THE HARTWELL
LAW OFFICES, LLP

SEPTEMBER 2016 CASE LAW UPDATE

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Baumann v. Workers' Compensation Appeal Board -- A.3d -- (Pa. Cmwlth September 23, 2016) WL 5323129

Issues: (1) Whether the Board erred by affirming the WCJ's decision granting Employer's 2010 Termination Petition; and (2) whether the Board erred by affirming the WCJ's decision granting Claimant's Penalty Petition, but awarding a 0% penalty.

Answer: No.

Analysis: On May 5, 2007, Claimant suffered a right shoulder and upper back strain as a result of a car accident that occurred during the course and scope of his employment as a sales representative for Employer. Employer issued a notice of compensation payable (NCP) and paid Claimant WC benefits. By August 28, 2008 WCJ order, Claimant's injury description was amended by stipulation to include a right C-6 radiculopathy.

On March 16, 2009, Employer filed a petition to terminate Claimant's WC benefits (2009 Termination Petition). Hearings were held before WCJ Bruce Doman (WCJ Doman), during which Employer offered the June 2, 2009 deposition of neurologist Richard Bennett, M.D. (Dr. Bennett) who conducted a January 7, 2009 independent medical evaluation (IME), and Claimant testified and offered the September 15, 2009 deposition of orthopedic surgeon Norman Stempler, M.D. (Dr. Stempler). In a Decision dated November 23, 2009, WCJ Doman denied the 2009 Termination Petition.

On December 2, 2009, Employer filed a petition to modify Claimant's WC disability benefits from full to partial (Modification Petition), based upon the results of an October 26, 2009 IME.

On March 11, 2010, Claimant filed the Penalty Petition, wherein he averred that Employer violated the WC Act (Act) when it notified Claimant's surgeon that Employer would not pay for Claimant's March 18, 2010 right shoulder surgery, which resulted in the surgery's cancellation. Employer denied the allegations in the Penalty Petition.

On May 4, 2010, Claimant underwent a second IME conducted by Dr. Bennett, following which Dr. Bennett opined that Claimant had fully recovered from his May 5, 2007 work accident and could return to full-duty work without restriction. On July 21, 2010, Employer filed the 2010 Termination Petition based upon Dr. Bennett's conclusion.

Hearings were conducted before WCJ Tina Rago (WCJ Rago) relative to Employer's Modification and Termination Petitions, and Claimant's Penalty Petition.

In a December 13, 2011 decision, WCJ Rago deemed Claimant's testimony of ongoing shoulder pain not credible because he had not treated for it since December 2009, his activities included playing guitar and video games, and he was able to get a tattoo on his right arm.

WCJ Rago found claimant fully recovered and granted Employer's 2010 Termination Petition. WCJ Rago also granted Claimant's Penalty Petition because Employer violated the Act but only imposed a 0% penalty without stating the basis for her decision.

Claimant appealed from WCJ Rago's decision to the Board. The Board remanded the matter to WCJ Rago to determine whether Employer met its burden of proving that Claimant's medical condition had changed since the 2009 Termination Petition, to reconsider the 2010 Termination Petition, and to render findings why she imposed a 0% penalty.

After remand, WCJ Rago again granted Employer's 2010 Termination Petition and Claimant's Penalty Petition, but declared that Employer's failure to pay for Claimant's shoulder surgery was not sufficiently significant to warrant more than a 0% penalty. Claimant appealed to the Board which affirmed WCJ Rago's decision. Claimant appealed to the Commonwealth Court.

Relative to the Termination, the Commonwealth Court examined the history of the case law for securing a subsequent Termination after the first Termination was denied by prior adjudication. Essentially, the Court has recognized that the evidence necessary to prove a change since a prior adjudication "will be different in each case." [B]y accepting the employer's medical evidence of full recovery as credible, a WCJ could properly make a finding that the employer has their burden. Although the WCJ's finding cannot be based solely upon evidence that pre-dates the previous adjudication, it may be based upon a review of such evidence plus a post-adjudication examination. It is not necessary for the employer to demonstrate that a claimant's diagnoses have changed since the last proceeding, but only that his symptoms have improved to the point where he is capable of gainful employment. A change sufficient to grant a termination exists if there is a lack of objective findings to substantiate a claimant's continuing complaints.

