MARCH 2008 WORKERS' COMPENSATION (AND RELATED) CASE LAW UPDATE

I. Utilization Review – A postage meter 'stamp' will suffice for proof of timely mailing of medical records by a provider under review to the Utilization Review Organization (URO); a United States Postal Service (USPS) postmark is not required to establish proof of timely mailing.

The Case:

Sueta v. WCAB (City of Scranton), 2008 Pa. Commw. LEXIS 99 (March 07, 2008).

The chiropractor under review mailed records on the 30th day after the URO request for records, and the envelope containing those records was postage meter stamped with that date. The records, as would be expected, actually arrived at the URO beyond the 30th day. 34 Pa. Code 127.464 (a) requires such "mailing" within 30 days after the URO request for records. The Court deemed the postage meter mark sufficient to establish the date of mailing without requiring the use of a postmark of the United States Postal Service (USPS), reasoning that the Regulation in issue required "mailing", not a USPS postmark or actual receipt of the records by the 30th day. The Court ordered that the records be sent to a reviewer for Utilization Review Determination.

II. Settlement – Child/Spousal Support – Calculation of the $5,000. threshold under 23 P. S. 4308.1.

The Case:

Faust v. Walker, 2008 Pa. Super. LEXIS 165 (March 11, 2008).

A personal injury case settled for $10,000. Fees and costs were $3,199.07, leaving a balance of $6,800.93. Child Support arrears were $12,000. The Trial Court ultimately entered an Order of Attachment in the amount of $1,800.93 [$6,800.93-$5,000.00]. The reviewing Court affirmed, holding that the calculation of "Net Proceeds" under 23 P. S. 4308.1 was correct, and that no distinction in this regard was to be drawn between personal injury and workers' compensation settlements/awards.

III. Reinstatement/Claim of Specific Loss Time Barred.

The Case:

Romanowski v. WCAB (Precision Coil Processing), 2008 Pa. Commw. LEXIS 122 (March 12, 2008).

The claimant sustained a crush injury to his ankle in 1978. On January 28, 1993, he executed a Supplemental Agreement memorializing that he returned to work on January 21, 1993 for a new employer at no loss of wages. A second Supplemental Agreement in June 1994 memorialized the same thing. The 500 week period within which to seek reinstatement ended in July 2002. The claimant filed a claim in October 2004 alleging the resolution of his ankle injury into a specific loss. The issue before the Court was whether an apparent discrepancy in Average Weekly Wage, raised sua sponte by the WCJ in the Decision, that would arguably result in a partial wage loss on the return to work, operated to allow this claim within three years of the expiration of the 500 weeks – which would clearly make it timely. The Court held that there would be no stacking of the limitations periods [i.e., reinstatement from suspension and from modification]. The claimant failed to seek relief from the Suspension within 500 weeks, and therefore his claim was time barred. The Court noted that the "at any time" language in Section 413 (a) of the Act had no bearing on the limitations period, citing to *Penn Beverage v. WCAB (Rebich), 901 A.2d 1097 (Pa. Cmnwlth., 2006)*, and noting that it was just as likely – no evidence having been presented below - that the compensation rate, rather than Average Weekly Wage, was calculated incorrectly.

IV. Attorney Fee Bill – Burden of Proof - Lack of Extrinsic Evidence – Judicial Notice.

The Case:

Enright v. Springfield School District, et. al., (USDC, Eastern District), 2008 U. S. Dist. LEXIS 20051 (March 14, 2008).

This was a Plaintiff's Motion for Counsel Fee following the successful prosecution of a Civil Rights case. The Court noted that the moving party has the burden ["must"] to present evidence to justify the hourly rate, and time spent, as reasonable. The usual rate charged by the attorney is not dispositive. Once the opposite party objects [there was no objection here to the claimed rate, only to the time entries], the Court is to examine the billing entries "line by line". The Court here reduced billing for Interoffice Conferences, the preparation of a Response to

Motion for Summary Judgment, drafting a Complaint, and deposition digesting. The Court did allow time, after reduction, for the preparation of the Fee Bill.

V. Withdrawal from the Labor Force – Post Retirement Good Faith.

The Case:

Mason v. WCAB (Joy Mining), 2008 Pa. Commw. LEXIS 127 (March 18, 2008).

The claimant was injured in 1992. He was released to medium duty work. His employer did not offer work. The claimant then applied for and was granted a disability pension from his employer and at some point also began to receive Social Security disability benefits. Vocational efforts were undertaken. The WCJ modified benefits based on bad faith. The employer had argued that the bad faith demonstrated a complete withdrawal from the labor force and therefore warranted a Suspension. The WCJ declined to enter a Suspension. The WCAB accepted the employer's argument and reversed the denial of Suspension. The Court held that under *Southeastern Pennsylvania Transportation Authority v. WCAB (Henderson), 669 A. 2d 911 (1995*), a claimant who is retired must demonstrate either the inability to perform any job or that the work injury forced the retirement. The Court reinstated the WCJ's Modification, and remanded for additional fact finding on the issue of withdrawal from the labor force.

VI. Van Itself, and Modifications, can Qualify as an "Orthopedic Appliance" under Section 306 (f.1) (1) (ii) of the Act if factually established need is present – Not Subject to Cost Containment under Section 306 (f.1) (3) (i) of the Act, as cost containment applies only to a Health Care Provider.

The Case:

Griffiths v. WCAB (Seven Stars Farms, Inc.), 2008 Pa. LEXIS 260 (March 19, 2008.

The claimant was rendered a C-5 quadriplegic as a result of the work injury. The Griffiths tried different vans, and chose a model that was substantially lower in cost that other converted vans. The employer paid for the conversion, but refused to pay the base cost of the van. The WCJ awarded the full costs, and a Penalty, inferring financial hardship since the purchase funds were borrowed from a family friend. The Pennsylvania Supreme Court held that the base cost of the van, as well as the cost of conversion, was to be paid by the employer. The Court disapproved *Petrilla v. WCAB (People's Natural Gas), 692 A.2d 623 (Pa. Cmnwlth., 1997*) to the extent it would impose a means test for reimbursement. The Court left the door open for case by case consideration of prior lifestyle facts

that might militate against full reimbursement (e.g., prior van ownership). As to Cost Containment, the 80% ‘catch-all’ cap was held to apply only to a [health care] provider. “Obviously, an automobile dealer does not provide ‘health care services’ within the meaning of this definition.”.