

CASE LAW UPDATES MAY, 2008

Brockway Press Metals and ACE USA v. (WCAB) (Holben) No. 43 D.C. 2008, Commonwealth Court of Pennsylvania, 2008 Pa. Commw. LEXIS

The issue in this case is whether a claim for decedent's benefits is barred by Section 301(c)(1) of the Act because decedent's death occurred more than 300 weeks after the injury (non-Hodgkin's lymphoma due to exposure to solvents at work). In concluding that the claim was time-barred, the Court supplied an interesting discussion on the interplay between Sections 301(c)(1) and 301(c)(2) of the Act.

In this case, the Court reversed the Board which affirmed the decision of the WCJ granting the fatal claim petition filed by widow of decedent. In a Decision issued July 11, 2000, the WCJ found that decedent contracted non-Hodgkin's lymphoma as a result of his exposure to solvents at work and that decedent was injured and disabled by that disease on October 13, 1997. The WCJ concluded that the occupational disease provisions of Section 301(c)(2) of the Act were inapplicable because non-Hodgkin's lymphoma is not an occupational disease as defined by Section 108 of the Act. Consequently, the WCJ granted decedent benefits pursuant to the general injury provisions of Section 301(c) of the Act. The decision was not appealed.

On April 4, 2005, decedent died from his work-related non-Hodgkin's lymphoma, and on August 1, 2005, claimant filed a petition. Employer filed a motion to dismiss asserting that because decedent's death occurred more than 300 weeks after the injury date, it was not compensable under the express language of Section 301(c)(1). That section states, in relevant part, "Wherever death is mentioned as a cause for compensation under this Act, it shall mean only death resulting from such injury and its resultant effects, and occurring within 300 weeks after the injury." On December 19, 2005, the WCJ denied employer's motion and acknowledged that decedent had been awarded benefits under a 301(c)(1). Nevertheless, applying Section 301(c)(2), the WCJ stated that it is disability, not death, which must occur within 300 weeks, and that once the claimant established work-related disability within that period, it does not matter how many months or years later the death occurs. The WCJ concluded that claimant proved her entitlement to widow's benefits and granted the petition.

Employer appealed to the WCAB, arguing that claimant's petition is barred by Section 301(c)(1) and that the WCJ erred in relying on 301(c)(2) to grant the petition. The Board disagreed and affirmed the WCJ.

The Board relied upon the Supreme Court's Pawlosky decision for the proposition that a claimant can establish an occupational disease for the purposes of Section 301(c)(2) even where the disease is not encompassed within Section 108 of the Act. Thus, the Board held that decedent had established an occupational disease and that Section 301(c)(2) applied. Further, the WCAB held that because decedent had a compensable disability as a result of his work-related non-Hodgkin's lymphoma within 300 weeks of October 13, 1997, decedent's death from that disease was compensable under 301(c)(2).

The Court noted that the sole issue was whether the Board erred in relying on Section 301(c)(2) and Pawlosky to grant claimant benefits for decedent's Section 301(c)(1) injury. In siding with employer, the Court stated that the Board's interpretation of Pawlosky was erroneous. The Court noted that based on Pawlosky's broad interpretation of "injury" in Section 301(c)(1), it is settled law that a claimant can establish a right to benefits for an "injury" in the nature of a work-related disease. However, the fact that Courts recognize a work-related disease as an injury under Section 301(c)(1), does not mean that all work-related diseases are recognized as occupational diseases under Sections 108 or 301(c)(2). Notably, the Court references the 2001 Torrey/Greenberg treatise. The Court noted that it agreed with employer that the plain language of Section 301(c)(2) precludes an award of benefits because its time limitations expressly applied to disability and death resulting from an "occupational disease" as defined by Section 108 of the Act.

Because decedent's death occurred more than 300 weeks after his injury, claimant's petition is barred per Section 301(c)(1).

The Pennsylvania State University/PMA Insurance Group v. WCAB (Hensal), 1942 C.D. 2007, Commonwealth Court of Pennsylvania, 2008 Pa. Commw. LEXIS 905

The issue in this case is whether an employer is entitled to a suspension of benefits after claimant applied for and received a company disability pension and then engaged in only a cursory job search in response to employer's suspension petition which alleged that by retiring, claimant has voluntarily withdrawn from the workforce. In an interesting opinion that addresses the concept of "good faith," the Court concluded that suspension of benefits was appropriate.

