CASE LAW UPDATE
OCTOBER 2010

Allegis Group & Broadspire vs. WCAB (Coughenaur) No. 977 C.D. 2010, Commonwealth Court of Pennsylvania

Whether a penalty is appropriate against an employer who inadvertently mailed a benefit check to a claimant at a wrong address?

To determine if the employer violated the Act, findings must be made as to whether an Employer was given notice of claimant's correct address, if not, then employer did not violate the Act.

Case was vacated and remanded back to the WCJ for issuance of new findings of facts and conclusions of law regarding whether the employer knew about the change claimant's address.

Claimant alleged that he suffered a hardship due to a delay in receiving employer's lump sum payment of $60,000. The WCJ issued a decision approving a Compromise and Release Agreement in the matter on October 17, 2008. The original check was sent to the wrong address, which was the address where claimant lived during the commencement of this litigation. Claimant received his lump sum payment of $60,000.00 on December 10, 2008.

The WCJ imposed a 35% penalty on Employer, due to the delay in Claimant receiving his check. Employer appealed to the WCAB, which affirmed. The case of *Snizaski v. WCAB (Rox Coal Company),* the PA Supreme Court found that Section 428 of the Act gives employers thirty (30) days to pay compensation award without fear of penalties, however, Section 435 of the Act authorized penalties without addressing grace periods. The *Snizaski* Court noted that "penalties should be tied to some discernable and avoidable wrongful conduct." 586 Pa. 146, 164 (2006).

Snizaski suggests a rule of reason - i.e., **whether employer acted with reasonable diligence –** as the appropriate standard for measuring compliance with the Act. The record of this case contains no evidence that claimant ever notified Employer of an address change. The adjustor in this case acknowledged receiving a Review Petition filed by Claimant with a different numerical address; however, the new address was on the same street, in the same town. While the adjuster failed to make note of the address change, the WCJ made no findings as to whether the adjustor was actually given notice of Claimant's correct address, thus Employer could not have violated the Act by mailing the check to the wrong address.

***Commonwealth of Pennsylvania, Department of Corrections v. WCAB (Wagner-Stover)* No. 1133 C.D. 2008**

1. Whether another agency's proceeding of full recovery from a work injury creates a preclusive effect in the Workers' Compensation proceeding?

2. Whether the doctrine of *res judicata* bars claimant from pursuing a review petition to add additional injury?

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1. **An agency adjudication can and will have effect in another agency's proceedings or judicial proceeding when the amount in controversy or issues are identical in each proceeding and each proceeding involves similar procedures to allow both parties to fully litigate the issues.**

2. **The court did not address and found to be moot Claimant's Review Petition based upon the decision of the first issue. It is too late for the WCJ to amend an NCP after a claimant has been found to be fully recovered from work related injuries.**

Claimant was employed at a state correctional institution at Camphill and following a prison riot on October 25, 1999, filed a Claim Petition that this event caused her to suffer a psychiatric injury. A Notice of Compensation Payable (NCP) accepting liability was issued, with the department paying Claimant full salary in accordance with Act 632, which governs state penal or correctional institutions.

In December 2004, claimant was offered a job in the Office of Professional Responsibility and she refused this job. The department then instituted an administrative proceeding to terminate Claimant's Act 632 benefits. An outside hearing examiner was appointed to hear evidence to recommend adjudication to the Secretary of Corrections. The Act 632 proceedings involved deposition testimony of an IME psychiatrist, in addition to claimant testifying, and Claimant offering her own expert psychiatrist. The hearing examiner recommended Claimant's Act 632 benefits be terminated immediately. Claimant filed exceptions to the hearing examiner's proposed report; however, the Secretary of Corrections adopted the hearing examiner's opinion and terminated Claimant's Act 632 benefits as of February 17, 2006.

The Department then filed a petition with the Bureau of Workers' Compensation to terminate Claimant's workers' compensation benefits. Claimant filed an answer denying that she was fully recovered. The Department relied on the Secretary's Act 632 adjudication arguing that it collaterally had estopped claimant from asserting that she was not fully recovered in the workers' compensation proceeding. Claimant also filed a review petition to assert that she now suffered from TMJ, which was also related to her work injury. The WCJ rejected the department's argument regarding the Secretary's adjudication of the Act 632 proceeding denied the department's termination petition, and imposed unreasonable contest attorney's fees. The WCJ also granted claimant's review petition and added TMJ as a work injury.

On appeal, the Board reversed the unreasonable contest determination but otherwise affirmed.

