CASE LAW UPDATES
July, 2008

HCR ManorCare v. WCAB (Bollman), July 2, 2008, 2008 Pa. Commw. LEXIS 314

Does a WCJ have jurisdiction to reassign a UR request when the medical provider fails to submit medical records and the Verification Form required by 34 Pa. Code §127.459(c)?

A WCJ has jurisdiction to decide the issues of the adequacy of the URO's pursuit of the Verification Form, the URO's compliance with 34 Pa. Code §127.464(b), and whether the provider complied with that section.

Employer filed a request for Utilization Review for Claimant's medical treatment of Dr. LoDico. The URO assigned by the BWC obtained Dr. LoDico's records. However, because the required Verification Form did not accompany the records, the URO did not forward Dr. LoDico's records to utilization reviewer to perform the UR (the medical records were returned to Dr. LoDico). Because the utilization reviewer received no medical records from Dr. LoDico which could be reviewed, a UR Determination was issued concluding that the treatment by Dr. LoDico was neither reasonable nor necessary. Claimant then filed a UR petition.

Evidence supporting the URO's efforts to obtain both the medical records and the required verification form was submitted to the WCJ. However, the URO miscalculated the due date for Dr. LoDico to submit the medical records and verification form. Further, Dr. LoDico's office attempted to obtain the verification form from the URO, but never received the same.

The WCJ ordered that there should be another UR performed in making the following finding:

> 8. Dr. Lodico's office should have requested the verification form by a telephone call or by fax when the requested record was mailed on November 17, 2005, one day before the requested due date and six days before the expiration of the 30-day period. Ms. Sinkiewicz [URO] could have contacted Dr. Lodico's office by telephone, as she had three times previously, when she received Dr. Lodico's records on November 2, 2005, within the 30-day period but without the verification form. She may have accepted the November 18, 2005 date which she stated in her letter of October 24, 2005 as the end of the 30-day period. In any event she elected to return Dr. Lodico's records on the same date that she elected to assign the review to Dr. Johnson [UR Reviewer], November 22, 2005.

The WCAB affirmed as did the Commonwealth Court. The Court held that the WCJ decided whether the URO's request for the medical records was properly perfected and not the merits, the WCJ had jurisdiction to order the records to be re-reviewed by the URO. It is unclear whether or not the same URO would perform the review. However, this Opinion makes clear that not only must the provider timely submit the medical records, but the Verification Form must also be timely submitted before the URO has to send the records to the UR reviewer for a review on the merits. Failure of the provider to perfect its submissions to the URO should result in a "no records no" and bar the WCJ from deciding the case on the merits.

Gorman v. WCAB (Kirkwood Construction), July 9, 2008, 2008 Pa. Commw. LEXIS 316

Can an Employer enforce its subrogation rights after the parties have resolved the claim by C/R when the Claimant notifies the Employer of his third party claim after the WCJ approves the C/R and there was no reservation of the Employer's subrogation rights in the C/R Agreement?

The Claimant has the duty to notify the Employer of a potential third party claim before the Employer can waive its subrogation right.

Claimant was injured at work on October 27, 2000, when a nail was ejected from a nail gun and hit him in the right eye. The WCJ entered an order approving the C&R on February 21, 2002.

On January 13, 2005, Employer filed a petition to review compensation benefit offset seeking a subrogation credit due to a third party recovery. Employer alleged that after receiving approval of the C&R in 2002, Claimant filed a third party action. Employer alleged that it was not informed of the third party action until September 2004 when contacted by Claimant's counsel inquiring as to whether or not the subrogation lien would be waived.

Claimant testified that prior to his C/R, he was never contacted by the attorney he discussed his third-party claim with and that "[t]wo years passed. I had no one representing me and I assumed that was the end of it." After being contacted by another attorney in October 2002, Claimant filed a third-party claim in December 2002. In December 2004, Claimant received a settlement.

