November 2015 Case Law Updates

Walter v. W.C.A.B. (Evangelical Cmty. Hosp.), No. 139 C.D. 2015, 2015 WL 7424145, (Pa. Commw. Ct. Nov. 23, 2015)

Issue(s): When is the WCJ authorized to amend an NCP to include an additional injury without a pending Petition for Review?

Answer: Section 413(a) of the Act specifically authorizes the WCJ to amend the NCP during litigation of any petition where the evidence presented shows that the NCP is materially incorrect. The employer must have the opportunity to contest a corrective amendment. Whether an employer has had a fair opportunity to contest the corrective amendment is determined on a case-by-case basis by looking at the totality of circumstances. The amendment must also be "corrective"; an amendment is corrective if the WCJ adds a diagnosis that is part of the original work injury. On the other hand, where a claimant develops another new injury as a consequence of the original injury, the WCJ cannot add that injury to the NCP without a Review Petition.

Analysis: Ruling on a Termination Petition, the WCJ found that claimant had recovered from some of the accepted injuries but not others. In doing so the WCJ also expanded the accepted injury to include left suprascapular neuropathy. The employer appealed, arguing that the expanded scope of injury was improper in the absence of a Petition for Review. The Board agreed and reversed the WCJ. Claimant appealed to the Commonwealth Court.

The Commonwealth Court reversed the board. The Court cited Cinram Manufacturing, Inc. v. Workers' Compensation Appeal Board (Hill), 975 A.2d 577 (Pa. 2009), for the proposition that a WCJ can make a "corrective amendment" to an accepted work injury in the absence of a petition to review where the evidence supports it and the employer has the opportunity to contest the corrective amendment. The court also cited Krushauskas v. Workers' Compensation Appeal Board (General Motors), 56 A.3d 64 (Pa. Cmwlth. 2012), petition for allowance of appeal denied, 63 A.3d 1250 (Pa. 2013), a case where in ruling only on a penalty petition, the court retroactively suspended the claimant's benefits, for the proposition that the pleading rules for notice are relaxed in workers' compensation and a party can be placed on notice of the relief sought during the proceedings.

The Court looked to a variety of sources in the record to conclude that the defendant had been given a fair opportunity to contest the amended injury including comments by the defense counsel acknowledging the claimant's surgery for the condition at issue, the defendant's medical expert's commentary on the subject in both his report and deposition, and the cross examination of claimant's expert on the same subject.

Next the Court addressed the defendant's argument that the WCJ's action was improper because the amendment was not "corrective". The Court found that the amendment was corrective, citing Cinram, the Court noted that an amendment is corrective if the WCJ adds a diagnosis that is part of the original work injury. On the other hand, where a claimant develops another new injury as a consequence of the original injury, the WCJ cannot add that injury to the NCP without a review petition. The party seeking to amend the NCP has the burden of proving that the NCP is materially incorrect. Here, the court looked to the medical evidence in the record for expert testimony that the disputed amended diagnosis was part of the original injury.

Conclusion and Practical Advice: A claimant does not need to file a Review Petition to expand the scope of an accepted injury. Defendants who become aware of claimants alleging or treating for additional conditions allegedly caused by the original injury should prepare a defense. Unfortunately for defendants, knowledge of this rule may result in a sort of self-fulfilling prophecy: as seen in this case, the preparation of a defense in anticipation of a potential amendment can be used as evidence of notice and as a basis for expanding the accepted injury in the absence of a petition to review.

Gahring v. W.C.A.B. (R & R Builders), No. 534 C.D. 2015, 2015 WL 7424317,1 (Pa. Commw. Ct. Nov. 23, 2015)

Issue(s): What notice is required to an employer to satisfy Section 311 in cumulative trauma cases?

Answer: In cumulative trauma cases the court will look to "collective communications" to determine if the Employer was on notice of "the possibility [an injury] was work related".

Analysis: Claimant injured his lower back when working for Employer 1 and entered into an indemnity only C&R. Claimant left employment with Employer 1 and began working for Employer 2. While working for Employer 2, claimant began experiencing increased back pain. Claimant reported to his supervisor at Employer 2 that he was experiencing increased pain and that this was related to additional hours Employer 2 was requiring him to work. Claimant's increasing back pain culminated in surgery. Ultimately, Employer 2 could not accommodate claimant's work restrictions, so claimant's employment was terminated.

