JULY 2009 CASE LAW UPDATES

Cinram Manufacturing, Inc. & PMA Group v. WCAB (Hill),
No. 37 MAP 2008 (July 21, 2009)

Facts: Claimant was injured in the scope of employment with Cinram Manufacturing, Inc. in March of 2004. The employer issued an NCP describing the work injury as a lumbar strain and Claimant began receiving workers' compensation benefits. In August 2004 the employer filed a Termination Petition alleging a full recovery from the accepted work injury.

The parties presented conflicting medical evidence within the proceedings and the WCJ credited Claimant's evidence, denied the Termination Petition and directed the NCP to be amended to include an aggravation of a pre-existing disc herniation, and nerve impingement. The Employer appealed the decision arguing that the WCJ lacked authority to amend the description of injury because the Claimant never filed a Review Petition. The WCAB affirmed the decision noting that the NCP was properly amended under Section 413(a) of the Act. The Commonwealth Court in a divided decision from a three Judge panel affirmed the decision of the WCAB, and the Supreme Court allowed the appeal primarily to address the correctness of their decision in Jeanes Hospital v. WCAB (Hass), 872 A.2d 159 (2005).

Issue: Whether, Claimant needs to file a Review Petition as a pre-requisite requirement to seek "corrective amendments" to the description of injury on the NCP pursuant to 77 P.S. § 771.

Holding: In this case the Supreme Court explained and distinguished their prior holding in Jeanes Hospital from the facts at hand. In Jeanes Hospital the court held that pursuant to Section 413(a) to amend the description of injury on an NCP it was appropriate to file a Review Petition and not a Claim Petition. The court distinguished the facts in this case, explaining that Jeanes Hospital did not make the filing of a Review Petition an absolute requirement to make "corrective amendments" to an NCP, and discussed the differences between seeking "corrective amendments" to an NCP pursuant to 77 P.S. § 771 and seeking an amendments to the NCP based on "consequential" conditions or changes in disability pursuant to 77 P.S. § 772. The Court explained that "corrective amendments" may be made by the WCJ during any Petition if it is proven that the NCP was materially incorrect at the time of its issuance. A Review Petition is still required to amend the NCP due to a change in the description of injury based on "consequential" changes in disability. The Court did not go into detail about what determines the difference between a "corrective amendment" as

opposed to a "consequential" change in condition, but the implication seems to be that a consequential change occurs if additional injuries are alleged that flow from the original injury, but did not exist at the time the NCP was issued.

Community Service Group v. WCAB (Peiffer),
No. 90 C.D. 2009 (Pa. Cmwlth., 07/30/2009)

Facts: Claimant was injured in 2002 while attempting to restrain a mentally challenged individual who was under her care. Claimant underwent a cervical fusion procedure and an agreement was entered into between the parties that Claimant would be entitled to 57.5 weeks of scarring or disfigurement benefits to be paid when she ceased receiving indemnity benefits. A Modification Petition was litigated based on an IRE determination that found Claimant to have a 28% impairment rating, and pursuant to that litigation a decision was circulated ordering a modification to partial benefits, and also ordering that the scarring claim be paid concurrently with the indemnity benefits. Employer filed an Appeal arguing that the WCJ erred in awarding scarring benefits to be paid concurrently with partial disability benefits because both payments arose out of the same work injury. The WCAB affirmed the WCJ findings and the issue was appealed to the Commonwealth Court.

Issue: Whether, under Section 306(d) of the Workers' Compensation Act, the scarring that is the result of a cervical fusion surgery is a separate and distinct injury from the work injury that necessitated the surgery.

Holding: The court followed a previous holding in Seekford v. WCAB (RPM Erectors), 909 A2d. 421 (Pa. Cmwlth. 2006) and confirmed that a medical procedure performed to treat the original work injury is not a separate and distinct injury, and payment of specific loss benefits for that injury may not begin until disability payments are no longer due and owing. Specific loss benefits are not to be paid concurrently with partial disability benefits for the same date of injury.

Anthony Bentley v. WCAB (Pittsburgh Bd. of Edu.),
No. 1560 C.D. 2008 (Pa. Cmwlth, 07/29/2009)

Facts: Claimant injured his left shoulder in the course and scope of his employment as an electrician. The employer accepted the claim and began payment of TTD benefits. Employer received a medical release from Claimant's treating physician and a Notice of Ability to Return to work was sent out between January 22, 2003 and March 14, 2003 (at that time there was no date on the bureau form). Employer filed a Modification Petition based on the medical release and an earning power assessment and labor market survey that found 10 light duty jobs available within 25 miles of Claimant's home. The WCJ granted the modification Petition crediting the testimony of Claimants treating physician as to his physical capabilities and crediting the testimony of the vocation expert as to Claimant's earning power. The WCAB affirmed the decision of the WCJ, but made a "technical correction" amending the date of modification to approximately on month after the WCJ ordered. Claimant filed an appeal arguing that:

1. The employer failed to prove that they provided a Notice of Ability to Return to Work "promptly" as required by Section 306(b)(3);
2. The WCJ erred in finding that work was open and available in Claimant's geographic area;
3. The WCAB erred in refusing to award litigation costs to Claimant.

