September 2015 Case Law Updates

Charles Mecca v. WCAB (Procura Management, Inc. and Zenith Insurance), (Pa. Cmwlth., No. 132 C.D. 2015, filed September 23, 2015).

Issue(s): Whether the claimant is entitled to disability benefits after he was laid off by the Employer when the Employer issued a medical only NCP?

Answer: No.

Analysis: The claimant worked for the Employer as a vocational case manager when he sustained an injury to his back while bending down to retrieve a case file. The Employer issued a medical only NCP describing the injury as a "back strain/sprain." The claimant continued to work his regular job duties until he was laid off in August of 2012.

In September of 2012, the claimant reported to the Employer that the February 25, 2011 work incident caused a disabling head and back injury described as "pain, confusion/amnesia." The Employer subsequently issued a notice of denial denying that the claimant sustained disabling head and back injuries as a result of the work incident.

The claimant then filed a Claim Petition asserting that he sustained a low back compression fracture and injuries to his head, left shoulder and arm as a result of the February 25, 2011 work incident and that he was entitled to wage loss benefits for same. The Employer filed an answer denying the material allegations asserting that the acknowledged work injury did not cause a wage loss and that the claimant was laid off for economic reasons.

The WCJ ruled in favor of the Employer and found that the Claimant's work-related back strain did not cause a wage loss. In this regard, the WCJ found the testimony of the Employer's medical expert and fact witnesses as more credible. Accordingly, the WCJ concluded that Claimant failed to prove he sustained a disabling work injury on February 25, 2011 and denied the claim petition. The Claimant appealed to the Board and the Board affirmed. Claimant then petitioned for review by the Commonwealth Court.

The Court affirmed both the Board and the WCJ. The Court began its analysis by highlighting the Claimant's burden in a claim petition setting. The Court further indicated that "a claimant who continues to perform his regular job after the injury and is later laid off for economic reasons is not entitled to disability benefits." Klarich v. WCAB (RAC's Association), 819 A.2d 626, 628 (Pa. Cmwlth. 2003).

Applying the above law, the Court noted that Claimant overstated the significance of the medical only NCP as it simply acknowledged a *non-disabling* strain/sprain. After the Claimant was laid off by the Employer he alleged additional disabling work injuries as a result of the February 25, 2011 incident. As such, the Employer properly issued a notice of compensation denial denying Claimant's alleged disabling head and back injuries as it relates to the work

incident. The Court found that the WCJ was not required to discuss the NCD further because it did not conflict with the NCP. Notwithstanding the medical only NCP, the Claimant had the burden of proving that he sustained a disabling work injury through competent medical evidence.

The Court found that the WCJ's decision was reasoned as he made findings of fact and conclusions of law necessary to address the issues presented in the claim petition. The Court noted that it was undisputed that the Claimant continued working without medical restrictions or wage loss until he was laid off. Furthermore, the WCJ accepted the testimony of Employer's medical expert that Claimant's strain resolved and accepted the testimony of Employer's fact witnesses that Claimant performed his regular job duties until he was laid off because of a decline in Employer's business.

Conclusion and Practical Advice: The Court concluded that the WCJ properly denied the claim petition and affirmed the Decision of the Board. A claimant who continues to perform his regular job after the injury and is later laid off for economic reasons is not entitled to disability benefits.

CeeMee, Inc., Acadia Insurance Company/W.R. Berkley Corporation/Berkley Mid-Atlantic Group v. WCAB (Sowers), (Pa.Cmwlth. No. 1003C.D. 2014, filed September 23, 2015)
Issues:

(1) Whether the WCJ erred in granting Claimant's claim petition four years after the injury occurred;
(2) Whether the WCJ erred in finding that Claimant was employed by Employer on May 25, 2006; and
(3) Whether the WCJ erred in calculating Claimant's average weekly wage.

Answer:

(1) No.
(2) No.
(3) No.

Analysis: The Claimant was injured on May 25, 2006 while attending a trade show in Las Vegas on behalf of the Employer when the Claimant was moving a drum set weighing between 75 and 100 pound when he felt a sensation in his right eye.