Employer appealed from an Order of the Board affirming a Decision by the WCJ denying its petition to suspend benefits of claimant. Employer argued entitlement to a suspension of benefits because claimant failed to engage in a good faith job search by actively seeking employment, and, instead, had voluntarily withdrawn himself from the entire workforce. After sustaining a left shoulder injury on February 21, 2002, claimant remained out of work and then, in January 2004, applied for a disability pension. On June 23, 2004, employer filed a modification petition claiming that work was available within his light-duty work restrictions. Employer demonstrated that work was generally available to claimant, and following a hearing in which employer demonstrated that work was generally available for claimant, the Judge granted employer's modification petition on June 13, 2005 and modified claimant's benefits. Claimant remained unemployed, and on March 30, 2006, employer filed a petition to suspend his benefits claiming that by retiring, claimant had voluntarily withdrawn from the workforce.

Employer offered the deposition testimony of a vocational rehabilitation specialist to establish that employment was available to claimant within his work restrictions. Admittedly, claimant was not hired for any of the positions identified as generally available to claimant. Employer also submitted into evidence the WCJ's June 13, 2005 Decision modifying claimant's benefits, wherein the Judge found that work was available to claimant within his work restrictions. In opposition, claimant testified that after sustaining his work injury, he applied for a disability pension in January of 2004 in order to maintain health insurance, hospitalization, vision and other benefits provided by employer. Claimant stated that he registered with Career Link, an organization assisting job seekers, and that he occasionally checked the Web for available jobs. Claimant testified that he had not found work through his efforts. Claimant further testified that he was interested in a position with a local company but no openings were available, and he was also interested in taking a civil service test to pursue an opportunity with the Drivers' License Center. Claimant acknowledged that he had retired from his position with employer on February 21, 2002 and had not worked in any capacity since that time. The WCJ denied employer's suspension petition based on his finding that claimant had not voluntarily removed himself from the workforce because he was seeking employment consistent with his pre-injury earning power. Employer appealed to the Board arguing that claimant had not met his burden of showing that he had not withdrawn from the workforce because he had not shown a good faith effort to seek employment by merely taking action to locate jobs two weeks before the hearing. The Board affirmed the finding that claimant's efforts demonstrated that he had not voluntarily removed himself from the entire workforce.

Following the Supreme Court's 1995 Henderson decision, the Court noted that where claimant accepts a pension, she is presumed to have left the workforce entitling an employer to a suspension of benefits unless claimant establishes that: 1) he/she is seeking employment, or 2) the work-related injury forced him/her to retire. The Court noted that there was no contention that the work injury forced claimant to retire, and the only question was whether claimant sustained his burden of showing that he was actively seeking employment. In that regard, claimant had to show that he engaged in a good faith job search. The duty of "good faith" has been defined as honesty in fact in the conduct or transaction concerned. To show good faith, the claimant has to show that he has honestly undertaken efforts where an employer knows that he is seeking employment. Relying on the facts as found by the WCJ, the Court noted that claimant failed to show that he was engaged in a good faith effort to seek employment. Searching the internet and newspaper ads for jobs, without more, does not constitute a job search; it constitutes "surfing" the Web and reading the newspaper—it is window shopping. The Court then noted that to show that he was engaged in a good faith effort, the claimant has to show that he applied or sent applications for employment or other indicia that he was actively applying for employment. The Court concluded that employer was entitled to suspension of benefits because claimant had not satisfied his burden under Henderson by showing that he was incapable of working at any job in the entire labor market or sought alternative employment within his work restrictions in good faith.

The key point in this case is that if an injured worker on workers' compensation benefits applies for and receives a disability pension and makes only a cursory effort at procuring alternative employment in response to a suspension petition, he or she is in danger of losing benefits. Inquiry should be made in every case as to whether claimant has applied for a disability pension with employer.

WAWA v. WCAB (Seltzer), No. 2292 C.D. 2007, Commonwealth Court of Pennsylvania, 2008 Pa. Commw. LEXIS 210

The issue in this case is whether claimant timely challenged a notice of modification of benefits (NOM) based on a determination of evidence as to when the NOM was received.

In this case, employer challenged the Board's decision which affirmed the remand decision of a WCJ granting claimant's challenge to a NOM issued by employer pursuant to Section 413(d) of the Act. After receiving benefits in accordance with an award from a Claim Petition since October 2001, claimant returned to work in November 22, 2004 with employer at earnings less than his pre-injury wage. The same day, employer issued a NOM alleging claimant was only entitled to partial disability benefits. Claimant only worked one day and did not return to work after November 22, 2004. On December 20, 2004, claimant filed a challenge to the NOM, and employer filed a Modification Petition alleging it offered claimant a job within his physical and vocational capabilities.

After receiving evidence on whether claimant could return to light-duty work, a WCJ accepted all evidence demonstrating claimant remained totally disabled. The WCJ did not address whether claimant filed a timely challenge. The WCJ granted the challenge and denied the Modification Petition.

