THE HARTWELL
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MAY 2016 CASE LAW UPDATE

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I A Const. Corp. v. W.C.A.B. (Rhodes), ___ A.3d ___, (PA Supreme Ct. May 25, 2016).

Issues: Whether the Commonwealth Court was permitted to overturn WCJ's credibility determination for the IRE physician based upon his out-of-specialty opinion.

Answer: No. The PA Supreme Court determined that the Commonwealth Court erred in overturning the WCJ's credibility finding. The PA Supreme Court determined that the WCJ could decline a Modification of Benefits based upon an IRE due to the lack of expertise by the IRE physician even though the physician was assigned by the Bureau.

Analysis: The claimant in this matter sustained a work related injury in 2005. After several years (beyond the point where the Employer could utilize the Administrative remedy for an IRE), the Employer requested that the Bureau designate an IRE physician. The Bureau assigned Dr. Bud Lateef to conduct an IRE, which was completed and he designated that the claimant was at 34%.

Employer proceeded with a deposition of Dr. Lateef, who testified that he had examined Claimant and reviewed various medical records. According to Dr. Lateef, he confirmed three primary present diagnoses, which he described as traumatic brain injury, a cervical condition in the nature of a herniated disc, and a spinal condition resulting in gait dysfunction. Dr. Lateef explained that he assigned a discrete impairment rating to each of these conditions, which, together, comprised the 34 percent "whole person impairment rating".

The Employer presented Dr. Lateef's deposition testimony as well as the IRE report. Claimant did not testify on his own behalf, nor did he present medical testimony or other evidence.

The WCJ denied Employer's modification petition, rejecting Dr. Lateef's impairment rating opinion. Initially, the WCJ expressed a concern that Dr. Lateef had inappropriately "lumped" an array of discrete injuries into three categories. The WCJ then focused her concern upon the significant portion of Claimant's impairment rating attributable to cognitive issues. In her estimation, Dr. Lateef's assessment of cognition was an unduly limited one, since he performed only a cursory examination and otherwise relied upon only a limited range of medical records. The WCJ indicated that she was un-persuaded by Dr. Lateef's opinion since he specialized in physical medicine and pain management, not neurology.

On Employer's appeal, the WCAB affirmed relying substantially on the principle that a WCJ, as the fact-finder, appropriately determines the weight to be accorded to the evidence presented.

On appeal the Commonwealth Court reversed in a published decision. *See IA Constr. Corp. v. WCAB (Rhodes),* 110 A.3d 1096 (Pa.Cmwlth.2015). From the outset of its analysis, the Commonwealth court stressed that Dr. Lateef met the WCA's stated qualifications for IRE physicians and that he followed the statutorily-prescribed methodology for conducting the examination citing 77 P.S. § 511.2(1)). The Court opined that the WCJ lacked the authority to reject the physician's testimony on the basis that cognitive impairment was outside the area of his specialization (opining that rejection of an impairment rating based on a mismatch between the particular specialization of an examining physician and a claimant's condition "would impose standards in excess of those set forth in Section 306(a.2)(1) of the Act").

In terms of the remaining reasons provided by the WCJ in support of her finding that Dr. Lateef's testimony was unpersuasive, the Commonwealth Court posited, based on the requirement that factual findings must be supported by substantial evidence, that "a WCJ's opinion as to the insufficiency of an IRE cannot stand without some record support." Noting Claimant's failure to adduce evidence on his own behalf, the Commonwealth Court found the record to be lacking in these material regards. The court also explained that the WCJ did not reference any provisions of the AMA Guides or other evidence in support of her conclusions that Dr. Lateef mischaracterized or improperly grouped Claimant's injuries or that he erroneously calculated the impairment rating.

This matter was then appealed to the PA Supreme Court who, after a significant analysis of the Statute for the IRE process, as well as a the opinion of the WCJ, noted that a WCJ may validly accord lesser weight to an underdeveloped, out-of-specialty opinion. They asserted that this approach is also consistent with other jurisdictions. The Supreme Court stated that they have previously determined that physicians' impairment rating opinions pertaining to IREs conducted under Section 306(a.2)(6) are subject to vetting through the "traditional administrative process." Accordingly, the Commonwealth Court erred in its conclusions that a WCJ lacks the authority to reject un-contradicted testimony by an IRE physician and that, in the present case, the WCJ was required to identify substantial contrary evidence in the record to support such rejection. The order of the Commonwealth Court was reversed, and the matter was remanded for reinstatement of the WCJ's adjudication, as affirmed by the WCAB.