Issues:
1. Whether the Employer provided prompt written notice to Claimant as required by Section 306(b)(3), when the exact date the notice was sent to Claimant was not known.
2. Whether a labor market survey that finds jobs within a 25 mile radius of Claimant's home complies with 77 P.S. §512(2) that requires the jobs to be in the "usual employment area" in which Claimant lives.
3. Whether the WCAB erred in not awarding litigation costs when they modified the decision of the WCJ to change the effective date of the modification of benefits from 1/22/2003 to 5/5/2003.

Holding:
1. The Court cited to their previous holding in Melmark Home v. WCAB (Rosenberg), 946 A.2d. 159 Pa.Cmwlth. 2008) and noted that the employer complied with the Notice requirements in this case. In order to determine what constitutes prompt written notice the facts and timeline of each case must be examined to see if Claimant was prejudiced by the timing of the notice. The

exact date of when the Notice was sent out is not a requirement, so long as the facts support Claimant was not prejudiced, and the notice was sent out prior to the attempt to modify benefits.

2. The Court citing to Litzinger v. WCAB (Builders Transport), 731 A.2d 258 (Pa. Cmwlth. 1999) noted that jobs are available if they are "within the geographic area where others in Claimant's community would accept employment". The testimony of the vocational expert was sufficient when stating that the jobs were within 25 miles from Claimant's home, and many of the jobs were "fairly close" to his home. The court rejected Claimant's suggestion that the vocation expert was required to specifically testify that 25 miles is the usual geographic area, or that other persons in Claimant's neighborhood travel 25 miles to work, finding "no such magic words are required".

3. Section 440(a) of the Act that authorizes an award to claimant for litigation costs where claimant prevails in whole or in part. Citing to Reyes v. WCAB (Amtec), 967 A.2d 1071 (Pa. Cmwlth. 2009) the court explained that claimant must also prevail on an issue that was actually contested. The Court found that the decision of the WCAB to change the date of modification was merely a "technical correction" and Claimant did not prevail on any of the contested issues. It was also noted that this technical correction did not serve to secure any additional benefits for Claimant as the employer's supersedeas request was denied and Claimant received TTD benefits through 4/25/2006.

Good Tire Service v. WCAB (Wolfe),
No. 729 C.D. 2008 (Pa. Commw., 07/15/2009)

Facts: Claimant sustained a broken leg as a result of a work related motor vehicle accident. Claimant filed a third party lawsuit arising out of the work injury, and subsequently settled the suit for $75,000.00, having incurred litigation costs of $727.25. As of that date of the settlement the employer's accrued lien totaled $48,259.32.

Claimant entered into a contingent fee agreement of 40% for the amount received in the third part suit, but third party counsel agreed to reduce his fee upon distribution waiving $9205.92 of the fee in order to avoid Claimant from receiving less monies.

The employer filed a Petition to Review Benefit Offset arguing that the subrogation claim was not paid in full and that the refunded fee is not a reasonable attorney fee within the meaning of Section 319. The WCJ granted the Petition and directed Claimant's Counsel to reimburse the insurer the portion of the fee that was waived ($9,205.92). The WCAB reversed the decision of the WCJ

characterizing the fee waiver as a "gratuity" from third party counsel to the Claimant.

Issue: Whether under section 319 of the Act a third party Counsel can voluntarily reduce their fee to pay additional monies to Claimant, and have those monies not subject to the employer's right to subrogation.

Holding: The Court held that Section 319 is clear and unambiguous and admits no express exceptions, equitable or otherwise. The fee actually paid was $20,794.08 and not $30,000.00 and the amount that would be used to calculate the employer's pro rata share is the **fee actually paid**, and not some hypothetical fee that might have been paid.

Antonio Braz v. WCAB (Nicolet, Inc.),
No. 2226 C.D. 2008 (Pa. Commw., (03/31/2009 - designated opinion 7/6/2009)

Facts: Claimant was injured on January 23, 1986 in the course and scope of employment as a machine operator in Souderton, PA. At some point Claimant moved to Portugal where he had lived for more than a decade. Employer filed a Petition to Suspend benefits because Claimant was unavailable for employment as he resided in Portugal. The parties did not present any medical evidence, and the parties stipulated to the facts. The WCJ denied the Petition because the employer offered no evidence of a change in Claimant's medical condition. The WCAB reversed finding that since Claimant was living in Portugal his actions constituted a removal from the workforce and the finding of a change in his medical condition was not needed.

Issue: Whether the employer is required to provide evidence of a change in Claimant's physical condition to get a modification in benefits if Claimant has removed himself from the work force by moving to and residing in a foreign country.