Claimant filed a Penalty Petition and Claim Petition against Employer 1; Employer 1 then filed a Petition for Joinder of Employer 2. Crediting the testimony of claimant's medical expert, the WCJ found the claimant had sustained the alleged injury while working for

Employer 2, and the WCJ dismissed the petitions against Employer 1. Although the WCJ believed claimant's medical expert, the WCJ found that claimant had failed to give notice to Employer 2 within 120 days of the last day of his employment with Employer 2 and that his claim was barred by Section 311 of the Act.

Claimant appealed this decision to the Board. The Board affirmed the WCJ. Claimant appealed to the Commonwealth Court, which reversed and remanded. The Court cited Gentex Corporation v. Workers' Compensation Appeal Board (Morack), 23 A.3d 528 (Pa. 2011) for the proposition that in cumulative trauma cases, notice to the employer can be made through "collective communications" and that a claimant need not state with certainty that an injury is work-related as long as employer is informed of the "the possibility it was work related"; the adequacy of such notice is determined from an examination of the totality of the circumstances. The Court held that claimant's belief that the injury was a recurrence of a previous injury and his supervisor's same belief was of no importance and that the employer had adequate notice because claimant had sufficiently informed Employer 2 of "the possibility it was work-related".

Conclusion and Practical Advice: In cumulative trauma cases, the courts will hold an employer to have received notice of a work related injury even when claimant states that an injury is not work related. The court will find an employer on notice if "collective communications" are enough to notify the employer that the injury was possibly work related. In cases where notice is a potential defense be sure to speak to all relevant witnesses beforehand to determine exactly what the claimant may have communicated when.

Falco & Sons, Inc. v. W.C.A.B. (O'Toole), No. 544 C.D. 2015, 2015 WL 7356299, (Pa. Commw. Ct. Nov. 18, 2015)

Issue(s): Was the WCJ in error classifying claimant's "warranty work" as performed in furtherance of the employer's business affairs when no formal warranty for the work existed?

Answer: No.

Analysis: This dispute centered on whether claimant was injured furthering the named employer's business. Claimant, an employee of the named employer, was with employer's co-owner, Michael Falco, performing a "side job". When the side job was completed the homeowner/customer asked Falco if they would fix an installation that had originally been installed by the named employer. Co-owner Falco agreed and while doing this work, claimant was injured.

Claimant filed a Claim Petition and the employer filed two Joinder Petitions seeking to add Michael Falco and/or the Uninsured Employer Guarantee Fund (UEGF) as defendants. Testimony established that the employer typically performed warranty work on previous jobs. Relying upon this testimony, the WCJ found that claimant had been injured while doing warranty work for the named employer. The WCJ granted the Claim Petition, and denied the Joinder Petitions. Employer appealed to the Board, who affirmed. Employer then appealed to the Commonwealth Court arguing the WCJ and Board had erred because warranty work is a legal fiction in the absence of a formal contractual agreement.

The Commonwealth Court explained that the term warranty, as used by both the WCJ and the Board, did not refer to a formal contractual warranty as argued by the employer. Rather, it referred to what the employer had testified to earlier, work that was done to correct previous projects "in order to preserve its good reputation". The Court found that even in the absence of a formal warranty agreement, this type of "warranty work" constituted furthering the employer's business affairs.

Conclusion and Practical Advice: Employer's whose employees engage in "side projects" may expose themselves to potential liability by not carefully limiting the scope of their work. Before accepting any project or side project it should be made clear in writing to all parties who the responsible entity is.

Chesik v. W.C.A.B. (Dep't of Military & Veterans' Affairs), 126 A.3d 1069, 1070 (Pa. Commw. Ct. 2015)

Issue(s): (1) Is a claimant's retirement from employer and relocation out of state sufficient to show a claimant has voluntarily removed himself from the workforce? (2) Is a claimant's retirement from employer and acceptance of a pension sufficient to show claimant has removed himself from the workforce?

Answers: (1) No, Section 306(b)(2) of the Act specifically contemplates the calculation of earning power of claimant's who relocate. (2) No, a claimant's acceptance of a pension grants the employer an inference which, even if drawn, must be considered in the totality of circumstances to determine if the claimant has voluntarily withdrawn from the workforce.