Conclusion and Practical Advise: The Supreme Court addressed that even though the Bureau appointed the physician to conduct the IRE, the WCJ still has the authority to discredit the opinion of the IRE physician based upon his expertise even if there is no conflicting evidence. This case along with other past cases could potentially require Employer's to actually depose the IRE physician. In years past most IRE cases would be resolved through stipulation. Over the last year, many claimant's counsel are requiring that the deposition be secured in order for defendant's to sustain their burden. Defendant counsel should be advised that, in addition to the actual medical aspect of the case, during the deposition they need to thoroughly address qualifications of the physician as well as whether or not they meet the criteria for a physician under the Act.

Com., Dept. of Labor and Industry v. W.C.A.B. (Kendrick and Timberline Tree & Landscaping LLC), __ A.3d __ (Pa. Cmwlth May 9, 2016)

Issues: Whether or not "compensation" includes both wage loss and medical benefits, within the meaning the WC provision under which claimants who fail to provide the Uninsured Employers Guaranty Fund (Fund) with notice within 45 days of discovering that an employer is uninsured are limited to compensation from the date of notice.

Answer: Yes.

Analysis: The Fund appeals to the Commonwealth Court from an Order of the Board affirming and amending an order of a Workers' Compensation Judge (WCJ). The WCJ granted the Claim Petition against the Fund seeking total disability (wage loss) and medical benefits as of the date of Claimant's injury, November 7, 2011. The Board affirmed the WCJ's decision to grant medical benefits as of the date of Claimant's injury, but limited the Fund's liability for wage loss benefits to payments due after February 8, 2012, the date the Fund received notice of Claimant's injury.

On appeal, the Fund contends that the Board erred in requiring it to pay Claimant's medical benefits prior to the date it received notice of the claim. The Commonwealth Court reversed in part and affirmed in part.

Claimant was injured in the course and scope of his employment on November 7, 2011. Claimant filed a Claim Petition against Employer on or about November 16, 2011, which was not accepted by Employer. It was determined by Claimant at a December 21, 2011 hearing that Employer was not insured for workers' compensation in Pennsylvania.

Claimant filed a Notice of Claim against the Fund on February 8, 2012, to notify the Fund of his injury and that Employer was uninsured. Claimant then filed a Claim Petition against the Fund on March 6, 2012. The parties stipulated that Claimant sustained a compensable work-related injury on November 7, 2011, for which the Claimant is entitled to receive workers' compensation benefits from the Fund due to the Employer's failure to pay the claim.

The parties could not reach an agreement as to when Claimant's benefits were to commence. The Fund maintained that Claimant is not entitled to compensation until notice was provided to the Fund on February 8, 2012. Claimant asserted that he is entitled to benefits retroactively to the date of the injury, November 7, 2011. At issue is Section 1603(b) of the Workers' Compensation Act. 77 P.S. § 2703(b).

The Commonwealth Court in examining past precedent determined that whether the term "compensation" includes medical benefits as well as [wage loss] benefits is determined on a section-by-section basis.

How the term "compensation" is defined is dependent upon where in the Act the term is used and how it is defined for purposes of the particular section. Sections 306, 311, 314 among others all utilize the term "compensation." This is also the case in Sections 1601 and 1603.

The Commonwealth Court's interpretation of the term "compensation" in Section 1603(b) includes both medical and wage loss benefits and is based on the plain language of Section 1601 and this Court cannot disregard the plain language of the Act "under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). Moreover, this interpretation is not in conflict with the humanitarian purposes of the Act. Employees injured while working for uninsured employers do *not* assume the costs of medical treatment provided to them prior to notice being given to the Fund. Medical providers are prohibited from requiring injured employees to pay for work-related treatment by Section 306(f .1)(7) of the Act, 77 P.S. § 531(7) ("A provider shall not hold an employe liable for costs related to care or service rendered in connection with a compensable injury under this act"). Medical providers, however, maintain their right to pursue a remedy outside the workers' compensation system against uninsured employers to cover the expenses incurred in the treatment of injured employees.

Accordingly, the Commonwealth Court interpreted the term "compensation" in Section 1603(b) of the Act as including both wage loss benefits and medical benefits. As such, since the claimant failed to provide notice to the Fund within 45 days after he knew the employer was uninsured, he will receive compensation for wage loss and medical benefits for any expenses incurred after notice was given to the Fund on February 8, 2012 but not before that date.

Conclusion and Practical Advise: The Commonwealth Court reiterated a position that the claimant must notify the Fund of any uninsured employer within 45 days to have coverage for both medical and indemnity benefits. There is also good language in this case to distinguish the "humanitarian purposes of the Act" argument in situations where the claimant is not actually harmed or impacted.

Martinez v. W.C.A.B. (Roman Catholic Archdiocese of Philadelphia), 2016 WL 2016 WL 2754016 (Pa. Cmwlth May 12, 2016) (please note this is an unreported determination).