The WCJ set aside the C/R agreement in finding that there was a mutual mistake with respect to the term of the C/R agreement addressing subrogation. The WCJ further found that the Employer was entitled to enforce its subrogation lien.

The WCAB reversed in finding that because the mutual mistake was not in existence when the parties entered into the C&R, it should not be set aside. However, the WCAB opined that the Employer did not waive its subrogation rights because the Employer was unaware of the possibility of the third party action until after the C&R was approved. On this issue, the WCAB remanded back to the WCJ for calculations regarding the amount of the subrogation lien.

The WCJ ordered that he Employer was entitled to $71,191 as reimbursement of its lien.

The Claimant appealed to the WCAB on the waiver issue. The WCAB noted that it had already ruled upon this issue but since the ruling also included a remand, the Claimant was unable to appeal at the time. Therefore, the WCAB simply affirmed the WCJ's Decision so Claimant could appeal to Commonwealth Court.

In affirming, the Court reasoned that there was no evidence establishing that the Employer waived its subrogation rights. Both parties agreed that a third party action was not contemplated at the time of the C/R. As such, Employer could not have bargained away its subrogation rights as part of the settlement agreement. The fact that Employer stated in the C/R that there was no lien or potential lien for subrogation does not indicate a waiver of a right to subrogation. Rather, it merely indicates Employer's belief that a lien or potential lien did not exist, a belief that Claimant agrees was correct at the time.

Prebish v. WCAB (DPW/Western Center), July 14, 2008, 2008 Pa. Commw. LEXIS 320

Can a Termination Petition be granted four years after litigating a prior Termination Petition in the absence of evidence of a change in the Claimant's physical condition since the prior adjudication?

***In a termination proceeding, a WCJ must make a finding with respect to whether or not the Claimant's condition has changed since the last adjudication. If there is no evidence of change, a WCJ would likely find that the petition is barred by res judicata and collateral estoppel in reliance on Lewis v. WCAB (Giles & Ransome, Inc.),* 919 A.2d 922 (2007).**

Claimant's injury was broadly accepted via NCP and described as a "right knee injury". Claimant previously unsuccessfully attempted to amend the injury description to include a "left and right knee compression injury "to patella and other structures."" Employer's first Termination Petition alleging a full recovery as of June 6, 2000 was denied in April 10, 2002. Employer filed another Termination Petition in November 2004 alleging a full recovery as of September 28, 2004. The WCJ granted the petition in finding that the Employer's evidence relied upon an examination and medical records that post-dated the first adjudication. Further, Employer's medical expert opined that the Claimant's knee condition pre-dated the work injury was not work-related and that this condition could explain the Claimant's symptoms in both knees. The second WCJ provided a detailed explanation as to why res judicata and collateral estoppel did not apply.

The WCAB affirmed but Commonwealth Court remanded on the limited issue of whether or not the Employer presented evidence of a change of Claimant's physical condition from the last adjudication in compliance with the Lewis case which was not issued at the time of the second Termination Petition. Finally, the Court stated that "A fact-finder could determine that Claimant's condition did not change materially since the time of First WCJ's decision; alternatively, a fact-finder could determine that Claimant's condition changed since First WCJ's decision, returning to a baseline related solely to the preexisting arthritis present in both knees." This final statement provides guidance relative to what the Court is looking for in the record.

Allegheny Power Service Corp. and Accordia Employer Service, Inc. v. WCAB (Cockroft), July 22, 2008, 2008 Pa. Commw. LEXIS 330

Can evidence of earning power be used to modify benefits payable under § 306(c)(23)?

Payments made under § 306(c)(23) are paid as if the Claimant were totally disabled under § 306(a) regardless of whether or not the Claimant is actually working; the WCAB has sole discretion in this area.

On January 19, 1995, Claimant sustained severe electrical burns to both of his upper extremities when he made contact with a charged electrical line. As a result of the injury, Claimant's right arm was amputated just below the elbow. Claimant's left hand also was badly injured, and the third and fourth fingers of that hand were removed. Because of damage to his tendons, Claimant's left index finger was relocated to the site of the fourth finger. However, this relocation was unsuccessful, and Claimant has virtually no use of this transplanted finger.

