June 2015 Case Law Updates

M.C. Duffey v. WCAB (Trola-Dyne, Inc.), (Pa.Cmwlth., No. 1840 C.D. 2014, filed June 26, 2015).

Issue(s):
Did the Board err in modifying a claimant's disability status from total to partial disability based on an IRE that did not consider all of the Claimant's work-related injuries?

Answer:
No. An IRE that considers a claimant's work injury **as it is defined and exists at the time the IRE is performed, is valid** notwithstanding an after-the-fact expansion of the scope of a claimant's work-related injury.

Facts:
The claimant sustained work-related injuries to both hands when he had picked up hot wires that someone had reconnected by accident. When the claimant reached 104 weeks of receiving total disability compensation, the employer requested an IRE. The IRE report indicated that the claimant had a six percent impairment rating, and the Employer changed the claimant's status from total to partial disability.

The claimant filed a Review Petition asserting that the IRE was invalid and that the description of injury was incomplete because it did not include work-related mental injuries that the claimant sustained (the diagnosis of the mental injuries occurred prior to the claimant reaching 104 weeks of receiving total disability benefits). The employer presented evidence that, while the claimant may have suffered from mental injuries, he was fully recovered from these conditions.

The WCJ ruled in favor of the claimant and added mental injuries to the claimant's NCP as work-related injuries. The WCJ also concluded that the IRE was invalid because it did not address the claimant's additional work-related injuries. The employer appealed to the Board, arguing that the WCJ erred in finding the IRE invalid. The Board agreed and reversed the WCJ's determination.

Analysis:
The Court affirmed the Board's decision. The Court began its analysis by highlighting the purpose of the IRE. The Court held that statutory language and case law dictated that the focus in determining the validity of an IRE is on the state of the claimant and the compensable injury, *as described in the NCP at the time the IRE is performed*.

The Court pointed out that the claimant may challenge the IRE during the initial sixty day period on the basis of 1) whether the IRE physician meets the qualifications for performing IREs or the manner in which the IRE was performed, and 2) the description of the work-related injury as it existed at the time the IRE was performed. The Court felt that an otherwise valid IRE that addresses the injuries established to be work-related at the time it was performed should not be invalid because doing so would not improve the efficiency of the WC system.

The Court found it significant that the claimant was diagnosed with his mental injuries almost a year before the IRE was performed, yet the claimant did not to seek to amend the NCP to include these injuries until after the results of the IRE. The Court held that a delay in adding injuries as a litigation strategy to defeat an IRE does not serve the purpose of the IRE process or the 1996 Amendments to the Act.

Conclusion and Practical Advice:
The Court concluded that an IRE, which addresses the injuries that were identified as compensable at the time the IRE was performed, is not invalid if it is subsequently determined that the claimant sustained additional work-related injuries. The IRE is still valid and may be used to modify the claimant's disability status from total to partial disability.

This opinion encourages claimants to be proactive in determining whether any work-related injuries should be added to the NCP so they are considered if an IRE is requested and performed.

The Court was clear in asserting that its holding does not prevent claimants from challenging the change to partial disability status if additional injuries are recognized or adjudicated as being work-related. In other words, if the subsequently-recognized injuries push the claimant's impairment rating over fifty percent, then the claimant would still be free to challenge their partial disability status at any time within the 500 week partial disability period.

W. Kane v. WCAB (Glenshaw Glass), (Pa.Cmwlth., No. 1172 C.D. 2013, filed June 25, 2015).

Issue(s):
When there are two separate injuries, is an application for reinstatement time-barred under Section 413(a) of the Act if it was filed within three years of the date of the last payment of compensation for an injury which the claimant received in lieu of compensation for another injury?

Answer:
No. A petition for reinstatement should not be time barred pursuant to Section 413(a) when benefits for one injury were suspended due to receipt of benefits for another injury.

