City of Pittsburgh v. W.C.A.B (McFarren) 1701 C.D. 2007, June 4, 2008

Issue: Whether the Board's decision to increase disfigurement award from 6 weeks to 35 weeks for a slight scar on claimant's neck was an abuse of discretion.

Claimant, a firefighter, injured his neck on April 15, 2004. He underwent an anterior cervical disc fusion at C5-C6, and was left with a scar on his neck from the surgery. Claimant filed a Claim Petition for specific loss for disfigurement under Section 306(c)(22) of the Act. The WCJ viewed the scar, and in granting 6 weeks of compensation benefits for disfigurement, described the scar as follows: "The scar is in the creased area of his neck. It is approximately one and one-half (1 ½) inches in length. The last one-half (1/2) inch of the scar is not noticeable as it is in the Claimant's natural crease of his neck. The scar is slightly indented. The first one inch (1") of the scar is slightly lighter than the rest of the skin on Claimant's neck." Claimant appealed, arguing that the award is significantly lower than what other WCJs would award.

On appeal, the WCAB, citing General Motors Corp. v. WCAB (McHugh), 845 A.2d 225 (Pa.Cmwlth. 2004), acknowledged the power to review and modify WCJ awards for disfigurement to ensure uniformity without being bound by any "rule of thumb" so long as it explained its reason for modification of the award. The Board viewed the scar and accepted the WCJs description, however, it determined that most WCJs award between 30 and 40 weeks of compensation for the scar. The Board concluded that the WCJ erred, and increased the award to thirty-five weeks. Employer appealed, assigning error to the Board in that the statewide rule of thumb for such a scar is twenty-five weeks.

The Commonwealth Court, on appeal , relied on its holding in Lord and Taylor v. WCAB (Bufford), 833 A.2d 1223 (2003), to support the maxim that the Board is required to explain its determination of a range of awards that most judges would select in order to promote statewide uniformity in these types of cases.

In this case, the Court distinguished the instant matter from its holding in General Motors, noting that the Board in General Motors properly rejected a *local* rule of thumb because it did not promote *statewide* uniformity. The Court concluded that the Board, in the instant matter, failed to explain how, after accepting the WCJ's description of the scar as "slight" it increased the award to thirty five weeks. The Board failed to explain how it concluded that the proper range was between 30 and 40 weeks. As such, the Commonwealth Court vacated the Board's decision and remanded for the Board to explain its decision to increase the award from 6 to 35 weeks, and explain how it determined the range to be 30 to 40 weeks when it accepted the WCJs description of the scar.

Lindtner v. WCAB (Acme Markets and Broadspire Services, Inc.) 2080 C.D. 2007 June 11, 2008

Issue: Whether the WCJ failed to consider all medical evidence in granting Employer's Utilization Review Petition, and whether the WCJs findings are inconsistent when it determined (1) it did not have jurisdiction under Geisler, and in the alternative (2) employer met its burden of proof.

Employer filed a Utilization Review Request for treatment provided by Dr. Mark Avert, D.O. from 8/5/04 and ongoing. Upon request for medical records by the URO, Dr. Avart returned one progress note dated 8/5/04. The URO determined the treatment to be neither reasonable nor necessary, citing claimant's failure to respond to conservative treatment over many years, lack of documentation and treatment plan, and the ineffectiveness of cortisone injections , which is not indicated for chronic pain management. Claimant filed a UR Petition. Employer submitted the report of the URO Reviewer, and reports of Dr. Korevaar. Claimant submitted a packet of medical records from Dr. Avart, a report from Dr. Avart, and his own testimony.

The WCJ denied the Petition based on lack of jurisdiction based on the Commonwealth Court's holding in County of Allegheny v. WCAB (Geisler), 875 A.2d 1222 (2005)(holding that if an unfavorable URO determination is made due to the provider's failure to supply medical records, the determination may not be appealed since it should not have been assigned to a reviewer and no report should have been generated). In the alternative, the WCJ credited the reports of employer's medical expert over the evidence submitted by Claimant. Claimant appealed to the Board.

On appeal, the Board concluded that the WCJ erred in finding that she did not have jurisdiction. It determined Geisler inapplicable to this case because the provider *did* provide a progress note. However, it affirmed the WCJ's Decision based on its credibility determinations of employer's medical expert over claimant's evidence. Claimant appealed, assigning error to the Board and the WCJ in that the WCJ failed to consider all medical evidence submitted by claimant. Specifically, claimant asserted that it submitted medical records from 1991 to 1993, and 1996 to 2005, but the WCJ only considered the medical records up to 1993 (WCJs Decision lists in the Exhibits section "Packet of Medical Records from Dr. Avart through 1993).

On appeal, the Commonwealth Court determined, as did the Board, that Geisler was inapplicable, because one progress note was enough to allow the URO to address treatment. The Court pointed to the URO's report wherein it referenced the ineffectiveness of cortisone injections, and determined that treatment was addressed substantively. In reviewing the record, the Court determined that the 1991 to 1993 and 1996 to 1995 medical records had in fact been admitted into evidence. The Court further determined that the Exhibits description was a harmless error – that medical records up to 2005 had in fact been admitted into evidence, but listing it as records up to "1993" was a mistake. Most notably, the WCJ's Findings of Facts reveal that the WCJ considered all of the evidence, as she referenced claimant's treatment which varied very little over the course of fourteen years.

Ultimately, the Court affirmed the Board's decision, determining that the WCJs Decision was based on credibility, of which the WCJ is the final arbiter.

