THE HARTWELL
LAW OFFICES, LLP

JUNE 2016 CASE LAW UPDATE

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Righter v. W.C.A.B. (Righter Parking) - A.3d -- (Pa. Cmwlth June 14, 2016) WL 3261674

Issues: Whether claimant's counsel is entitled to a fee for payment of medical expenses based upon the contingent fee agreement executed with claimant.

Answer: It depends. Based upon the facts of this case, claimant's counsel is not entitled to the fees for medical expenses. The PA Commonwealth Court determined Counsel must demonstrate to the WCJ why such a fee is justified in light of time and effort expended on obtaining medical benefits for claimant. The WCJ must assess: (1) whether claimant and Counsel intended for Counsel to receive a percentage of medical bill payments; and (2) whether the fee is reasonable.

Analysis: Claimant appealed an Order of the WCAB affirming a WCJ Decision. The sole issue on appeal is whether the WCJ erred by concluding that Claimant's attorney (Counsel) was not entitled to an attorney fee of 20 percent of the medical bills paid in conjunction with the claim in this matter.

The parties stipulated that Claimant and Counsel entered into a fair and reasonable contingent fee agreement (Agreement) that entitles Counsel to 20 percent of the indemnity benefits to be received by Claimant. The Parties agreed to "continue to litigate the issue of whether [Counsel] is entitled to [20 percent] of any work-related medical bills paid in conjunction with this claim as part of his attorney's fee" and to "continue to litigate the penalty petitions and unreasonable contest issues".

The parties agreed to a second Stipulation of Facts (Second Stipulation), where the parties "resolve[d] the Penalty Petitions and unreasonable contest issues" and agreed that Employer would pay Claimant 25 percent of past due wages, of which 20 percent would be deducted and paid to Counsel. The parties agreed to continue to litigate whether Counsel is entitled to 20 percent of any work-related medical bills paid in conjunction with the claim. Thus, the only issue left unresolved by the two stipulations was the question of Counsel's entitlement to an attorney fee of 20 percent of the medical bill payments.

In determining whether medical bill payments should be included in a contingent fee agreement, the WCJ must assess: (1) whether the claimant and counsel intended for counsel to receive a percentage of the medical bill payments; and (2) whether the fee is reasonable. David Torrey and Andrew Greenberg describe the WCJ's inquiry in this regard as a "quantum meruit analysis", and the Commonwealth Court agreed that this is an appropriate description of the WCJ's task. D. Torrey & A. Greenberg, Workers' Compensation: Law and Practice § 15:10 (West 2008) (hereinafter, Torrey & Greenberg). Thus, counsel seeking a contingent fee on medical bill

payments in addition to the per se reasonable 20 percent contingent fee on indemnity benefits must demonstrate to the WCJ why such a fee is justified in light of the time and effort expended on obtaining medical benefits for the claimant. Upon receipt of this evidence, the WCJ will conduct a quantum meruit analysis to determine the reasonableness of any fee in excess of 20 percent of the claimant's indemnity benefits.

Here, the WCJ concluded that a 20 percent attorney fee based on Claimant's medical bill payments was unreasonable. In making this determination, the WCJ first assessed the Agreement between Claimant and Counsel. The Agreement provides Counsel with 20 percent of "all compensation payable to [Claimant] for as long as [Claimant] receive[s] workers' compensation benefits". The WCJ concluded that the text of the Agreement does not set forth any promise pertaining to medical bill payments in addition to indemnity benefits. The WCJ also reviewed Claimant's testimony regarding the Agreement and found that the testimony did not establish that the Agreement provided Counsel with 20 percent of the medical bills paid. The WCJ next assessed the nature and difficulty of the work performed by Counsel and found that Claimant did not "establish that any particular work performed *specifically advanced the payment of medical bills to warrant* a 20 [percent] attorney fee of the medical bill payments".

The Commonwealth Court affirmed the WCJ determination that the Agreement entered into by Counsel and Claimant does not firmly establish that Claimant intended Counsel to receive 20 percent of her medical bill payments. Second, the Commonwealth Court agreed with the WCJ's conclusion that the work performed by Counsel does not warrant an award beyond 20 percent of the indemnity benefits Counsel continues to receive as agreed to in the First Stipulation. The case does not appear to have been exceedingly difficult or time consuming; the major issues were resolved through the First and Second Stipulations; and there is no evidence in the record showing a dispute to Claimant's entitlement to medical benefits that required extensive legal work. The WCJ's finding that there was no indication that the payment of the medical bills was advanced by the legal work performed sufficient to warrant a 20 percent attorney fee was not an error.