In this case the WCJ concluded that the claimant's condition improved following the prior IME and therefore it was appropriate to deem the claimant fully recovered based upon the evidence.

Relative to the Penalty Petition the Commonwealth Court confirmed that it is was within the WCJ discretion so the Judge was permitted to award a 0% penalty.

Conclusion and Practical Advice: This case actually gives a great case to cite when litigating a penalty petition. The Commonwealth Court concluded that even though the Judge determined there was a violation of the law it was still justified to award a 0% penalty. This also provides additional case law support for a subsequent Termination Petition.

Northtec, LLC v. Workers' Compensation Appeal Board (Skaria) -- A.3d -- (Pa. Cmwlth September 14, 2016) WL 4784123

Issues: Whether the Board erred by determining that Claimant's delay in obtaining an expert opinion was due to circumstances beyond his control; and whether the Board erred by not considering Employer's ability to defend the claim.

Answers: No.

Analysis: On November 25, 2013, Claimant filed a claim petition and a penalty petition seeking total disability benefits due to a May 16, 2012 work injury. The petitions were assigned to a WCJ. At the final hearing on July 23, 2014, Claimant's counsel withdrew both petitions. In a July 31, 2014 decision, the WCJ marked the petitions withdrawn without prejudice, and noted in the decision that Claimant had not submitted any evidence.

On August 19, 2014, Claimant filed the Petition, again seeking total disability benefits as of May 16, 2012. WCJ hearings were conducted. At the October 7, 2014 hearing, Claimant's counsel submitted into evidence Claimant's March 24, 2014 deposition testimony, and the WCJ scheduled the next hearing within 90 days thereafter for Claimant to present his medical evidence. At the January 13, 2015 hearing, Claimant's counsel stated that Claimant's medical expert had not yet been scheduled, and requested that the Petition be withdrawn without prejudice. Employer's counsel asserted in her letter brief to the WCJ that Employer had been prepared to present fact witnesses on the issue of injury notice before the former WCJ, but both witnesses have since left Employer's employment.

The WCJ determined that Employer would be prejudiced if Claimant was afforded an opportunity to file another petition. The WCJ concluded that, given the nature of the allegations of the occupational disease, Claimant would have to provide a medical expert's deposition to prove causation. However, despite Claimant's 2013 and 2014 claims alleging a May 16, 2012 injury, Claimant still had not scheduled his medical expert's deposition. The WCJ further found as a fact that Employer's witnesses are no longer readily available for Employer's defense. Thus, the WCJ dismissed Claimant's Petition *with* prejudice. Claimant appealed to the Board. The Board determined that Claimant's delay in obtaining an expert opinion was due to circumstances beyond his control. The Board modified the WCJ's order by dismissing the Petition *without* prejudice. Employer appealed to the Commonwealth Court.

The Commonwealth Court affirmed the Board's Decision to withdraw the Petition without prejudice citing that the failure to secure testimony from his expert was beyond his control. The Commonwealth Court then sidestepped the Employer's argument that the Employer was prejudiced because that prejudice was not caused by the claimant's delay of a specific deadline from the Judge.

Conclusion and Practical Advice: The Commonwealth Court in this matter sided with the claimant to assert that they should not be prejudiced to file a Claim in the future. Essentially, they did not want to preclude the claimant from filing an additional petition.

Hutz v. Workers' Compensation Appeal Board (City of Philadelphia) -- A.3d -- (Pa. Cmwlth September 7, 2016) WL 4648529

Issues: Whether the WCJ was justified in denying claimant's Claim Petition alleging prostate cancer as a firefighter under the Section 108(r).

Answer: Yes.

Analysis: In April 2012, Claimant filed a claim petition alleging his prostate cancer resulted from direct exposure to IARC (International Agency for Research on Cancer) Group I carcinogens while working as a firefighter for the City of Philadelphia (Employer). Claimant sought total disability benefits for the closed period of March 13, 2006 to June 5, 2006. Employer filed a timely answer denying Claimant's material allegations.

The case outlines the detailed and lengthy assessment of the factual information in the case and the respective expertise of the experts in this matter.

