Giant Eagle, Inc. v. WCAB (Givner), J-102-2010 (Pa.SC. 3/13/12)

Issue: Whether or not the word "compensation," as used in Section 314(a) of the Workers' Compensation Act, 77 P.S. §651(a), must include medical benefits as well as wage loss benefits?

Answer: No, but in certain circumstances it may.

Analysis: Claimant suffered a work-related injury on June 4, 1998, while working for Employer. On October 29, 2007, Employer filed a suspension petition alleging that Claimant failed to attend a physical examination. Following a hearing, the WCJ issued an Order directing Claimant to attend the deposition. Further, the Order also provided that should the Claimant fail to attend, such failure could result in the suspension of Claimant's wage loss benefits.

Claimant did in fact fail to attend the physical examination, and Employer filed another petition to suspend her benefits. After a hearing was held, in which Claimant also failed to attend, an Order was entered by the WCJ suspended Claimant's wage loss benefits.

Employer filed a timely appeal to the WCAB arguing that the WCJ erred by suspending only the wage loss benefits and not medical benefits as well. The WCAB rejected Employer's arguments, citing O'Brien v. WCAB (Monefiore Hospital), 690 A.2d 1262 (Pa.Cmwlth. 1997). The WCAB interpreted O'Brien as supporting the determination that medical expenses are included as "compensation" under the Act when the employer has not yet been determined to be liable, but medical expenses are not included as compensation when liability has been established.

The Commonwealth Court affirmed.

The Supreme Court accepted review on the limited issue as follows: "Whether 'compensation' must include medical benefits as well as wage loss benefits under section 314(a) of the Worker's Compensation Act.

In its opinion, the Court noted that the term "compensation" is used differently throughout the Act. Standing on its own, Section 314(a) does not give a concrete answer as to whether or not "compensation" must include medical benefits. However, the Court stated that the Act uses the term most frequently to denote wage loss benefits. Indeed, it reviews each section of the Act where this term is found, finding that "when we look to numerous other sections of Article II, we observe that the term 'compensation' appears to be used only in a manner denoting wage loss benefits.'"

That being said, the Court recognizes that in some circumstances, most notably Section 306(f.1) regarding Employer's obligation to pay medical expenses, the term "compensation" plainly denotes medical benefits.

Conclusion: From this, the Court reasons that the General Assembly did not intend the term to be restricted to only apply to wage loss benefits. Thus, the Court holds that "compensation" need not always include medical benefits as well as wage loss benefits under section 314(a), but in proper circumstances, it may. Thus, it upheld the Commonwealth decision.

John Leca v. WCAB (Philadelphia Sch. Dis.), 679 C.D. 2011 (Cmwlth. Ct., 3/7/2012)

Issue: Whether the WCJ erred in granting Employer's UR Petition because it relied upon medical experts who did not review chiropractic treatment specifically under review, and who were not specifically chiropractors but orthopedic surgeons?

Answer: No, the WCJ did not err. The treatment under review included chiropractic care. These treatments were repetitive and ongoing in nature. Because Employer's medical experts addressed the specific type of treatment under review, their opinions were based upon substantial evidence. Further, the court noted that there is no requirement in the Act governing a challenge to a utilization review determination which states that a physician must be of the same qualifications as the provider under review.

Analysis: On April 14, 2004, Claimant sustained a low back injury while trying to break up a fight during his duties as a school police officer. Employer accepted liability and issued an NCP. In March of 2008, Employer filed a utilization review request to determine the reasonableness and necessity of Claimant's chiropractic care. The treatment was determined to be reasonable and necessary.

Thereafter, Employer filed a UR Petition. In support of this petition, it submitted the 10/17/07 IME report of Dr. Robert Mannherz. Dr. Mannherz diagnosed Claimant with low back syndrome with extensive degenerative disease at L4-5 and lumbar spinal stenosis with bilateral lumbar radiculopathies. He noted that Claimant was treating with his chiropractor six days a week, but gained no improvement. As such, further chiropractic care could not be justified.