Analysis: Claimant was working for employer while receiving compensation benefits and decided she wanted to move to Nevada for health conditions unrelated to her work injury. Claimant retired from her position with the employer and applied for disability pension benefits. Employer filed a Suspension Petition on the basis that the claimant had voluntarily removed herself from the workforce. During claimant's deposition, claimant testified that if there was a possibility of work she would like to return to the workforce.Nonetheless, employer's Suspension Petition was granted by WCJ on the basis that claimant had voluntarily withdrawn from the workforce by moving to Nevada and accepting a disability pension. Claimant appealed and the WCAB affirmed. Claimant appealed and the Commonwealth Court of Pennsylvania reversed.

Citing Riddle v. WCAB (Allegheny City Elec., Inc.), [981 A.2d 1288 (Pa. 2009), the Commonwealth Court held that Section 306(b)(2) of the Act specifically contemplates the calculation of earning power based upon a claimant who relocates. Therefore, a claimant's relocation, by itself is not sufficient for a WCJ to find that claimant has voluntarily removed themselves from the workforce. Additionally, citing City of Pittsburgh v. Workers' Compensation Appeal Board (Robinson), 67 A.3d 1194, 1198 n.4 (Pa. 2013), the Court noted that a claimant's acceptance of a pension grants the employer an inference of retirement which, if drawn, is not sufficient to establish the worker has retired, but rather must be considered in the totality of circumstances. Based on these two conclusions the Commonwealth Court reversed.

Conclusion and Practical Advice: A WCJ Decision finding that a claimant has voluntarily removed herself from the workforce must be supported by Findings of Facts explicitly addressing the totality of the circumstances. If, as in this case, a claimant testifies that she wishes to return to the workforce if possible, the WCJ must issue a credibility determination.

Gieniec v. W.C.A.B. ((Palmerton Hosp.), No. 195 C.D. 2015, 2015 WL 9295120, (Pa. Commw. Ct. Nov. 3, 2015)

Issue(s): Can a claimant file a Reinstatement Petition while a Claim Petition for the same injury is pending on appeal.

Answer: No.

Analysis: Claimant suffered a 2007 low back injury and filed a Claim Petition and two Review Petitions for aggravation. The WCJ granted the claimant's petitions but for medical benefits only. The employer and the claimant both appealed. While the appeal was pending before the WCAB, claimant sustained another work injury to the same area of her lower back and, filed a Claim Petition and Reinstatement Petition.

The two new petitions were assigned to a different WCJ who denied the Claim Petition on the basis that it was not a new injury but granted the Reinstatement Petition on a contingent basis and suspended benefits until the WCAB decided the pending appeal on the 2007 injury. The employer appealed the Reinstatement Petition and the claimant did not appeal the denial of her Claim Petition.

Meanwhile, the WCAB upheld the WCJ regarding the medical only nature of the 2007 injury and claimant appealed to the Commonwealth Court. While the appeal for the 2007 injury was pending before the Commonwealth Court the WCAB addressed the appeal on the more recent petitions. The WCAB dismissed the Reinstatement Petition based on Bechtel Power Corp. v. Workmen's Compensation Appeal Board (Miller), 452 A.2d 286 (Pa. Cmwlth. 1982) (dismissing petition filed while appeal on identical issue pending). Claimant appealed to the Commonwealth Court. While the appeal regarding the Reinstatement Petition was pending, the Commonwealth Court upheld the WCJ and WCAB regarding the medical only nature of the 2007 injury.

Addressing the more recent injury to claimant's lower back, the Commonwealth Court explained that the Bechtel Power rule is applied prevent premature petitions, litigation of identical issues, and to preclude a party from advocating inconsistent positions. The Commonwealth Court found that claimant's Reinstatement Petition was premature, litigated identical issues, and was inconsistent with her then pending appeal. As dicta, the Commonwealth Court noted the claimant should have waited until her original appeal was resolved and if it had been resolved in her favor she could have then filed a Reinstatement Petition.

Conclusion and Practical Advice: The important lesson from this case is to spot duplicative petitions early and to make the WCJ aware of the pending appeal as well as the governing case Bechtel Power.