In reviewing the evidence, the WCJ found Claimant's testimony credible as to his work history. The WCJ also credited the testimony of Claimant's Expert, and the reports of Drs. Weaver and LeMasters, to the extent they established that Claimant was exposed to IARC Group 1 carcinogens during his career as a firefighter. On that issue, the WCJ observed, Employer failed to present any contrary evidence.

However, the WCJ found that Claimant's Expert's testimony failed to credibly or persuasively establish that exposures to Group 1 carcinogens were a significant contributing factor to the cause of Claimant's prostate cancer. The WCJ provided several reasons for rejecting Claimant's Expert's testimony as to causation. First, Claimant's Expert never designed a study protocol and he never published on the etiology of cancer or on firefighters specifically. In particular, he never performed any research on the etiology of prostate cancer.

Further, Claimant's Expert did not know the methodologies of various groups. In addition, Claimant's Expert could not cite any authority for his assertion that the differential diagnosis methodology he used is the accepted methodology for determining a potential causative relationship between a given carcinogen and a given cancer.

The WCJ also noted Claimant's Expert is not an epidemiologist and that he could not assess reliability based on study design. Claimant's Expert was unfamiliar with the Bradford Hill criteria used in epidemiological research to determine a cause-and-effect relationship between a particular agent and the development of a disease, as explained by Employer's Expert. Furthermore, Claimant's Expert is not a statistician and did not know how statistical significance is calculated. He did not address the biostatistical methods and analytic techniques used in the studies he reviewed.

Claimant's Expert also agreed that Dr. LeMasters' study did not address the issue of dose response, and he acknowledged he was unaware that the 28% increase of prostate cancer among firefighters, cited by Dr. LeMasters, was lower than the percentage usually attributed to

detection bias. Claimant's Expert further acknowledged problems with two other studies he relied on (Samet Study and Bates Study); he also agreed that none of the studies he reviewed were controlled for smoking.

In addition, the WCJ observed, Claimant's Expert agreed that the CDC and other sources indicate that the most common risk factors for prostate cancer are race, family history and age.

Finally, the WCJ noted that Claimant's Expert never treated or examined Claimant. What is more, Claimant's medical records only went back to 2006. Claimant's Expert also agreed that Claimant's reports did not mention potential causes other than firefighting that contributed to the development of Claimant's cancer, including potential exposures at his second job, his ethnic background, diet, geography and possible exposures during military service.

In his last finding, the WCJ accepted as credible Employer's Expert's testimony that Claimant's Expert's opinions did not conform to the usual epidemiologic standards for the formation of a general causation opinion. Employer's Expert also credibly explained that any elevated risk for prostate cancer among firefighters might also be explained by other factors, such as PSA detection bias, ethnicity and geography. Lastly, the WCJ found Dr. Stanford credibly explained that prostate cancer is a complex disease in which multiple factors contributed to causation.

The WCJ noted Claimant filed his occupational disease claim pursuant to Section 108(r), which provides for a rebuttable presumption of *compensability* specifically for firefighters who suffer from cancer caused by a direct exposure to an IARC Group 1 carcinogen. To be entitled to this presumption, a claimant must show, in accord with Section 301(e) of the Act (relating to a rebuttable presumption of *causation* regarding occupational diseases generally), that he was employed as a firefighter at or immediately before the date of disability. On this basis, the WCJ determined the presumption of compensability afforded to firefighters by 301(f) did not apply in this case. The WCJ reasoned the case must be decided on general causation principles.

Ultimately, the WCJ determined the credible evidence did not establish that Claimant's employment as a firefighter caused his prostate cancer.

The Commonwealth Court made numerous findings in this matter related to the timing of the petition and the discovery rule. However, significantly, the Court again reiterated that the Claimant must establish the causal link between the alleged cancer and his occupational exposure to a carcinogen recognized as a Group 1 carcinogen by the IARC. Since the claimant failed to prove the connection between his prostate cancer and a Group 1 carcinogen, the presumption of compensability in Section 301(f) of the Act is unavailable to Claimant. Therefore, the initial burden of proving causation remained with Claimant.

Conclusion and Practical Advice: The Commonwealth Court for the third time in as many months has issued an opinion clarifying Act 46 and Section 108(r). The Court has determined that the claimant must prove that the cancer is related to an occupational exposure of a carcinogen that would cause that type of cancer.