

October 2015 Case Law Update

O'Rourke, Laura v. W.C.A.B. (Gartland), 125 A.3d 1184 (Pa. October 27, 2015).

Issues: Whether the Bunkhouse rule is expanded to a claimant who was providing personal care services to a relative.

Answer: No.

Analysis: Andrew Klaber of the Pittsburgh office recently prevailed before the Pennsylvania Supreme Court in this case. The case involved a claimant who was attacked by her son at 1:30 a.m., while sleeping in her own bedroom. The claimant provided attendant care to her son during his recuperation for a number of health issues, including drug addiction. The claimant was paid through a program set up by the State but was considered to be her son's employee for purposes of the Act.

The WCJ awarded benefits and found that the claimant was required to be on the premises and thus injured in the course of her employment, even though she was sleeping, and not furthering her employer's interests at the time. The Workers' Compensation Board reversed the award and held that the claimant was not injured in the scope of her employment. The Commonwealth Court reversed the Workers' Compensation Appeal Board and again awarded benefits to the claimant. The Commonwealth Court relied upon the "Bunkhouse Rule" which extended coverage to workers, regardless of their activities, if they were provided with housing by their employer. The Bunkhouse Rule arose from a 1924 case that involved a mine operator who provided housing to his employees to keep them away from striking workers. The employees in that case were killed when a bomb was thrown into their sleeping quarters.

Through a Decision dated October 27, 2015, the Supreme Court reversed the Commonwealth Court and denied benefits. In so ruling, the Supreme Court found that the claimant was not injured in the course and scope of her employment duties. The Court evaluated Section 301(c)(1) of the Act and determined that the claimant was not "required by the nature of her employment to be present on the premises." The Court based this on the facts of record which established that the claimant was not required to provide round-the-clock care. In fact, she was not on the clock when she was injured and was instead engaged in purely personal activities. The Supreme Court also declined to apply the Bunkhouse Rule and chose not to extend coverage to a sleeping claimant under the circumstances of the case at bar.

Conclusion and Practical Advise: The case is important in that it reinforces the basic elements associated with the "course and scope of employment". At a high level, there has been a gradual expansion of coverage for injured workers engaged in what would not appear to be work related activities. The fact that the Commonwealth Court awarded benefits under this fact pattern suggested that coverage would again be expanded. The Supreme Court's ruling is significant in that it reinforced the fact that the Workers Compensation Act was not intended to be used as a general insurance policy on the lives and health of Pennsylvania workers. It is designed to cover workers for injuries that occur while engaged in work related activities pursuant to Section 301(c)(1).

Ingrassia, Alex v. W.C.A.B. (Universal Health Services, Inc.), 126 A.3d 394 (Pa. Cmwlth October 26, 2015)

Issues: Whether the burden of proof for a claimant who is seeking disability benefits following issuance of a Medical Only NCP is that of a claim petition.

Answer: Yes.

Analysis: Claimant petitions for review of a denial of his claim for disability benefits. In doing so, the Board determined that Claimant failed to prove by credited medical evidence that his work injury, which his employer had acknowledged by a medical only notice of compensation payable, caused any loss of earning power.

Claimant was employed as a full-time transportation van driver, shuttling children to and from appointments. While sitting at a red light, the claimant's van was rear-ended by another vehicle. That day, Claimant sought medical treatment with Employer's panel doctor, who cleared him for work. Employer issued a medical only notice of compensation payable (NCP) that described the injury as a strain/sprain of the neck and lumbar areas and accepted liability for medical treatment. The next day, Claimant reported for work but left early, citing a headache and dizziness. He never returned to his job with Employer.

Claimant filed a claim petition alleging that in addition to suffering a neck and back injury, he also injured his head and left arm in the accident. The petition also alleged that claimant was totally disabled.

After a series of medical depositions and testimony from fact witnesses relative to the claimant's other medical conditions and out of work activities such as playing the guitar, the WCJ accepted Claimant's testimony as credible except for any suggestion that his pre-injury job was too difficult as of July 2012.

The WCJ credited the testimony of Employer witnesses and found that Claimant's guitar playing involved the active use of both hands. The WCJ credited the claimant's treating physician's testimony to expand the description of injury but rejected his testimony that the claimant was disabled as a result of the expanded description.

Based on these findings, the WCJ concluded that Claimant proved that his work injury includes additional injuries and ordered the NCP be amended. However, the WCJ concluded that Claimant failed to offer credible medical evidence that his work injury disabled him from performing his pre-injury job.

Claimant appealed the denial of disability benefits, and the Board affirmed. On appeal, Claimant argues that it was error to deny him disability benefits because the WCJ and the Board applied the wrong burden of proof. Claimant also asserts that the WCJ failed to issue a reasoned decision and capriciously disregarded unrebutted medical evidence that Claimant was disabled by his work injury, which includes the additional injuries.