On appeal to the Board, employer argued claimant filed an untimely challenge, and as a result, the NOM became a supplemental agreement by operation of law rendering the modification petition moot. The Board issued a decision remanding the matter to the WCJ for the purpose of making findings on when claimant received the notification. On remand, the WCJ determined claimant received the NOM on November 29, 2004, and, therefore, claimant had timely challenged the NOM within twenty days of receipt. Accordingly, the WCJ granted the challenge and denied employer's Modification Petition. Employer asserted the WCJ's determination that claimant filed the challenge notification within twenty days of receipt of the NOM was based on mere speculation and, therefore, not supported by substantial evidence. The Court noted that in performing a substantial evidence analysis, it must view the evidence in a light most favorable to the party who prevailed before the fact finder. Further, the Court is to draw all reasonable inferences which are deducible from the evidence in support of the fact finder's decision in favor of the prevailing party. In finding that the WCJ's findings were supported by substantial evidence, the Court reviewed seven key facts which supported the inference drawn by the WCJ about claimant's date of receipt of the NOM.

The key point in this case is that employer must have in place good business procedures as to the mailing of the NOM, preparation, tracking and notarization of the NOM, and any evidence of receipt of the NOM, including return receipt. If not, a WCJ could draw inferences that favor claimant regarding receipt of the NOM and conclude that the challenge was timely.

The issue addressed by the Commonwealth Court in this case is whether the Board erred in affirming the denial of employer's Modification Petition where the WCJ found claimant to be physically capable of performing the jobs in question and he never argued that the jobs were unavailable due to a lack of transportation.

Claimant sustained a work-related neck injury on September 25, 1988 while working as a corrections officer. Claimant received weekly compensation benefits of \$252.26, later increased to \$377 in 1989, per an NCP describing the work injury as a cervical strain/sprain. In September 2004, claimant was released to sedentary or light-duty work by employer's expert. Between November 2004 and February 2005, employer notified claimant of five jobs for which he had been medically cleared. The jobs were both full-time and part-time positions and claimant did not apply for any of the jobs. Claimant lived alone, did not drive, and relied on the goodwill of his former daughter-in-law for transportation. Employer filed a modification petition seeking to reduce claimant's weekly benefits because he failed to apply in good faith for available jobs within his physical, vocational, and geographic capabilities. Based on the whole record, the WCJ found that none of the jobs were available to claimant because available bus service would not enable claimant to work 40 hours or to work evenings, and employer failed to provide information to establish that the available bus transportation was compatible with the hours required, or that any of the prospective employers were willing to modify the hours to coincide with the bus schedule.

In affirming the WCJ, the Board rejected employer's argument that it met the burden under Kachinski and that claimant never raised the lack of transportation as the reason for failing to apply. The Board concluded that because claimant did not drive, the only positions actually available were those that were reasonably accessible to him by public transportation. Because the WCJ found that employer did not establish that the positions were reasonably accessible by public transportation based on claimant's place of residence, employer did not meet its burden. Moreover, the WCJ did not err in this regard because claimant did not drive. As for claimant's failure to apply, the Board noted that it was employer's burden to show referral of jobs that were actually available and that the burden never shifted to claimant to show that he followed through in good faith.

The Court concluded that employer failed to meet its burden under Kachinski to show that the referred jobs were actually available to claimant: it failed to show that he had access to some form of transportation to allow him to commute to and from work. The Court noted that the WCJ found that the existing bus service identified by employer would be inadequate to fulfill the hours requirement of the referred positions and that there was no evidence to show that respective employers would be willing to modify the hours to coincide with the bus schedule. Additionally, there was no evidence to show that the positions were accessible by bus, and the WCJ found that claimant could not safely walk to one of the jobs from the bus stop. Therefore, the Board did not err in concluding that employer failed to meet its burden and that claimant's

failure to follow through on the job referrals is all irrelevant because, under Kachinski, the burden never shifted to him.

In finding that the jobs were not actually available to claimant, the Court found that the WCJ's interpretations represented a common sense review of the evidence consistent with Kachinski.

Key Points of the Case

1. In a Kachinski type of modification petition, be wary of the non-driving claimant. Even though claimant's inability to drive was unrelated to his work injury, it remained employer's burden to prove that the referred jobs were actually available to claimant.
2. Employer was required to show that claimant had access to some form of transportation to allow him to commute to and from work. Using a "common sense review of the evidence," the Court found that the WCJ had properly determined that the bus service identified by employer was inadequate to fulfill the hours requirement of the referred positions, and there was no evidence to show that the prospective employers would be willing to modify the hours to coincide with the bus schedule.
3. Therefore, the Board did not err in concluding that employer failed to meet its burden and that claimant's failure to follow through on the job referrals is irrelevant because, under Kachinski, the burden never shifted to him.
4. Make sure your vocational expert identifies the availability of public transportation to claimant and that the public transportation schedule will permit claimant to appear at the job on the days and hours proposed.