Nearly four years later, Claimant filed a claim petition alleging that he injured his right eye on May 25, 2006 during the course and scope of his employment, which subsequently led to the loss of vision in his right eye. The WCJ denied Employer's affirmative defense of the statute of limitations and determined that if Claimant was successful on his claim petition, the calculation of his average weekly wage would be based on his earnings in 2008 when he was advised that he had lost vision in his right eye.

The Employer then filed four joinder petitions alleging that Claimant was employed by one of the joined parties. The WCJ granted Claimant's claim petition and awarded Claimant benefits for a specific loss commencing on September 22, 2008 and continuing for a period of 285 weeks and a ten week healing period. The WCJ dismissed the Employer's joinder petitions. The Employer then appealed to the Board.

The Board affirmed the WCJ's granting of the claim petition and dismissal of Employer's joinder petitions, but reversed the WCJ's granting of a ten week healing period. The Employer appealed to the Commonwealth Court.

The Commonwealth Court affirmed the WCAB's Decision/Order. First, the Court addressed the Employer's argument that the medical opinions offered by Dr. Ho were equivocal and speculative and, therefore, not sufficient to support a workers' compensation benefit. The Employer contended that because the doctor used words such as "possibly" and "could have been" his causation testimony was equivocal. This Court disagreed. The Court noted that the doctor, after providing foundation for his testimony, stated more than once that, in his professional opinion, that he believed Claimant's heavy lifting at the trade show in Las Vegas cause Claimant's injury.

Second, the Court addressed the Employer's argument that the Claimant was not its employee at the time of his injury because Claimant was working for CeeLite, LLC when the injury occurred. However, the Court noted that the Employer stipulated at a hearing held before the WCJ that the Employer and CeeLite, LLC were one and the same. Therefore, the Court found the Employer's argument to the contrary could not stand.

Lastly, the Employer argued that the WCJ erred in calculating the Claimant's average weekly wage. The Employer argued that the Claimant's wages should be based on the year preceding his injury, 2006, which would be zero, rather than September 22, 2008. This Court has held "in specific loss cases under Section 306(c) of the Act,…the date of the injury is the date when the claimant is notified by a doctor of the loss of use of the member or faculty for 'all practical intents and purposes' and that the injury is job-related in nature." Roadway Express, Inc. v. WCAB, 708 A.2d 132 (Pa. Cmwlth. 1998). Since the Claimant's loss of vision became permanent as of the Claimant's last date of surgery, which occurred on September 22, 2008, this Court did not find that the WCJ erred in calculating Claimant's average weekly wage.

Conclusion and Practical Advice: In specific loss cases, the date of injury is the date the claimant is notified by a doctor of the loss of use of the member for all practical intents and purposes. The calculation of Claimant's average weekly wage will be the year preceding the specific loss date of injury.

Protz v. WCAB (Derry Area School District), (Pa.Cmwlth. No. 1024 C.D. 2014, filed September 18, 2015)

Issue: Whether Section 306(a.2) of the Act is an unconstitutional delegation of legislative authority pursuant to Article II, Section 1 of the Pennsylvania Constitution?

Answer: Yes.

Analysis: In April 2007, Claimant sustained a work injury to her right knee when she fell while working for the Employer. The Employer issued a Notice of Temporary Compensation Payable. Claimant then returned to work in August of 2007 and her benefits were suspended pursuant to Employer's Notice of Suspension. However, in February of 2008, Claimant's work injury recurred and her benefits were reinstated pursuant to a Supplemental Agreement.

The Employer then filed a request for designation of a physician to perform an Impairment Rating Evaluation. The bureau assigned Jeffrey M. Moldovan, D.O., who evaluated Claimant in October 2011 and provided a ten percent (10%) impairment rating under the Sixth Edition of the AMA Guidelines.

The Employer later filed a Petition to Modify, seeking to convert Claimant's total disability benefits to partial disability benefits thereby reducing the amount of compensation payable to 500 weeks.

The WCJ determined that Claimant's impairment rating was less than fifty percent (50%) under the Sixth Edition of the AMA Guidelines. Accordingly, the WCJ granted Employer's modification petition, finding that Claimant was only entitled to partial disability benefits. The WCJ also granted the Claimant's review petition and amended the description of her injury.