Claimant argues that because Employer issued a medical only NCP, his benefits should be treated as though they are in a suspension status. Accordingly, his burden of proof was that applicable in a reinstatement petition, *i.e.*, where a claimant's testimony alone can support a reinstatement. The burden then shifts to the employer to prove that the disability is unrelated to the work injury. Claimant asserts that because he was found credible by the WCJ, he met his burden for a reinstatement and the Employer medical does not opine to the contrary.

The court found that the Employer issued a medical only NCP, acknowledging that Claimant had sustained a non-disabling neck and lumbar strain/sprain work injury. This made Employer responsible for paying medical expenses for that injury, but nothing more. Because Claimant did not establish a loss of earning capacity resulting from the work injury accepted by Employer, there were no disability benefits to suspend or to reinstate. In short, Claimant's case has not "advanced procedurally or in substance to the suspension/reinstatement stage." *Klarich, 819 A.2d at 629*. Claimant properly filed a claim petition and, thus, he had the burden of proving a disabling work injury by competent medical evidence. The WCJ and the Board applied the correct burden of proof.

The second component of this case, relates to the Judge's capricious disregard for the evidence resulting in a Decision that was not reasoned. The court references inconsistencies in the medical evidence that the WCJ failed to explain. The court addresses three relatively minor situations that are fact specific to this case in order to help the claimant.

Conclusion and Practical Advise: The case provides additional leverage to deny a reinstatement of benefits if a claimant goes out of work for an injury accepted under a Medical Only NCP. Please also focus on the accepted injury and whether it would potentially justify a denial if the description of injury is broad and the potential reason for disability is outside the description of injury. This case will certainly be beneficial to combat penalty petitions for this type of denial.

Further, there are some good factual issues to use in an argument to assert that the WCJ failed to issue a reasoned decision. A good analysis could be made from a defense perspective that if the inconsistencies addressed in this case were sufficient to assert a capricious disregard, the facts that you may be litigating are sufficient to support a reversal of the Judge's Decision.

Saladworks, LLC v. W.C.A.B. (Gaudioso), 124 A.3d 790 (Pa. Cmwlth October 6, 2015)

Issues: Whether or not a Franchisor is considered a statutory employer.

Answer: No.

Analysis: Claimant worked at a Saladworks restaurant. Claimant's job duties included placing food orders, doing prep work, working the cash register, and making salads. Claimant sustained an injury when he slipped and twisted both of his knees. Claimant petitioned for benefits against Saladworks though that name was later amended to G21, LLC d/b/a Saladworks (G21). Claimant also petitioned for penalties on the basis that G21 had not filed any Bureau documents to accept or deny the claim in violation of Section 406.1 of the Workers' Compensation Act (Act) 77 P.S. § 717.1.

Claimant filed a separate claim petition against the UEGF. The UEGF filed a joinder petition against Saladworks (the Franchisor) and alleged that Saladworks was “an additional employer, agent, statutory employer of Claimant” and that Saladworks was jointly and severally liable. Saladworks moved that the joinder petition be dismissed/stricken because Saladworks had no relationship with Claimant but was a franchisor that granted certain rights to G21 to use its registered trademarks and system pursuant to the terms and conditions of the Franchise Agreement (Agreement).

The Commonwealth court agreed with Saladworks that its main business is the sale of franchises to franchisees that desire to use its name and “System” and marketing expertise. Saladworks provides certain services to independent franchisees like G21, it is not in the restaurant business or the business of selling salads.

Claimant was not an employee of Saladworks. The evidence established that G21 was Claimant's employer at the time of injury and was liable for the payment of benefits. It also appears that G21 lacked workers' compensation insurance. Therefore, UEGF is responsible pursuant to Section 1602(c) of the Act, 77 P.S. § 2702(c).

Conclusion and Practical Advise: The Commonwealth Court determined that a Franchisor is not an Employer under the Act. It should be noted that the facts of this case are at the extreme for how hands off the Franchisor was in this case. In part that was the justification the court used to justify the opinion. It is possible to see the Commonwealth court deciding the other way if there a situation where the Franchisor has more of a role in the operation of the business.

Sloane v. W.C.A.B. (Children's Hosp. of Philadelphia), 124 A.3d 778 (Pa. Cmwlth October 1, 2015)

Issues: Does the Statute of Limitations start on the day of the injury on the disability claim following the issuance of a Medical Only NCP.

Answer: Yes.