Employer also presented the 9/11/08 report of Dr. Elizabeth Genovese, who similarly documented Claimant's history and chiropractic treatments. She also concluded that further treatment with passive modalities, including PT and chiropractic care, could not be justified as reasonable because there was no objective evidence that these treatment were leading to increased function.

Claimant relied upon the UR determination of Dr. Auslander. He determined that Claimant's treatment "extends well beyond the typically observed standards of care," but concluded that the documented subjective complaints of pain and positive objective findings support the treatment under review.

The WCJ issued a Decision on 5/21/09 granting Employer's UR Petition, and finding Drs. Genovese and Mannherz to be more credible and persuasive than Dr. Auslander.

On appeal, Claimant argued that Employer's experts were not qualified because they did not review the specific chiropractic treatments at issue, i.e. the period under review. Claimant relied upon Brookside Family Practice v. WCAB (Heacock), 897 A.2d 539 (Pa.Cmwlth. 2006).

In that case, Claimant was implanted with a spinal cord stimulator on two separate occasions, November 2003, and December 2003. On review, the Employer's medical experts only reviewed the December 2003 treatment notes. The Commonwealth Court ultimately concluded that because Employer failed to present any evidence regarding the specific treatment under review, i.e. the November 2003 spinal cord stimulator implantation, the employer failed to meet its burden.

However, in the present case, the Court concluded that the facts were distinguishable and did not control. Unlike Brookside, this case involves hundreds of chiropractic treatments which are repetitive and ongoing in nature. Because both experts reviewed numerous treatment records related to this ongoing chiropractic care, Claimant's reliance on Brookside was misplaced. Furthermore, section 306(f.1)(6) specifically contemplates prospective utilization review, stating in pertinent part, "The reasonableness or necessity of all treatment provided by a health care provider under this act may be subject to prospective, concurrent or retrospective utilization review at the request of an employe, employer or insurer." 77 P.S. §531(6)(i)(emphasis added).

Next, Claimant argued that because Employer's medical experts were not chiropractors, they were unqualified to render opinions with respect to the challenge of a utilization review determination. The Court did not agree. While the Act requires that the initial utilization determination be rendered by a health provider licensed in the same profession as the provider under review, there is no corresponding requirement in the Act governing a challenge to a utilization review determination.

Conclusion: When the treatments under review in a Petition to Review Utilization Review Determination are repetitive and ongoing in nature, medical experts need not specifically address each and every treatment to render a credible opinion. Further, while the Act requires that the initial utilization determination be rendered by a health provider licensed in the same profession as the provider under review, there is no corresponding requirement in the Act governing a challenge to a utilization review determination.

Alfred Glaze v. WCAB (City of Pittsburgh), et. al, 1122 C.D. 2010 (Pa.Cmwlth. 2012)

Issue: (1) Whether or not the WCJ erred in rejecting Employer's expert testimony on the basis that he could not identify specific amounts contributed by Employer to any specific Claimant's pension plan, and in violation of pertinent case law? (2) Whether or not the WCJ erred in rejecting Employer's expert testimony by relying on claimant's experts

speculative and incompetent testimony? (3)Whether or not Claimants are entitled to a reimbursement for pension benefit offsets previously taken by Employer?

Answer: (1) Yes. (2) Yes. (3) Given the remand for reconsideration of the evidence, this issue is moot, and was not addressed on appeal.

Analysis: These consolidated appeals consist of 38 petitions for review from orders of the WCAB compelling the Employer, the City of Pittsburgh, to begin paying 19 retired fire fighters their weekly compensation benefits without any further reduction for a pension offset.

Claimants responded by seeking clarification as to whether Employer should reimburse them for pension offsets previously taken. The WCJ did not agree, and order that Employer was not required to reimburse Claimants for past due benefits.

Section 204(a) of the Act allows employers to claim an offset against workers' compensation benefits for pension benefits simultaneously received by an employee. So in 2005 and 2006, Employer filed benefit offset notices against Claimants, who were receiving compensation indemnity benefits and pension benefits. Thirty (30) days after issuing these notices, Employer reduced the comp benefits for each Claimant pursuant to its own calculation of the funding. In response, Claimants filed review offset petitions.