Issues: Whether the WCJ abused their discretion in closing the record and failing to allow claimant to take rebuttal testimony that was scheduled for 8 days after the final hearing.

Answer: No.

Analysis: Claimant appealed to the Commonwealth Court an order of the Board affirming a decision of the WCJ that granted Claimant's claim petition and awarded him wage loss benefits under the Act for a closed period of approximately five months with a Termination of benefits thereafter. Claimant contends the WCJ erred in closing the record and precluding the deposition testimony of Claimant's treating physician, which Claimant scheduled for eight days after the final (fourth) hearing. Claimant asserts the WCJ should have allowed the deposition in rebuttal to the employer's medical evidence. Claimant further asserts this medical evidence would have altered the WCJ's findings regarding the diagnosis of his work injury and the resulting period of disability. The Commonwealth Court affirmed. Namely, claimant was not permitted to secure the additional deposition.

Claimant filed a claim petition alleging he sustained a work-related low back injury. In support of his claim petition, Claimant submitted the deposition testimony of Dr. Sofia Lam (Claimant's Physician), who is board certified in anesthesiology and pain management.

In opposition to the claim petition, Employer submitted the deposition testimony of Dr. Armando Mendez (IME Physician), who opined Claimant sustained a lumbar strain and sprain as a result of the February 2013 work incident but was fully and completely recovered from that injury as of his July 3, 2013 evaluation. In addition, IME Physician opined Claimant could return to work without restrictions and required no further medical treatment for that injury.

Thereafter, Claimant scheduled a rebuttal deposition of Dr. Daisy Rodriguez (Rebuttal Physician), Claimant's primary treating physician, to be held on March 19, 2014. At the fourth and final hearing on March 11, 2014, Employer objected to the rebuttal deposition. The WCJ sustained Employer's objection and denied Claimant's request for the deposition. As reasons for her denial, the WCJ noted the first hearing occurred nearly a year ago and "that Claimant is out of time to take additional evidence." The WCJ further stated that Claimant failed to provide a sufficient reason why Claimant's Physician's testimony was insufficient.

Following the close of the record, the WCJ circulated a decision granting Claimant's claim petition for the period of February 1, 2013 to July 3, 2013 and finding claimant fully recovered as of July 3, 2013. Claimant appealed, and the Board affirmed.

On appeal, the Commonwealth Court affirmed the WCJ's determination stating it is within the discretion of the WCJ to waive the Judge's Rules to extend the timing for the litigation. In particular, evidentiary matters, including the taking and the admission of testimony and exhibits, fall within the discretion of the hearing body. The admission of evidence falls within

the WCJ's discretion and will not be disturbed absent a showing of an abuse of that discretion. It is within the WCJ's discretion to control her docket by ordering the parties to proceed in a timely manner. Here, the WCJ held the first hearing on April 23, 2013. On March 11, 2014, the WCJ held the fourth and final hearing in the case.

First, the Commonwealth Court noted that the WCJ properly determined Claimant's deposition would have unreasonably delayed the disposition of the case. Section 131.63(c) of the Judges' Rules provides that a moving party depose its medical expert within 90 days of the first hearing. 34 Pa.Code § 131.63(c). The Court stated that the Claimant had ample time to depose Claimant's Physician and Rebuttal Physician and concluded that the close of the record at the fourth hearing on March 11, 2014, was consistent with the WCJ's announcement at the November 2013 hearing, and therefore did not violate Claimant's due process rights.

Second, the WCJ determined Claimant failed to offer any compelling reason why Claimant's Physician's testimony was not sufficient. The WCJ observed that Rebuttal Physician referred Claimant to Claimant's Physician. In addition Claimant's Physician had Rebuttal Physician's records. Claimant argued that Rebuttal Physician was Claimant's treating physician, practiced a different specialty, and could testify as to Claimant's condition from the beginning. However, Claimant's Physician testified she reviewed Claimant's prior treatment records. As such, the Commonwealth Court determined there was no abuse of discretion in the WCJ's determination in sustaining Employer's objection to Claimant's scheduled deposition and closing the record.

Conclusion and Practical Advise: The Court determined that the claimant was not permitted to take any additional rebuttal testimony from the physician and that there was no abuse of discretion by closing the record as directed. This case should serve as a reminder to all practitioners and claim's administrators that there is no guarantee that the case will be extended for additional evidence. Often, especially now with the mandatory mediation process delaying the initial depositions, it is wise to secure dates for depositions as quickly as possible. This was a case where the claimant was only requesting an additional 8 days on a denied claim petition. It is certainly possible that a Judge would be less forgiving to a defendant seeking additional evidence on a denied claim petition.