Analysis: Claimant seeks review of the portion of the Board's order that reversed the WCJ's reinstatement of total disability benefits arising from work injuries sustained in 2004 and 2006. Employer seeks review of the Board's order to the extent it upheld the WCJ's determination that Claimant's 2007 right-knee replacement surgery and related treatment were compensable medical expenses related to the 2006 work injury. The Commonwealth Court affirmed the order of the Board.

On April 20, 2004, Claimant injured her right elbow during the course and scope of her employment as a nurse for Employer. Employer accepted the injury and resulting wage-loss disability through a Notice of Compensation Payable (2004 NCP), which described the injury as lateral epicondylitis of the right elbow. Claimant began receiving partial disability benefits pursuant to a series of supplemental agreements entered into by the parties and returned to work in a light-duty position with reduced wages.

Claimant suffered a second work-related injury to her right elbow and right knee on December 3, 2006 while attempting to restrain a patient. Employer accepted this injury through a medical-only NCP (2006 NCP) that did not recognize compensation for loss of wages. The injury was described in the 2006 NCP as an "exacerbation of right elbow epicondylitis and flare up of preexisting [degenerative joint disease in her] right knee." Following the injury, Claimant returned to light-duty work while continuing to receive partial disability for the 2004 injury until November 16, 2007 when she ceased working in anticipation of right-knee replacement surgery. The surgery was performed by Dr. Robert Booth in December 2007. Claimant did not return to work following this surgery.

Claimant filed the Petition on May 31, 2011 seeking the reinstatement of total disability benefits as of November 1, 2007. The claimant testified and the parties secured medical evidence depositions.

In a May 15, 2012 decision and order, the WCJ granted the Petition, concluding that Claimant was totally disabled as of November 17, 2007 based on both her 2004 and 2006 work injuries. The WCJ further concluded that Employer was liable for payment of medical services provided or prescribed as a result of the 2004 and 2006 work injuries, including the December 2007 right-knee replacement surgery and subsequent treatment. The WCJ found Claimant credible and found the treating physician more credible than the IME doctor.

The Board affirmed in part and reversed in part. The Board reversed the portion of the WCJ's order that had granted total disability benefits based on the 2006 work injury, concluding that Claimant was required to comply with the three-year limitations period of Section 413(a) of the

Workers' Compensation Act (Act) for modification of an NCP rather than the 500-week period for reinstatement of suspended partial disability benefits.

As Claimant did not file the Petition within three years of the issuance of the 2006 NCP, the Board determined that Claimant was barred from receiving total disability benefits for the 2006 injury. (*Id.* at 8-9.) The Board concluded that the Petition was timely filed with respect to the 2004 work injury because Claimant continued receiving partial disability payments through the date of filing of the Petition. The Board, reversed the WCJ's award of total disability benefits for the 2004 injury, concluding that the credible medical evidence of Claimant's own witness, rebutted Claimant's testimony that she was totally disabled as a result of the 2004 injury and instead showed that the disability was a result of the 2006 injury. The Board also affirmed the WCJ's order to the extent it found Employer liable for Claimant's 2007 right-knee replacement surgery related to the 2006 work injury.

The Commonwealth Court ruled that despite the apparent ambiguity relating to the proper form of the Petition, we need not resolve this issue because Claimant's request for disability benefits for the 2006 injury would be untimely under the limitations periods of Section 413(a) or Section 315. Under Section 413(a), a reinstatement petition must be filed "within three years after the date of the most recent payment of compensation made prior to the filing of such petition." 77 P.S. § 772. The payment of medical benefits by an employer does not constitute "compensation" for the purposes of Section 413(a) that would act to toll the liability period. Since no disability compensation had been paid for the 2006 injury, Claimant was required to establish an entitlement within 3 years of the date of the injury. The Petition filed on December 31, 2011 was therefore untimely under Section 413(a).

Section 315 also imposes a three-year limitations period, measured from the date of injury. 77 P.S. § 602. Unlike Section 413(a), payments of medical expenses may toll the Section 315 limitations period where those payments were made "in lieu of" workers' compensation benefits. However, the controlling question in this analysis is the intent of the employer, i.e. whether the employer intended the payments for medical services to replace disability benefits. Here, by issuing the medical-only NCP, Employer made its intent expressly clear that it would pay Claimant's medical expenses but accepted no liability for wage-loss benefits. Thus, the Petition would also be untimely under Section 315.

Conclusion and Practical Advise: The Commonwealth Court determined that a claimant has three years from the date of injury to seek disability if there is a medical only NCP. There is also good language that the intent of a Medical Only NCP is to only accept medical. It would be beneficial to advise clients that they should issue a TNCP even if there is lost wages and then upon the claimant's return to work within 90 days revoke the TNCP and issue a medical only NCP. This could potentially give them cover down the road if additional surgery is necessary.