Leona Paul v. WCAB (Integrated Health Services) 16 C.D. 2008 June 11, 2008

Issue: Whether the Board erred in affirming the WCJs Decision and Order terminating claimant's benefits despite Employer's failure to establish an improvement or change in claimant's physical condition

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On December 13, 2000, claimant sustained a compensable injury when, as an x-ray technician doing home visits, she fell on ice. The converted NTCP recognized the injury as "left ankle, left wrist, left thigh and right knee contusions." She ultimately required surgery in 2001 on her left wrist to repair a torn TFCC (triangular fibrocartilage complex). During the litigation of Employer's Termination Petition, claimant submitted the deposition testimony of her treating orthopedic surgeon, who diagnosed claimant with TFCC tear (which was directly related to the fall) and symptomatic pre-existing arthritis in her left wrist/hand which was aggravated by the fall. According to Dr. Sotereanos, claimant has not fully recovered, and required light duty restrictions. In support of its termination petition, Employer submitted the deposition transcript of its medical expert, who diagnosed claimant with right knee contusion, left ankle sprain, and left wrist injury resulting in surgery. He opined that claimant displayed minimal effort with regard to strength tests, had no evidence of atrophy, and had identical arthritic changes in both her left and right wrists. He concluded that claimant had fully recovered from her work injury.

The WCJ granted the Termination Petition, finding employer's medical expert more credible than claimant's expert, and finding claimant not to be credible. Claimant appealed to the Board, which affirmed the WCJ's Decision and Order.

On appeal, Claimant assigned error to the WCJ and Board in that the Employer failed to establish an improvement or change in claimant's condition as required by the PA Supreme Court's holding in Lewis v. WCAB (Giles & Ransome, Inc.), 919 A.2d 922 (Pa. 2007), thereby shifting the burden of proof to Claimant to establish her continued disability. Specifically, Claimant asserts that Lewis overruled the holding in King v. WCAB (K-Mart Corporation), 700 A.2d 431 (Pa.1997)(concluding that proof of a change in a claimant's condition was not necessary to prevail on a termination petition). Claimant alleges that Employer was required to show that the claimant's physical status has improved or changed, which it did not, and that the WCJ was required to address claimant's earlier physical examinations by her treating physician to determine whether employer's expert's testimony can support a determination that a change or improvement has occurred.

The Commonwealth Court provided a detailed analysis of Lewis, recalling that the PA Supreme Court relied upon its earlier opinion in Hebden v. WCAB (Bethenergy Mines, Inc.), 632 A.2d 1302 (1993)(holding it was not proper for an employer to challenge the diagnosis of the claimant's injuries as determined in a prior proceeding. In the instant matter, the Commonwealth Court determined that Lewis was inapplicable to this case, since the parties in both Lewis and Hebden had the opportunity to litigate the nature and extent of the injury while in the instant matter, the parties have not previously litigated the description of injury. A doctor's earlier opinions is *not* an adjudication. In this matter, it was employer's burden to prove that claimant's disability has ceased and/or that any current disability is unrelated to the claimant's work injury.

YDC New Castle – Pennsylvania Department of Public Welfare v. WCAB (Hedland) 230 C.D. 2008 June 11, 2008

Issue: Whether the WCJ erred in granting claimant's Claim Petition when claimant did not provide medical documentation for his 2-day absence as required by employer's policy

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Claimant, an employee of the Dept of Public Welfare, was injured on 9/3/2004 when he was assaulted by a student. Claimant ultimately missed two months of work. An NCP recognized claimant's cervical and thoracic sprain and strain, and under Act 534, claimant began receiving benefits as of 9/6/04 (Act 534 requires that DPW employees be paid their full salary by the Commonwealth, and that any workers' comp benefits received or collected be turned over to the Commonwealth). Claimant did not receive benefits for 9/4/05 and 9/5/05, and was required to use his sick time for those two dates. Claimant filed a Claim Petition, seeking TTD for those two days, or reimbursement of his sick time. Claimant agreed that he did not treat immediately after his injury – his injury occurred on Friday, doctor's office was closed on Saturday and Sunday, the two dates for which he is seeking compensation. Employer did not dispute the work injury, however argued that claimant was not entitled to benefits for those two dates since he did not provide medical documentation to support his absences as was required by its bargained-for policy, which was acknowledged by claimant by way of signature.

The WCJ granted claimant's petition, granting two days indemnity benefits or restoration of claimant's sick time, crediting claimant's testimony that he didn't seek immediate medical attention because he did not think it an emergency situation. On appeal, the Board affirmed.

On appeal to the Commonwealth Court, the employer argued that the WCJ capriciously disregarded its policy requiring medical documentation for his absences as a result of his work injury as of the first day. The Employer argued that the Act does not preclude the employer from requiring medical documentation.

The Court opined that the WCJ's decision was based on medical records restricting claimant from work as of the date of his exam on 9/8/05, and credibility determinations of claimant who testified that he did not feel capable of returning to work for those two missed days. Accordingly, the Commonwealth Court affirmed the Decision granting claimant's Claim Petition.

The Commonwealth Court addressed employer's concerns that it would be severely prejudiced in the future if a claimant is not required to submit medical documentation in support of its absences as policy mandates. However, the Court pointed out Section 407 of the Act which states that any agreement that varies the amount to be paid or period during which compensation shall be paid is null and void. The Court did indicate that employer is not without remedy in this instance, however. It could have terminated claimant's employment for failure to follow employer's rules. Employer's further concern that claimant may delay medical treatment to avoid detection of intoxication, for instance, may be addressed by filing for forfeiture under Section 306(f.1)(8) under the Act.

Timothy Diehl v. WCAB(IA Construction and Liberty Mutual Insurance) June 24, 2008 (see April case law update)

Employer's Petition for re-argument granted. The April 28, 2008 Opinion is vacated.