This Court focused their analysis on *Rue v. K-Mart Corporation* and *Cohen v. WCAB (City of Philadelphia)*. Both of these cases direct that an agency adjudication can have preclusive effect in subsequent administrative or judicial proceeding. The first issue in analysis is to determine whether the item of concern is based upon a "fact is a fact". Here, the court relied upon Claimant's proof of full recovery and that it ended her work-related disability for purposes of either statute. The next issue is whether both parties had a full opportunity to litigate the issue. As established in Cohen, this factor requires two inquires: (1) the amount of risk financially involved and (2) the type of procedural rules governing each proceeding. Here, the court found that the issue of Claimant's full recovery was identical in each proceeding, and Claimant had a full opportunity in the Act 632 hearing to litigate her full recovery. "She is not entitled to a second bite at the apple on this question."

The dissent was authored by Judge Pellegrini. He makes a sweeping proposition that an agency's adjudication can never have preclusive effect on another agency's fact finding. The majority addresses this by finding that the dissent's position is out of line with longstanding federal administrative law jurisprudence.

Melvin Day v. WCAB (City of Pittsburg) No. 2495 C.D. 2009 Commonwealth Court of Pennsylvania

When an employer files a Petition to Suspend Compensation Benefits on the basis that Claimant had retired, does the burden remain with the employer or does it shift to claimant to show either that he was forced to retire from the entire workforce or that he was looking for work?

The initial burden in a suspension petition is always on the employer; however, after the employer has shown that the claimant has retired, the burden shifts to the claimant to rebut the presumption that he has voluntarily withdrawn from the workforce.

Claimant was injured on March 19, 1992. Employer accepted claimant's injuries as a cervical strain, and he returned to a modified, light-duty position in 1995/1996. In 2000/2001 Claimant was laid off and received Unemployment Compensation in addition to temporary total disability workers' compensation. Claimant underwent an IME, which determined that Claimant was capable of full-time, medium-duty work. On this basis, employer filed a Suspension Petition on December 11, 2007, seeking to suspend claimant's benefits on the grounds that he had voluntarily withdrawn from the workforce.

Hearings were conducted at which time claimant testified that once he began receiving his pensions, he had not looked for work. The WCJ credited Claimant's testimony that he looked for modified-duty work while receiving UC benefits but stopped looking upon receipt of his pension, because he retired. On this basis, the WCJ concluded that claimant had voluntarily removed himself from the workforce and the Employer's Suspension Petition was granted.

Claimant appealed the WCJ's decision to the WCAB. The Board concluded that Claimant's testimony that he did not look for work after he began receiving his Social Security pension, provided substantial evidence for the WCJ's findings that claimant voluntarily removed himself from the workforce.

Claimant then petitioned this Court for review of the Board's order. He asserts that the WCJ and the Board improperly shifted the burden of proof to claimant to show that he was still looking for work after taking his Social Security pension, rather than requiring Employer to show that suitable jobs were available for claimant.

This court relied on the standards set forth in *Southeastern Pennsylvania Transportation Authority v. WCAB) (Henderson).* In Henderson, the court found that an employer is not required to prove the availability of suitable work when a claimant voluntarily removes himself from the labor market through retirement. The claimant has the burden of showing either that his work-related injury has forced him out of the entire workforce or that he is looking for work after retirement. In *County of Allegheny (Department of Public Works) v. WCAB (Weis),* this court held that the Claimant had to show he was forced out of the *entire labor market*, rather than just his pre-injury job.

In *Henderson*, the standard outlined was that the "employer must show, by the totality of the circumstance, that the claimant has chosen not to return to the workforce." Here, the totality of the circumstance includes claimant's acceptance of his pension from employer, a social security pension, exhausting UC benefits, and Claimant's own testimony that he believed he could work but was not looking for work, justified a holding that claimant intended to terminate his career and, therefore retire. The court does note that voluntary receipt of a pension alone does not necessarily bar a claimant from benefits.

The initial burden in a suspension petition is always on the employer. Only after the employer has carried its burden of showing that the claimant has retired does the burden shift to the claimant to rebut the presumption that he has voluntarily withdrawn from the workforce. A claimant whom an employer has shown to have retired may rebut this by showing an intent to remain connected to the workforce by seeking employment within his own limitations. The burden of the claimant is only to look for suitable work; he is not going to be denied benefits if he cannot find such work.

***Philip Payes v. WCAB (Commonwealth of PA/State Police)* No. 461 C.D. 2010**

Whether a state trooper who suffers from post-traumatic stress disorder ("PTSD") from an event when he struck and killed an individual who was attempting suicide by walking in front of his patrol car, rises to the level of an extraordinary event or abnormal working condition?

For a state trooper or other individual who works as a police officer to receive benefits for PTSD and/or depression, the Claimant must show that his injury resulted from an extraordinary event or abnormal working condition, and such injury cases are highly fact sensitive, and this situation does not meet that threshold.