Holding: The Court notied that the Supreme Court has recognized that the first prong in Kachinski v WCAB (Vepco Construction Co.), 532 A.2d 374 (1987) that requires the employer to offer evidence of a change in physical condition to modify benefits does not apply if the modification is not based on an assertion that Claimant has recovered some or all of his ability. *also see* Dillon v. WCAB (Greenwich Collieries, 640 A.2d 386 (1994). The Court went on to liken the facts in this case to their holding in Blong v. WCAB (Fluid Containment), 890 A.2d 1150 (Pa. Cmwlth. 2006) where a suspension of benefits was granted when

Claimant moved to New Zealand. The critical fact is removal, and as Claimant was, and had been resided in Portugal for over a decade, the Employer is not required to provide evidence of a change in condition in order to suspend benefits.

Doug Rebeor v. WCAB (Eckerd),
No. 2328 C.D. 2008 (Pa. Commw., (07/09/2009)

Facts: Claimant was injured in the course and scope of employment when he was involved in a work related motor vehicle accident on 08/28/2002. Claimant returned to work with the employer in a light duty position in March of 2003, but stopped working in December of 2005 because the light duty position was eliminated.

On December 11, 2006 Employer filed a Modification Petition based on a medical release and labor market survey. The earning power assessment was conducted in the area Claimant resided in Lawrence County, Pa. During the vocational examination the vocational expert became aware that Claimant was planning to move to South Carolina and acknowledged that she did not contact any of the employer's stores (Eckerd Drugs) in that area to see if light duty work was available, nor did she locate jobs in South Carolina that might be appropriate for Claimant.

The WCJ Granted the Employer's Modification Petition and rejected Claimant's argument that the employer was required to find work available in his current area of residence, South Carolina. The WCAB affirmed the decision of the WCJ and the matter was appealed.

Issue: Whether the employer is required to offer evidence of job availability outside the Commonwealth if Claimant moves, and what constituted the "usual employment area" as defined by Section 306(b)(2).

Holding: The usual employment area as defined by Section 306(b)(2) is the areas in which the employee lives in this Commonwealth, and if the employee does not live in the Commonwealth then the usual employment area where the injury occurred shall apply 77 P.S. §512(2). The court distinguished the facts in this case from those in Riddle v. WCAB (Allegheny City Electric, Inc.), 940 A.2d 1251 (Pa. Cmwlth. 2008) explaining that Riddle stood for the premise that an employer was not precluded from conducting a labor market survey outside the Commonwealth when a Claimant no longer lives in the Commonwealth, but does not stand for any **requirement** to do so. The Court noted that requiring Claimant to conduct a labor market survey in South Carolina when Claimant did

not live there at the time of the vocational exam, and was not injured there, would run counter to the plain language of the statute and would place an unreasonable burden on the employer.

William Lusby v. WCAB (Fischler Co. & Sparmon, Inc.),
No. 804 C.D. 2008 (Pa. Commw., (7/9/2009)

Facts: Claimant injured his low back in the course and scope of employment in 2002. The parties entered into a C&R agreement on August 8, 2005 for a lump sum payment of $85,000.00. Paragraph #10 of the C&R agreement stated the employer would remain liable for the payment of all reasonable and necessary medical treatment that was related to the work injury up until 8/8/2005 the date of the C&R hearing. Claimant's counsel, in addition to having a fee agreement with Claimant, also had a fee agreement with Highmark who had subrogation rights for medical bills that they paid for treatment related to the work injury. Two fee agreements were attached to the C&R paperwork, and an Order was circulated approving the agreement on 8/9/2005. On September 1, 2005 The WCJ issued an amended decision Ordering the employer to pay the Highmark lien as agreed, and the appropriate fee as agreed to in the Compromise and Release. Neither party appealed either the 8/9/2005, or the 9/1/2005 orders.

In May of 2006 Claimant's Counsel filed a Penalty Petition alleging that the Employer failed to pay the Highmark lien, and the attorney fee associated with the lien per the Order of the WCJ and the Compromise and release agreement. Employer's defense to the Penalty Petition was that that there was a double payment of the bills in question and that since they, as well as Highmark had already paid the bills, they complied with the terms of the Compromise and Release and the subrogation lien was not valid or enforceable. They further argued that Claimant counsel was aware of the double payment and made no effort to mitigate damages and seek reimbursement from the providers.

The WCJ granted the Penalty Petition and awarded a 50% Penalty on $22,154.71. The WCAB reversed reasoning that since the original C&R agreement did not directly reference the Highmark lien and pursuant to Section 319 the right to subrogation is not self executing the WCJ erred in concluding that there was a violation of the Act. Claimant filed an Appeal alleging that the WCAB erred in determining that the Highmark lien was not established as an enforceable lien under Section 319 of the Act.

Issue: Whether the employer is required to pay a subrogation lien for medical bills as agreed to in a Compromise and Release agreement even if it is later determined that the bills were already paid by both the third party payor and the employer.

Holding: The Court held that if an employer enters into a Compromise and Release Agreement where they agree to reimburse a third party payor for bills paid related to the work injury, they must honor the agreement even if it is later discovered that the bills had been double paid by both the employer and the third party payor. They determined that the lien was properly established as required by the Act, and that the defense of "mutual mistake" that was argued by the employer was not applicable because "entering into an agreement before damages are adequately addressed is not a mutual mistake".