In a review offset proceeding, the employer claiming a pension benefit offset bears the burden of proving its entitlement to a credit. City of Phila. v. WCAB (Andrews), 948 A.2d 221 (Pa.Cmwlth. 2008). Employer can meet this burden through actuarial evidence. After hearing evidence from both Claimant's and Employer's experts, the WCJ found in favor of Claimants in that Employer failed to meet its burden. However, in the Decision, she nonetheless found that Claimants were entitled to an offset for past due benefits, but that Employer was not required to reimburse them.

Issue (1): As in City of Philadelphia v. WCAB (Calderazzo), 968 A.2d 841 (Pa.Cmwlth. 2009), the WCJ in this case found that Employer is clearly entitled to an offset. However, in the present matter, the WCJ did err in rejecting Employer's Expert testimony on the basis that he could not identify how much Employer contributed to any specific individual's pension benefits. In Department of Public Welfare v. WCAB (Harvey), 605 Pa. 636 (2010), the PA Supreme Court held that an employer may rely on expert actuarial testimony to establish the extent the employer funded the claimant's defined-benefit pension.

Issue (2): In summary, Employer argued that it cannot be held to a standard beyond that required by Harvey. Employer argued that it presented competent testimony from individuals with specific knowledge as to how the plans were funded. Further, they contend that Claimant's expert merely reviewed the Employer's expert's calculations and opined that better data must exist. For this reason, Employer sough a remand for a definitive determination of its offset rights.

This Honorable Court determined that a remand was justified as the WCJ clearly erred when it rejected Employer's expert's testimony on the basis that Employer was unable to identify how much it contributed to any specific individual's pension plan. This is in direct contradiction to the standards set forth in Harvey and Pennsylvania State University/PMA Insurance Group v. Workers' Compensation Appeal Board (Hensal), 911 A.2d 225 (Pa.Cmwlth. 2006), appeal denied, 593 Pa. 743 (2007). Further, a remand was justified by the WCJ's clear misunderstanding of the Employer's burden of proof. On this issue, the Court remanded to the WCJ to determine which discrepancies are significant and fatal to the Employer's expert's actuarial calculations and a definitive determination of its offset rights.

Issue (3): Claimant argued that Employer failed to establish the extent of the offset. Where an employer fails to meet its burden of proof in this regard, Claimant argued that the employer is not entitled to any offset whatsoever. Thus, Claimants argued, the WCJ erred in finding that Employer is entitled to another opportunity to establish the extent to which it funded their pensions.

The Court distinguished Claimant's case law on this issue from the present case. Here, Employer presented expert actuarial evidence of the extent to which it funds Claimant's pensions. Moreover, given the decision to remand for a reconsideration of the evidence in light of Harvey and Hensal, the Court found that the argument was moot and need not be addressed on appeal.

Cytemp Specialty Steel v. WCAB (Crisman), 42 C.D. 2011 (Pa. Cmwlth Ct. 3/15/12).

Issue: Whether the WCJ and WCAB erred in granting a claim petition due to a lack of substantial evidence, and because the claim was barred by the principles of *res judicata* and collateral estoppel?

Answer: Yes, there was a lack of evidence to support Claimant's claim petition, and it was also barred by *res judicata*.

Analysis: Claimant worked as a mill hand for Employer and sustained injuries on September 23, 1992 and May 7, 1993. Claimant continued working until September 8, 1993. At that time, an NCP was issued listing a date of injury as May 7, 1993, and describing the injury as a "cervical sprain." TTD was paid, until benefits were reduced in March of 1995 due to Claimant's refusal of suitable light-duty work. Benefits were again reduced in July 1997, to reflect wages actually earned by Claimant during his work at the Salvation Army from May 30, 1995 though November 7, 1995. Claimant left this job on his own. The WCJ found that Claimant was capable of performing this job as of May 30, 1995 and at all times subsequent thereto.