The Claimant then appealed to the Board alleging that Section 306(a.2) of the Act, constitutes an "unconstitutional delegation of authority by the state legislature." The Board affirmed the WCJ's decision. The Claimant then appealed to the Commonwealth Court challenging, again, the constitutionality of Section 306(a.2) of the Act, as an unconstitutional delegation of legislative authority pursuant to Article II, Section 1 of the Pennsylvania Constitution.

The Claimant argues that Section 306(a.2) was added to the Act in 1996, at which time IREs were performed pursuant to the Fourth Edition of the AMA Guides. She further argues that the AMA guides have undergone two revisions since that time and that the Sixth Edition provides substantially different standards than those set forth in the Fourth Edition, thereby causing some claimants who would have been considered more than fifty percent impaired under the Fourth Edition to be less than fifty percent impaired under the Sixth Edition.

The Commonwealth Court vacated the Decision of the Board and remanded the case to the WCAB with instruction to remand further to the WCJ to apply the Fourth Edition of the Guides.

The Court cited to Article II, Section 1 of the Pennsylvania Constitution. Specifically, the Court noted that the Constitution vests legislative power in our General Assembly , "embod[ying] the fundamental concept that only the General Assembly may make laws, and cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority." However, this Court noted that it has been held that the General assembly may "delegate authority and discretion in connection with the execution and administration of a law" to an independent agency or an executive branch agency.

The Court compared the instant case to that of Bell Telephone Company of Pennsylvania v. Driscoll, 21 A.2d 912 (Pa. 1941). In Bell, Section 702 of the Public Utility Law of 1937, which then provided "[n]o public utility…shall, without the prior approval of the [Public Utility] [C]omission [(PUC)], make effective or modify any contract with an affiliated interest…" The Supreme Court noted, in Bell, that this provision contained no explicit standard to guide the PUC and indicated that "the legislature did not intend to set up any standard for the [PUC] in approving contracts, for its power to approve or disapprove is untrammeled by any conditions.

The PUC argued that "public interest" was the implied standard for approval. However, the Court rejected this argument and explained that unless the terms was further defined or limited in its meaning, it could not serve as a proper standard as the power to determine what constitutes "public interest" rests with the legislature.

In the case *sub judice*, the Court noted that the General Assembly failed to prescribe *any* intelligible standards to guide the AMA's determination regarding the methodology to be used in grading impairments. The Court noted that Section 306(a.2) is wholly devoid of any articulations of public policy governing the AMA. Section 306(a.2) merely requires that the most recent edition of the AMA Guides be used to determine the claimant's impairment rating. Under this basis alone, the Court found Section 306(a.2) of the Act unconstitutional.

The Court went on to discuss the General Assembly's adoption of the Fourth Edition of the AMA Guides at the time Section 306(a.2) was enacted. The Court further noted that the General Assembly has not reviewed and re-adopted the methodology contained in the subsequent editions. The General Assembly did not provide for review of subsequent editions of the AMA Guides leaving the review in the hands of a private entity. Accordingly, the legislature has provided a private entity with the authority to implement its own policies and standards.

The Court held that Section 306(a.2) of the Act is an unconstitutional delegation of legislative authority as it proactively approved versions of the AMA Guides beyond the Fourth Edition, without review. Therefore, the Court vacated the Board's decision with respect to the Employer's modification petition and remanded the matter to the board with instructions to remand the matter to the WCJ to apply the Fourth Edition of the AMA Guides in adjudicating same.

Conclusion and Practical Advice: Section 306(a.2) of the Act is an unconstitutional delegation of legislative authority as it proactively approved versions of the AMA Guides beyond the Fourth Edition, without review. Therefore, any IRE performed must be done in accordance with the Fourth Edition of the AMA Guides.

Robert Winchilla v. WCAB (Nexstar Broadcasting), (Pa.Cmwlth. No. 213 C.D. 2014, filed September 18, 2015)

Issue: Whether the IRE provisions of the Act, as applied to Claimant and/or facially, are unconstitutional, as they are capricious, arbitrary, not reasonably calculated, confiscatory, not used to assess disability in the workers' compensation sense improperly disregarded evidence that Claimant was totally disabled and improperly extinguish rights.