Pursuant to a notice of compensation payable, Claimant received total disability benefits from January 1995 through May 1997. On May 19, 1997, Claimant returned to work with Employer in a restricted duty position. Thereafter, Employer unilaterally ceased payment of Claimant's benefits, and Claimant filed a penalty petition and a challenge petition seeking a reinstatement of total disability benefits. The WCJ determined that the matter was governed by section 306(c)(23) which creates a statutory presumption of total disability for individuals who suffer specified bilateral losses: "*Unless the board shall otherwise determine,* the loss of both hands or both arms or both feet or both legs or both eyes *shall* constitute total disability, to be compensated according to the provisions of [section 306(a)]. Based on Employer's stipulation that Claimant suffered a loss of such severity as to come within section 306(c)(23), the WCJ concluded that the statutory provision obligated Employer to pay total disability benefits unless the WCAB determines otherwise. Accordingly, the WCJ reinstated Claimant's benefits and awarded Claimant penalties and attorney's fees.

Employer then filed a modification petition with the WCAB, seeking a determination that Claimant was not totally disabled within the meaning of section 306(c)(23). Alternatively, Employer requested a modification of Claimant's benefits in accordance with his actual earnings. At the WCAB's request, the matter was assigned to a WCJ for evidentiary hearings.

The Employer effectively waived the first issue because it had stipulated to the same before the WCJ.

With respect to the second issue, the Employer presented evidence of the Claimant’s residual function and vocational ability. Claimant presented evidence that the Claimant was only employable because the Employer was able to make accommodations that other employers would not be made by other employers. The WCJ specifically found that “Claimant is unable to button his shirt or pants, cut his food, tie his shoes or write, except for limited, slow, barely legible printing.” The WCJ found that Claimant remained totally disabled under section 306(c)(23) of the Act and concluded that Employer is not entitled to credit for Claimant's post-injury earnings.

The WCAB affirmed the WCJ's Decision. Notably, the WCAB ruled that earning power is not considered under § 306(c) and that in reliance upon its discretionary power, the Claimant remained totally disabled.

The Commonwealth Court affirmed. In doing so, it reasoned that the Legislature did not intend to limit compensation for Claimants receiving benefits under § 306(c)(23) despite the language referring to § 306(a). Further, the Court pointed out that the WCAB had the discretionary authority to determine that Claimant is totally disabled, without regard to, or in spite of, his earning capacity and that there was no abuse of this discretion. Lastly, courts may not dictate what the WCAB must or must not consider in determinations arising under section 306(c)(23).

Repash v. WCAB (City of Philadelphia), July 28, 2008, 2008 Pa. Commw. LEXIS 335

Is a firefighter entitled to the rebuttable presumptions in Section 301(e) and Section 108(o) when alleging coronary artery disease as the result of firefighting?

The Claimant is entitled to the rebuttable presumptions in Section 301(e) and Section 108(o) when alleging a work-related occupational disease as the result of employment as a firefighter. Further, Employer's rebuttal medical evidence may not reject Section 108(o) and should include an opinion on disability.

Claimant was employed for thirty-nine years as a firefighter for the Employer. On December 25, 2001, Claimant began experiencing chest pains upon exertion. On January 27, 2002, Claimant experienced an episode of chest pain while at work, and the next day he went to see his family doctor. Claimant underwent an angioplasty on January 30, 2002.

On February 12, 2004, Claimant filed a claim petition under Section 108(*o*) averring occupational disease in the nature of heart disease occurring in the course of his employment as of January 28, 2002 and seeking disability benefits from that date. Claimant has not returned to work as a firefighter since then, but on March 15, 2004 he began working in a light-duty capacity as a park ranger with Montgomery County.