The WCJ rejected Claimant's argument that he was totally disabled. Claimant then filed a claim petition against the Salvation Army alleging he sustained injuries while under their employment, and that he was totally disabled as of November 7, 2005. The Salvation

Army joined Employer on the theory that the injuries might be reoccurrences of the original work injuries.

The WCJ denied both the claim and joinder petitions. He found that Claimant did not sustain any new injuries nor did he aggravate old injuries. Claimant appealed. The WCAB remanded to reconsider evidence regarding Claimant's shoulder, which required surgery. The WCJ found that this was not work-related and reaffirmed all prior findings. Again, Claimant appealed.

By May 2003, Claimant exhausted his 500 weeks of TPD. Subsequently, Claimant filed multiple new claim petitions alleging he sustained injuries to his low back, right hip, and right leg in 1992, and right shoulder in 1993. The WCJ denied these as time-barred, and also noted that the shoulder issue was fully litigated and barred by *res judicata*.

However, some of the 2003 petitions were separated, and include a claim, reinstatement, and two review petitions. These are the subject of this appeal. The petitions allege that Claimant sustained a head, neck, and shoulder injury on September 23, 1992.

The WCJ found that claimant sustained a cervical strain and cervical spinal stenosis at work on September 23, 1992, rendering him totally disabled as of November 7, 1995. Employer appealed arguing that the WCJ's decision was barred by *res judicata* and collateral estoppel. The WCAB affirmed, however, this Court vacated and remanded to the WCJ to make a specific finding as to whether or not Claimant sustained two work injuries to his neck: one on September 23, 1992, and one on May 7, 1993.

On remand, the WCJ found that there were two separate injuries. Employer appealed, and the WCAB affirmed stating that because there were two injuries, neither *res judicata* or collateral estoppel applied.

On appeal to the Commonwealth Court, Employer argued that the claim petition was not supported by substantial evidence. The Court agreed. The record does not support a finding that Claimant sustained two separate neck injuries. Claimant's treating physician was only aware of one injury and Claimant himself testified that there was only one neck injury.

Second, the Court held that it does not matter how many neck injuries Claimant sustained, the issue was barred because the nature and extent of his ability to work has been fully litigated. Twice. In 1997, the WCJ found that Claimant's work-related neck injury rendered him partially disabled but able to do the Salvation Army job as of May 30, 1995 and ongoing. Next in 2000, the WCJ denied Claimant's petitions again discrediting Claimant's treating physician, and rendering an opinion that Claimant did not sustain any other work-related injuries.

The Court concluded that the current litigation represents "yet another attempt by Claimant to litigate the question of whether he was totally disabled as of November 7, 1995," and that Claimant was again relying "on the testimony of Dr. Macielak,

previously discredited, for the proposition that Claimant's neck injury prevented him from doing the Salvation Army job, or any job, as of November 1995."

Conclusion: It seems that this is a case of Claimant with too many lawyers and too many petitions. He filed dozens of petitions over two decades trying to seek total disability. In the words of the Court, "claimant's repeated attempts to prove total disability as of November 1995, with new attorneys and new filings cannot stand."

Diana Dillinger v. WCAB (Port Authority of Allegheny County), 770 C.D. 2011 (Cmlwth Ct., 3/1/12)

Issue: (1) Whether the WCAB erred in reversing the WCJ's decision amending the NTCP to include PTSD? (2) Whether or not the Employer's conduct in referring Claimant for treatment for PTSD, and payment for same, lulled Claimant into falsely believing that Employer considered PTSD to be work related. (3) Whether or not the WCAB erred in denying Claimant's cross appeal based on the WCJ's determination that Claimant's PTSD existed from the date of her original injury?

Answer: (1) No. (2) No. (3) Yes.

Analysis: Claimant sustained a work injury on November 15, 2003, in the nature of a left shoulder strain when she was attacked by a passenger while driving a bus. The NTCP set forth that Claimant's disability began on November 16, 2003. Claimant signed a supplemental agreement on December 8, 2003, and another on January 2, 2004, modifying her benefits. She signed a final receipt and a third supplemental agreement on February 20, 2004, which suspended her benefits.