Answer: No.

Analysis: The claimant sustained a lower back injury in the course and scope of his employment with the Employer, which was acknowledged via notice of compensation payable. The Claimant returned to work until February of 2005, at which time the claimant's pain worsened and he was unable to perform his job duties.

An IRE was performed by Dr. John A. Kline, who provided a whole person impairment rating of five percent (5%) under the Sixth Edition of the AMA Guides. The Employer filed a Modification Petition seeking to convert Claimant's total disability benefits to partial. In the Claimant's Answer to the Modification petition, Claimant contended that the Act's "IRE provisions are: as applied to Claimant and/or facially, are unconstitutional, as they are capricious, arbitrary, not reasonably calculated, confiscatory, not used to assess disability in the workers' compensation sense and improperly extinguish rights."

The Employer submitted the IRE report and Claimant did not submit any medical evidence and relied solely upon the decision of the Social Security Administration finding Claimant totally disabled based upon his back injury and hearing-loss impairment.

The WCJ granted the Modification Petition adopting Dr. Kline's medical opinion as the only medical evidence presented in the case and rejected the SSA's decision as non-binding. The WCJ also dismissed the Claimant's constitutional challenge, finding that Claimant failed to present any evidence to support this contention.

Claimant then appealed to the Board, challenging the constitutionality of Section 306(a.2) of the Act. The Board affirmed the WCJ's decision, noting that its scope of review does not permit it to consider constitutional issues.

The Claimant appealed to the Commonwealth Court parroting his answer to the Modification Petition and further asserting that Section 306(a.2) is improperly used to alter an injured worker's disability status for purposes of extinguishing entitlement to continued benefits.

Claimant then argued in his amended brief that Section 306(a.2) of the Act is an unconstitutional delegation of legislative authority to the AMA in violation of Article II, Section 1 of the Pennsylvania Constitution.

The Court held that although questions involving the validity of a statute may be raised for the first time before the Court, such issues were required to be asserted in Claimant's petition for review or were deemed waived.

The Court affirmed the Board's order granting Employer's modification petition as the Claimant failed to cite to Article II, Section 1 of the Pennsylvania Constitution in his petition for review. As such, Claimant's arguments raised in his amended brief were waived.

Conclusion and Practical Advice: Questions involving the validity of the statute must be raised before the Court in the Petition for Review or will be deemed waived.

William Watt v. WCAB (Boyd Brothers transportation), (Pa.Cmwlth. No. 53 C.D. 2015, filed September 15, 2015)

Issue: Whether the WCAB erred in affirming the WCJ's decision, which denied and dismissed Claimant's claim petition for lack of jurisdiction.

Answer: No.

Analysis: The claimant, an interstate truck driver, filed a claim petition alleging that he sustained a work injury in New Jersey while working for the Employer. The Employer filed an Answer denying the allegations and asserted that Pennsylvania lacked jurisdiction as Claimant was not injured or hired in Pennsylvania and Claimant was receiving workers' compensation benefits in Alabama pursuant to the terms of his employment contract.

The Claimant argued that he is a Pennsylvania resident, resided in Pennsylvania his entire life, and applied for the job with the Employer through an online application he completed on his personal computer in Pennsylvania. The Employer argued that Claimant signed a Workers' Compensation Agreement agreeing that both parties are subject to the workers' compensation laws of the State of Alabama. The Agreement further provided that Employer administers all workers' compensation claims from its workers' compensation offices in Clayton, Alabama.

The WCJ found that because the parties agreed in the WC Agreement that the Employer hired the Claimant in Alabama and that his employment was principally localized in Alabama, the WCJ was constrained to find, as fact, that Claimant's employment was principally localized in the State of Alabama. Therefore, the WCJ concluded that he lacked jurisdiction over the claim petition and denied and dismissed the petition. The Board affirmed the WCJ's decision.

The Commonwealth Court cited to Section 305.2(a)(1) of the Act providing that an employee who suffers an injury outside of PA shall be entitled to benefits that he would have been

entitled to had the injury occurred within the State provided that the employee's employment was localized in Pennsylvania at the time of injury.

