases even with the Act 46 presumptions are not a guaranteed win for the claimant. There are several steps that can be utilized to defend these cases. The claimant must jump through hoops. The Chartwell Law Offices has taken point on this intricate area of the law and has done a tremendous job in minimizing the impact of Act 46 on municipalities.