Facts:
The claimant suffered a work-related injury to his *left* shoulder in 1995 for which the claimant received benefits before returning to modified duty work with the employer. The claimant then suffered a work-related injury to his *right* shoulder in 1999 for which the claimant received benefits before returning to the same modified duty work with the employer. The claimant worked without a wage loss until 2004 when the employer ceased operations. The employer reinstated the claimant's benefits for the 1995 left shoulder injury via supplemental agreement, effective November 2004.

In 2006 the claimant filed a reinstatement petition for the 1999 right shoulder injury, which was denied by the WCJ on the basis that the claimant was still receiving benefits for his 1995 injury per the supplemental agreement. The WCJ also held that the claimant's benefits for the 1999 injury were properly suspended because of the continued payment of benefits for the 1995 injury. The Board affirmed the WCJ's decision. The Court affirmed the Board's decision, but did not foreclose the possibility of reinstatement of the 1999 injury claim at some point in the future.

The parties subsequently entered into a C&R of the 1995 left shoulder injury, which was approved on September 23, 2010. On September 29, 2010, the claimant filed a reinstatement petition against the Employer, seeking benefits for the 1999 right shoulder injury. No benefits had been paid on the 1999 injury since August 1999. The claimant argued that even though the 1995 injury has been resolved, he is now entitled to benefits for the 1999 injury. The employer argued that the reinstatement petition was barred by the 500-week limitations period contained in the Act. The WCJ granted the claimant's reinstatement petition, finding that the claimants 1999 right shoulder injury recurred in November 2001 but that benefits were suspended as a result of the claimant's receipt of benefits for the 1995 left shoulder injury. The Board reversed the WCJ's order on the basis that the reinstatement petition was time barred pursuant to Section 413(a) of the Act.

**[There was also a collateral estoppel issue to the case, which is not part of this summary. In short, the Court held that the previous litigation did not collaterally estop the claimant from seeking reinstatement for his 1999 injury.]

Analysis:
Section 413(a) of the Act, as clarified by Cozzone allows claimants to petition for modification of any workers' compensation payment for a minimum of three years from the last date of

payment. Where such payments have been suspended due to a return to work without a loss in earnings, the right to petition is extended to the 500-week period of partial disability. The Cozzone case explicitly says that the three-year limitations period is tolled by payments of, *or in lieu of*, workers' compensation. Cozzone v. WCAB(Pennsylvania Municipal/East Goshen Township), 73 A.3d 526 (Pa. 2013).

It is well established that when a claimant has two disabling injuries, they may receive disability benefits for only one of the injuries – they can't "stack" the benefits of both injuries and receive benefits for both at the same time. In overturning the Board's decision, the Commonwealth Court relied on the Clawson Supreme Court decision to support their finding that the amount of benefits should be limited to an amount "reflective of the claimant's loss in earning power," while preserving a claimant's entitlement to compensation for a disability for which he otherwise would be receiving compensation if it weren't for the prohibition on stacking of benefits. L.E. Smith Glass Company v. WCAB(Clawson), 813 A.2d 634 (Pa. 2002).

The Court held that, because the Act requires that the claimant choose one injury and receive compensation for that totally disability injury *in lieu of* receiving compensation for the other totally disability injury, the claimant must be permitted to seek reinstatement under Section 413(a) of the Act within three years after the date of the most recent payment of compensation received in lieu of compensation for the other injury, to which he otherwise would have been entitled.

The claimant received benefits for his 1995 injury *in lieu of* benefits for his 1999 injury. Because the claimant's benefits for the 1999 injury were suspended due to his receipt of benefits for his 1995 injury (and not as a result of a return to employment), the reinstatement petition must be filed within three years after the date of the last payment of compensation for his 1995 injury. The claimant filed its reinstatement petition for the 1999 injury six days after the approval of the C&R for the 1995 injury, so it was clearly within the three year period.

Conclusion and Practical Advice:
When a claimant has two disabling injuries, they are only allowed to receive benefits pursuant to one of the injuries. The benefits that they are receiving for one injury (the 1995 injury in this case) are *in lieu of* benefits they would otherwise be receiving for the other injury (the 1999 injury), and entitlement to the benefits for the other injury (the 1999 injury) remains preserved. Because entitlement remains preserved, the claimant may petition for reinstatement of these benefits (the 1999 injury) upon the date of last payment for compensation of the other injury (the 1995 injury).