Claimant alleged that while on duty, a woman who was mentally disturbed ran in front of his patrol car, she was struck and Claimant attempted resuscitation but the woman's injuries were fatal. Claimant filed a Claim Petition seeking total disability due to PTSD. The employer denied liability for any psychological injury or resulting earnings loss. Both parties' submitted testimony of board certified psychiatrists and ultimately the WCJ awarded total disability benefits finding that Claimant developed a compensable mental injury resulting from mental stimulus. The WCJ concluded that the evidence supported a finding that the accident victim attempted to commit suicide by running in front of his patrol car.

The WCAB reversed the finding, holding that this situation did not constitute an abnormal working condition given the nature of Claimant's stressful profession.

This court relied heavily on *Young v. WCAB (New Sewickly Police Dep't)* which found that a claimant seeking workers' compensation benefits for a mental stimulus which resulted in a disabling mental injury must show (1) actual extraordinary events occurred at work that caused the trauma and (2) that abnormal working conditions caused the injury. This court noted that in *Young,* that a claimant must establish that the incident that caused the mental injury is so much more stressful and abnormal than their already highly stressful position.

This court differentiated this case with two other cases in which workers' compensation was awarded due to mental condition. In *City of Pitts v. Logan,* a police officer was awarded benefits due to mental stimulus when there was a "very credible" threat to his life which in included a $50,000 bounty and death threats to his child at school. The Supreme Court held that this is not an officer's normal experience. The court also reflected upon *Borough of Beaver v. WCAB (Rose).* In *Rose*, an officer was subject to false accusations by the Chief of Police, there was public airing of these accusations which ultimately led to his termination and stripping of his duties. Again, the court found that those events were not inherent in police work and were rather highly abnormal conditions.

Overall, this court stressed that police officers are involved in highly stressful situations that often involve emergency/traumatic events, which are not out of the ordinary for police officers, including attempts to save a life, which are not successful.

***Barbara Muir v. WCAB(Visteon Systems, LLC) No. 274 C.D. 2010*, Commonwealth Court of Pennsylvania**

(1) Whether an employer who provides claimant with a LIBC-756 Form can take an offset for old age Social Security disability benefits retroactively?

(2) When a Modification Petition, if filed, is the date for modifying a claimant's benefits based upon an IRE determination effective sixty days from the date of the WCJ's decision or sixty days from the IRE?

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(1) An employer should bear the burden of supplying Claimant with the appropriate forms for Claimant to report benefits subject to offsets.

(2) If an IRE impairment is less than fifty percent, the modification should be based upon the date of the IRE, not sixty days from the date of the WCJ's decision.

In 2000, claimant suffered a work-related injury in the course and scope of her employment, which employer accepted via NCP. In August of 2005, employer sent claimant a LIBC-756 Form, in which she stated that she did not receive SS disability benefits. In June of 2007, claimant completed another LIBC-756 Form at the employer's request and at this time she noted that she started to receive "old age" SS benefits effective October 28, 2006, in the gross amount of $1,376.90 per month.

Accordingly, employer filed a notice of workers' compensation offset requesting a credit in the amount of $6,884.50 based upon the SS benefits received by claimant back to October 2006. The WCJ reduced claimant's benefits to zero for a period of several months to account for the offset.

Claimant appealed and the WCAB reversed in part and modified the WCJ's decision and ordered that claimant's benefits be reduced based upon the IRE which was also completed during this same time period. (In conjunction with the offset, defendant filed a Petition to Review alleging that claimant's status should be changed from TTD to TPD based upon an IRE determination.

Employer contends that the Board erred in modifying the WCJ's because they had previously sent claimant the LIBC-756 Form. Employer argued that claimant then had a duty and responsibility to notify employer of changes specifically regarding Social Security. Both the Board and this court focused on Maxim Crane Work v. WCAB (Solano) and provided two possible options regarding section 204(a) of the Act:

> (1) The employer needed to supply a claimant with a form LIBC-756 on one occasion, claimant then was on notice that she needed to notify employer of any change in circumstances; or
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> (2) The employer needed to supply the claimant with a new LIBC-756 Form every six months to remind and require her to update the reporting of benefits subject to offset.

The Board adopted the second interpretation finding that it would be unrealistic to expect unsophisticated claimants to file a new LIBC-756 on their own, every six months. This court found no err of law in the Board's interpretation.

Relative to the review Petition, claimant had an Impairment Rating Evaluation (IRE) on August 15, 2007. The result of this IRE was an Impairment Rating Determination that claimant had a whole body impairment of five percent. Claimant contended that the Board erred when finding that the modification of her benefits should be from the date of the IRE and not sixty days after the WCJ issued that order on December 9, 2008. The Court focused on the previous decision in Ford Motor/Visteon Systems v. WCAB (Gerlach), finding that the modification should occur 60 days from the date of the IRE, not the Judge's decision.