Both medical experts presented testified that the Claimant had coronary artery disease. Claimant's expert felt that the Claimant's work as a firefighter was the triggering event requiring the need for medical care and that the Claimant's exposure to noxious firefighting smoke was far in excess of the amount of passive smoke that might trigger atherosclerosis and that it was a definite causative risk factor for atherosclerosis and that he was disabled from firefighting. The WCJ found the Employer's expert credible and denied the Claim Petition in finding that the Claimant failed to establish a work-related injury or occupational disease. Employer's expert felt the Claimant had a number of risk factors and that firefighting did not precipitate the Claimant's coronary artery disease. Specifically, Employer's expert opined that there is no epidemiological proof that firefighters are at any higher risk than non-firefighters. Employer's expert testified that there was no evidence of disability in the records that were reviewed (Employer's expert performed a records review only).

The WCAB remanded back to the WCJ for application of the rebuttable presumption of work-relatedness under Section 301(e) and Section 108(*o*) (firefighter's presumption) since there was no dispute that the Claimant had coronary artery disease.[1] In doing so, the burden of proof shifted from the Claimant to the Employer. The WCJ granted the Claim Petition after applying

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[1] Section 301(e): If it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.

Section 108(*o*): The term "occupational disease," as used in this act, shall mean only the following diseases:

(*o*) Diseases of the heart and lungs, resulting in either temporary or permanent total or partial disability or death, after four years or more of service in fire fighting for the benefit or safety of the public, caused by extreme over-exertion in times of stress or danger or by exposure to heat, smoke, fumes or gasses, arising directly out of the employment of any such firemen.

the rebuttable and firefighter's presumptions. The WCJ noted that the Employer's expert rejected the statutory presumption that exposure as a firefighter to fighting fires for four or more years is a risk factor in the development of coronary artery disease.

Employer appealed to the WCAB who reversed in ruling that the claim should not have been remanded as an occupational disease claim since there was no evidence of disability. The WCAB reinstated the first Decision denying benefits.

The Commonwealth Court reversed. In doing so, the Court reasoned that the first WCJ Decision failed to make a finding with regard to disability and thus there was no error when the WCJ found the Claimant to be disabled in the second Decision. The second Decision was not outside the scope of the remand as the WCAB remanded the matter for application of the presumptions part of which required a finding on disability. The WCJ found Claimant's expert more credible than Employer's expert in the second Decision, which of course, the WCJ is permitted to do and in the process, found that the Employer failed to rebut the presumptions. The second Decision was reinstated by the Court.

Campbell v. WCAB (Pittsburgh Post Gazette), July 29, 2008, 2008 Pa. Commw. LEXIS 336

Are medical opinions reviewable when the WCJ finds the evidence incredible because the medical experts failed to explain why Claimant's psychological conditions were attributable to the physical injury rather than other causes?

Credibility determinations are not reviewable. Additionally, there is no requirement to use "magic words" to establish causation or rule out other factors that may have caused a condition.

Claimant sustained a January 11, 1994 back injury accepted via NCP. Claimant filed Claim and Review Petitions seeking to add psychological injuries. By Decision dated September 28, 2006, the WCJ ruled that the petitions were time barred, Claimant failed to give timely notice, and that Claimant failed to meet his burden of proving that the psychological injuries were related to the work-related back injury.

The WCAB modified the WCJ's Decision in reversing on the issues of being time barred and notice but affirmed the findings of credibility.

The Commonwealth Court agreed that the matter was not time barred since the Claimant was still receiving wage loss benefits. However, the Court was silent on the issue of notice.

With regard to the issue of causation, the Court explained that while a psychological injury must be proven by unequivocal medical evidence (which is reviewable as a matter of law), the evidence must first be found to be credible (which is not reviewable) by the WCJ. In this case, the Claimant's medical experts failed to present a "credible detailed analysis" as to why Claimant's conditions were work-related and not attributable to some other cause. Therefore, even though Claimant's evidence was unequivocal, the evidence was not accepted by the WCJ and was incredible. The WCAB was affirmed.