The Court was not convinced that the evidence offered by Claimant supported a finding that his employment was principally localized in Pennsylvania pursuant to Section 305.2(d)(4)(iii) of the Act. Specifically, the Court indicated that the Claimant spent only a fraction of his total time and miles in Pennsylvania and did not spend a "substantial part of his working time" in PA.

Additionally, the Court noted that the WCJ did not err in relying on the WC Agreement in reaching the decision that Claimant's employment was principally localized in Alabama. The Court cited to the Supreme Court's interpretation of Section 305.2(d)(5). Specifically, the Supreme Court concluded that an employee may enter into a written agreement establishing where the employee's employment is principally localized when an employee's duties require him to travel regularly in PA and one or more other states. Such an Agreement can be enforced so long as the parties agree that employment is principally located in another state.

Lastly, the Court addressed Claimant's argument that Section 305.2(d)95) of the Act is unconstitutional and violates the Full Faith and Credit clause of the U.S. Constitution. The Court noted that although Claimant's contacts with Pennsylvania represent a significant aggregation of contacts, an employer's place of business is also a significant contact. The Employer's contact is sufficiently significant that the application of Alabama law is neither unfair nor unexpected. Therefore, there is no constitutional problem with the choice of the workers' compensation laws of Alabama to govern the dispute.

Conclusion: Generally, an employee who suffers an injury outside of PA shall be entitled to benefits that he would have been entitled to had the injury occurred within the State provided that the employee's employment was localized in Pennsylvania at the time of injury. However, and employee can receive workers' compensation benefits in a different state if the parties enter into a written agreement establishing where the employee's employment is principally located.

Brenda Reichert v. WCAB(Foxdale Village), (Pa.Cmwlth. No. 2080 C.D. 2015, filed September 10, 2015)

Issue: Whether the WCJ/WCAB erred in finding that the Claimant was not in the course and scope of her employment at the time of her injury?

Answer: No.

Analysis: The claimant filed a claim petition alleging that she sustained a work related injury in the nature of a thoracic strain and aggravation of pre-existing degenerative condition in the thoracic spine. The Employer filed an Answer denying the material allegations and asserted that the Claimant was not working for the Employer on the date of injury, February 17, 2012.

The Claimant had worked for the Employer for nearly 17 years as a certified nursing assistant until she was taken out of work by her family physician in August 2011 for back pain unrelated to any work injury. Claimant then felt that she was capable of returning to work in January 2012. However, her doctor recommended that she complete a functional capacity evaluation (FCE). The Claimant completed the FCE on February 17, 2012 and stated that she was in so much pain and the end of the test that she could hardly move.

The WCJ determined that Moberg v. WCAB (Twining Village) was controlling and concluded that "having a functional capacity evaluation as a pre-condition of return to work following a period of non-work-related disability is not in the course and scope of employment under the Act." Therefore, Claimant's petition was dismissed. The Claimant appealed to the Board and the Board, affirmed.

The Claimant appealed to the Commonwealth Court contending that the Board erred in finding that she was not in the course and scope of her employment at the time of her injury. Claimant argued on appeal that her case differs from that of Moberg in that Claimant was an employee, although out on long term disability, at the time the FCE was performed and the claimant in Moberg was merely an applicant for employment.

The Court noted that the claimant had been out of non-work related long-term disability for a prolonged period of time and, although claimant indicated her desire to return to work, it was not confirmed whether the Employer would be able to provider her with employment. The Court further indicated that Claimant did not have to take the FCE if she did not wish to return to work. It required only that she obtain a fitness for duty certification from her primary care physician and her doctor ordered the FCE because he was uncomfortable certifying her without one.

Conclusion: The Court held that an injury that arises while participating in a pre-requisite for employment is only work-related insofar as the event has the potential to alter the employment relationship by allowing the Claimant to return to employment, but it does not arise in the course of employment. Therefore, the Claimant's injury did not occur during the course and scope of her employment.

Marc Palmer v. WCAB (Tasty Baking Company), (Pa.Cmwlth. No. 79 C.D. 2015, filed September 10, 2015)

Issue:

(1) Whether the WCJ/WCAB erred in finding Claimant fully recovered from his work injuries;
(2) Whether the WCJ/WCAB erred in finding the treatment of Dr. Kaplan neither reasonable nor necessary; and

(3) Whether the WCJ/WCAB erred in finding that the Claimant failed to present sufficient evidence to prove that the Employer violated the Act.