Claimant subsequently alleged a recurrence of her work injury on December 3, 2005. Employer issued an NCD on March 17, 2005. On March 22, 2007, Claimant filed a review petition seeking to amend the description of injury to include PTSD due to the original work injury. Claimant argued that Employer had been paying for this treatment but failed to formally accept it. On November 13, 2007, Claimant filed a claim petition alleging an aggravation of her PTSD due to continued interaction with the public.

After testimony and the presentation of evidence, the WCJ credited Claimant's testimony and found that Claimant's PTSD was "a condition that should have been listed on the [NCP] from the outset as it existed at the time the [NTCP] was issued." Thus, the WCJ granted Claimant's review petition. Further, the WCJ dismissed Claimant's claim petition as moot because she amended the NCP to include PTSD. Employer appealed. Claimant cross-appealed arguing that should the WCAB reverse the decision, it should grant the claim petition.

The WCAB reversed the WCJ's decision concluding that it was untimely under Fitzgibbons v. WCAB (City of Philadelphia), 999 A.2d 659 (Pa.Cmwlth. 2010). Further,

the WCAB denied Claimant's cross appeal concluding that PTSD was an original injury but was not acknowledged within three years of last payment of compensation.

Claimant first argues that the WCAB erred in reversing the WCAB decision when it relied on Fitzgibbons and found the review petition was untimely. This argument is without merit. In Fitzgibbons, this Court held

> When a party is seeking either to obtain relief through the correction of an NCP under paragraph one of Section 413 of the Act, or is seeking to add additional consequential injuries to a claimant's compensable, work-related injuries under paragraph two of Section 413 of the Act, **the party must file the petition within three years of the date of the most recent payment of compensation.**

999 A.2d at 663-64 (emphasis added).

Here, Claimant filed her review petition beyond the three-year limitation period, thus the Court found that Claimant cannot now seek to amend the description of injury to include PTSD.

Next, Claimant argued that should the review petition be denied, Employer's recommendation and payment of treatment for PTSD, lulled her into a false belief that the Employer consider this a compensable work injury. This argument also lacks merit.

Claimant is asserting an equitable estoppel principle. However, the Court noted that the "doctrine of equitable estoppel cannot toll the statue of limitations unless the Claimant can establish fraud, concealment or misrepresentation on the part of the employer." Budd Baer, Inc. v. WCAB (Butcher), 892 A.2d 64, 67 (Pa.Cmwlth. 2006).

Finally, Claimant argues that the WCAB erred in denying her cross-appeal based on the WCJ's determination that PTSD existed from the date of the original injury. The Court agreed.

The law is clear that a claimant with a pre-existing injury, whether mental or physical, is entitled to benefits as long as she shows that her injury has been aggravated by a working condition to the point of disability. Rag (Cyprus) Emerald Resources, L.P. v. WCAB (Hopton), 590 Pa. 413 (2007). Whether or not the pre-existing condition is related to the work-injury is irrelevant. The employer takes the employee as she comes. Id. at 429-30.

Moreover, the WCJ erred in dismissing Claimant's claim petition as moot because Claimant may be entitled to benefits based on an aggravation of her PTSD. However, in dismissing the claim petition as moot, the WCJ failed to make necessary findings as to whether Claimant's PTSD, a psychic injury, was caused by abnormal working conditions. See PA Liquor Control Board v. WCAB (Kochanowicz), 20 A.3d 105 (Pa.Cmwlth. 2011). Because the WCJ did not address this issue, the Court remanded for additional findings with respect to that evidence.

Conclusion: The case law is clear that a review petition must be timely filed. Furthermore, this time limitation is not tolled by equitable estoppel principles unless there is clear evidence of fraud or misrepresentation. As none was presented, Claimant's review petition was properly dismissed. However, her claim petition was improperly denied, and as such, was remanded for relevant findings as to the working conditions to determine if her psychic injury met the established principles of Kochanowicz.