Conclusion and Practical Advice: The Commonwealth Court concluded that the fee agreement between Counsel and claimant was not specific as to payment of medical bills. The Court also affirmed the WCJ determination that the work performed by Counsel did not substantially advance the payment of medical bills. The question arises as to whether or not an objection to the Counsel's fee agreement should be asserted at the onset of the litigation if it does include payment of medical. There are varying instances where this may make sense and other times where it would not be prudent.

Sandy v. W.C.A.B. (Com., Dept. of Military and Veterans Affairs) 2016 WL 3258020 (Pa. Cmwlth June 14, 2016 **(please note this is an unreported determination).**

Issues: Whether an Employer is entitled to recoup overpayment of indemnity benefits that should have been offset.

Answers: Depends on when the LIBC 756 was issued.

Analysis: This case is similar to a lot of scenarios that frequently happen with Pension and Social Security retirement benefits. In this matter the claimant received Social Security (old age) benefits and a Pension following retirement from her employment. The Employer sent the claimant an LIBC 756 within weeks of her retirement. However, they then waited approximately 6 months to issue the Notice of Offset and began taking the offset. They also took a credit for the overpayment that the claimant received during the six months.

The Commonwealth Court evaluated the body of caselaw on this topic and again reiterated the general principles. Essentially, if an employer provides the claimant with an opportunity to return the LIBC 756 within six months of receipt of the benefits where an offset is permissible, then it is acceptable to take a credit for the benefits received in that time frame. However, if there is no opportunity to return the LIBC 756 within six months, then the credit for overpayment is not permissible.

In the instant case, the Court concluded that the claimant was not prejudiced by the delay in issuing the Notice of Offset because this was done within the expected time frame allocated by the legislature.

Conclusion and Practical Advice: This case serves as an additional reminder that the LIBC 756 should be sent out every six months regardless of age. However, this is especially relevant in circumstances where the claimant is over 62 (potentially eligible for old age Social Security). This is certainly necessary when the claimant is over 66 (as it is likely they will begin receiving old age retirement). Obviously, in any municipal setting or Union setting where a pension is possible, this should consistently be done regardless of age as they could receive their pension at any time after leaving employment.

Knight v. W.C.A.B. (Com., Norristown State Hosp.) 2016 WL 3199412 (Pa. Cmwlth June 9, 2016) **(please note this is an unreported determination).**

Issues: Whether claimant was within the course and scope of her employment.

Answer: In this case the claimant was not within the course of her employment.

Analysis: The claimant appealed the WCJ Decision and the WCAB affirmation determined the claimant was not within her course and scope of employment. The claimant was injured when she got a flat tire and was struck by another vehicle 282 feet from the entrance of her Employer's parking lot. The claimant was on a public street at the time of the injury. However, the claimant had called her supervisor prior to her injury and he was sending someone to assist the claimant.

Ultimately, the main focus of the case was whether or not the street leading to the parking lot was an "integral" part of the employer's premises even though they did not own the public street. The Commonwealth Court determined that the public street was not an integral part of the claimant's employment because there were other entrances to the parking lot. However, they also opined that even if there were no other entrances that does not mean that this was an integral part of the premises.

Conclusion and Practical Advice: The Court determined that the public street 282 feet from the entrance to the parking lot was not an integral part of the claimant's employment. Generally, the overriding rule of thumb is that the trip to work is not compensable. However, once you pull into the parking lot (even if that parking lot is shared among multiple tenants) that is often compensable. Please note, every case needs to be evaluated on a case-by-case basis as there are nuances in every situation that could shift the Judge's determination. If it is questionable, please evaluate existing case law for analogous fact patterns.

Alvarado v. W.C.A.B. (Badilla Const.) 2016 WL 3406387 (Pa. Cmwlth June 21, 2016) **(please note this is an unreported determination).**

Issues: Whether the WCJ erred by dismissing the claimant's claim petition with prejudice for failing to attend several hearings and failing to abide by the scheduling order.

Answer: Yes.

Analysis: The claimant filed multiple claim petitions against an Employer, an alleged Statutory Employer and the UEGF, for an alleged work-related injury. There were multiple hearings where the claimant did not attend but was represented by counsel. At the fourth scheduled hearing where neither claimant's counsel nor the claimant attended, the Judge subsequently issued a Decision dismissing the case with prejudice. The WCAB affirmed the WCJ's determination.

Ultimately, after a full review of the record, the Commonwealth Court reversed the WCJ determination. The basis for this reversal was that the WCAB failed to render an opinion that the Employer was prejudiced from the delay and that the WCJ failed to show evidence that the claimant was not prosecuting the case. The Court further went on to state that the WCJ failed to provide proper notice that the case would be dismissed.

Conclusion and Practical Advice: The Judge has discretion over their calendar. However, that discretion is not unlimited and they are not permitted to abuse that discretion.