The Village at Palmerton Assisted Living v. WCAB (Kilgallon), (Pa.Cmwlth., No. 334 C.D. 2014, filed June 12, 2015).

Issue(s):
1) Do both Form LIBC-766 and Form LIBC-765 need to be filed within sixty days of the claimant receiving 104 weeks of temporary total disability in order to secure an automatic change to the claimant's benefits? What constitutes a timely request to submit to an IRE pursuant to the Act?

Answer:
No. In order to secure an automatic change to the claimant's benefits, the employer is only required to request the designation of an IRE physician by filing Form LIBC-766 within sixty days of when the claimant has received 104 weeks of temporary total disability benefits. Filing of Form LIBC-765 (request for the claimant's attendance at an IRE) does not need to occur within sixty days.

Facts:
The claimant suffered a work-related injury while employed by employer and was approaching 104 weeks of temporary total disability. The employer filed Form LIBC-766 (Initial Request for Designation) with the Bureau prior to the claimant reaching 104 weeks of TTD. The Bureau issued a Notice of Designation, appointing a physician to conduct the IRE. Employer then filed Form LIBC-765 (IRE Appointment), also with the Bureau, and also prior to the claimant reaching 104 weeks of TTD. An IRE was scheduled for a date before the claimant reached 104 weeks of TTD.

The employer realized that its Initial Request for Designation was premature and attempted to rectify the situation. The IRE eventually took place seven months after the claimant had reached 104 weeks of TTD benefits, and found the claimant to have an impairment rating of 11%. The Employer then related the IRE back to within the sixty day window and automatically modified the claimant's disability status.

The claimant filed Reinstatement and Review petitions alleging that the Employer was not entitled to an automatic change in disability status because the IRE request and resulting IRE were untimely. The Employer filed Modification and Review petitions seeking review and/or modification of the IRE change in status date to the date that the claimant had reached 104 weeks of TTD. The WCJ denied the employer's petitions and granted the claimant's review petition. The Board affirmed the WCJ's Decision.

Analysis:
The Court reversed the Board's Decision. The Board held that both the request for the designation of an IRE physician (Form LIBC-766) and, after designation of the IRE physician is received, the request for a claimant's attendance at the IRE (Form LIBC-765) must be filed within sixty days upon the expiration of the claimant's receipt of 104 weeks of TTD benefits in order to automatically change the claimant's benefits.

In reversing the Board, the Court held that a request is considered timely as long as the Form LIBC-766, requesting designation of an IRE physician, is filed within the sixty-day window. It is

not necessary, however, that Form LIBC-765 requesting the employee's attendance at the IRE be filed within the sixty-day window (though it does need to be filed at some point).

Form LIBC-765 cannot be filed until the Bureau has designated an IRE physician and an IRE has been scheduled. Because neither the insurer nor employer has total control over fulfilling these requirements, the Court reasoned that Form LIBC-765 does not need to filed within the sixty-day window. Furthermore, neither the Act, nor the regulations, nor the case law require that Form LIBC-765 be filed within the sixty-day window. Thus, the date the insurer requests that a physician be designated to perform an IRE (filing of LIBC-766) is the determinative date as to whether the IRE request is timely under the act.

Lastly, the Court held that even though the Employer's initial request for designation was premature, no IRE took place before the 104-week mark, so the Employer's subsequent efforts to request designation of an IRE physician were considered timely since they were made within the sixty-day window.

Conclusion and Practical Advice:
When the parties cannot agree on an IRE physician, the date the insurer requests that a physician be designated to perform an IRE (with Form LIBC-766) is the determinative date as to whether the IRE request is timely under the Act. Form LIBC-765 does not need to be filed within the sixty day window to affect an automatic change in benefits. If an employer prematurely requests that a physician be designated to perform an IRE, it can rectify their error (provided no exam actually took place) by making a subsequent request to the Bureau within the sixty-day window.