Answer:

(1) No.
(2) No.
(3) No.

Analysis:

Claimant worked for the Employer as a machine operator of a cake-wrapping machine. Claimant stopped working in June 2011, maintaining that his hands hurt. The claim was accepted via a TNCP, which converted, and acknowledged Claimant's injury as a wrist strain. Thereafter, Claimant filed a claim petition alleging that he sustained a work-related injury in April 2011 in the nature of bilateral carpal-tunnel syndrome and bilateral tendonitis. The Employer denied all material allegations. By decision dated October 2011, the NCP was expanded to include bilateral carpal-tunnel injuries, status post carpal-tunnel surgeries, and the claim petition was withdrawn.

The Employer then filed a Termination Petition alleging that claimant fully recovered from his work injuries, or in the alternative, failed to respond in good faith to a specific job offer. The Claimant then filed a Penalty Petition, for failure to pay for treatment rendered by Dr. Kaplan, and a UR Petition challenging the UR Determination that found treatment rendered by Dr. Kaplan neither reasonable nor necessary.

The WCJ granted the Employer's Termination Petition and denied Claimant's Penalty Petition determining that the Employer had proved that the treatment rendered by Dr. Kaplan was neither reasonable nor necessary; therefore, Claimant failed to prove that the Employer violated the Act. The Claimant appealed and the Board affirmed. Claimant then appealed to the Commonwealth Court.

The Commonwealth Court rejected Claimant's argument that the Employer's medical expert failed to testify that Claimant fully recovered from all of the accepted work injuries. The Court cited to specific language of the doctor's testimony wherein the doctor acknowledged the accepted injuries multiple times. The Court also rejected Claimant's argument that employer's medical expert merely opined that Claimant could return to work, without more. Again, the Court noted, as found by the WCJ, that the doctor considered Claimant's description of job duties and opined that there was no risk if Claimant returned to his pre-injury position. The Court further noted that the doctor considered an ergonomic assessment of the position at issue and claimant's detailed description of his work responsibilities.

Conclusion: The Court held that the Employer's medical expert testimony supports the WCJ's ultimate conclusion. The Court concluded that the Claimant failed to meet his burden of

proving that the employer violated the Act as the Claimant failed to produce sufficient evidence. As such, the Court found that the WCJ/WCAB did not commit an err of law in granting the Employer's Termination Petition and denying Claimant's Penalty/UR Petitions.

Anthony Curry v. WCAB (Brian's Professional Cleaning and Restoration and SWIF), (Pa. Cmwlth. No. 82 C.D. 2015, filed September 10, 2015)

Issue:

(1) Whether the Board erred by allowing the Employer to present evidence of earning power;
(2) Whether the Board erred in determining that Section 306(b)(2) of the Act does not require an employer to modify a job to comply with an employer's obligations under the ADA; and
(3) Whether the Board erred when it concluded that Claimant had a reasonable opportunity to apply for the job positions identified in the LMS.

Answer:

(1) No.
(2) No.
(3) No.

Analysis: The Claimant injured his right wrist during the course and scope of his employment. The Employer issued an NCP acknowledging an injury in the nature of "rt wrist contusion." The Employer filed a Modification Petition seeking to modify claimant's benefits based on a labor market survey showing that work is generally available in the area where Claimant resides. Claimant then filed a Review Petition seeking to amend the description of injury to include "right wrist contusion, peripheral TFC tear, membranous tear of his scapholunate ligament, de Quervain's syndrome with nerve damage, and thumb ligament damage."

The WCJ concluded that the Employer proved that it had no specific job vacancy that claimant was capable of performing and met its burden of proving there was work generally available to claimant in his labor market area within his physical and vocation capabilities. As such, the WCJ granted the Modification Petition. The WCJ also concluded that Claimant met his burden of proving that he sustained injuries beyond those listed in the NCP and granted his Review Petition.

The Board affirmed and held that the WCJ did not err by allowing the Employer to present evidence regarding earning power and concluded that the Claimant did not make the required showing that the Employer had an open position he was capable of performing but did not offer the position to the Claimant. The Board further held that the Employer was not precluded by the Americans with Disabilities Act from proceeding to the LMS because the ADA's requirement that employers provide reasonable accommodations to its disabled employees is

not relevant to the determination of an earning capacity under the Act. Last, the Board concluded that the general availability of work, as evidence by the LMS, was supported by substantial evidence and no remand was necessary to determine whether Claimant had a reasonable opportunity to apply for the positions.

The Claimant then appealed to the Commonwealth Court.

The Commonwealth Court affirmed the Decision of the Board. The Court first highlighted the Employer's burden with respect to a Modification Petition. The Court specifically noted that if the employer sustains its burden of proving that a specific job offer, within the claimant's capabilities, was not available with the employer, the employer may present expert testimony of earning power.

The Court concluded that the WCJ's finding that Claimant was not capable of performing secretarial and janitorial positions, which were available at the employer, was supported by substantial evidence. Thus, the Court held that the Employer met its burden of proof that it had no positions available that Claimant was capable of performed based on the evidence presented by the Employer. As such, the Board did not err in allowing the Employer to present evidence regarding the Claimant's earning power.

Next, the Court held that the Act does not require an employer to modify a job to comply with an employer's obligations under the ADA. In that regard, when establishing a claimant's earning capacity by a LMS, the relevant considerations are the claimant's residual productive skill, education, age and work experience. Therefore, the Board did not err in concluding that the ADA was not relevant to Claimant's appeal.

Last, the Court held that the Board did not err when it concluded that Claimant had a reasonable opportunity to apply for the job positions identified in the LMS. According to the Supreme Court, the Act requires that the jobs identified remain open for such time as the claimant is afforded a reasonable opportunity to apply for them. The Claimant does not contest that the positions identified by the LMS were actually open during the relevant time period. The Claimant chose not to apply because he did not believe he could perform the jobs. Furthermore, the Claimant did not dispute his own expert's testimony that the jobs remained open. Therefore, the Court held that the Board did not err.

Conclusion and Practical Advice: An employer may present expert testimony concerning an employee's earning power if the employer sustains its burden of proving that a specific job, within the employee's restrictions, was not available.

John Kobal v. WCAB (Mountain Intermodal, Inc.), (Pa. Cmwlth. No. 2111 C.D. 2014, filed September 9, 2015)

Issue:

(1) Whether the Board erred when it affirmed the WCJ's grant of the Employer's Termination Petition.

(2) Whether the Board erred when it affirmed the WCJ's denial of the Penalty Petitions.

Answer:

(1) No.
(2) Yes.

Analysis: The Claimant was working for the Employer as a truck driver on December 24, 2010 when he slipped as he climbed into a trailer. The Claimant filed a claim petition alleging that he sustained injuries to his neck, low back, and right arm/hand. The parties stipulated that Claimant suffered a "cervical and lumbar strain and sprain" in the course and scope of his employment on December 24, 2010. The Employer then filed a Termination Petition alleging that Claimant was fully recovered from the work-related injury. The Claimant then filed a Penalty Petition alleging that Employer had not paid benefits in accordance with the Stipulation. The Employer also filed a Petition to Modify alleging that work was generally available for Claimant in his labor market. Claimant filed another Penalty Petition alleging that the Employer refused to pay for Claimant's diagnostic tests and treatment in accordance with the terms of the Stipulation.

The WCJ granted the Employer's Termination Petition and dismissed Claimant's Penalty Petitions as the past due wage and medical benefits were paid. The WCJ also dismissed, as moot, the Employer's Modification Petition. The WCJ found the Employer's medical expert credible with respect to his opinion of full recovery and accepted his opinion, accordingly. Claimant appealed to the Board, which affirmed. The Claimant appealed to the Commonwealth Court contending that the Board erred when it affirmed the WCJ's grant of the Termination Petition and denial of the Penalty Petitions.

The Court noted that it would not disturb a WCJ's findings when those findings are supported by substantial evidence. The Court concluded that the Employer met its burden in proving that Claimant fully recovered from the work injury. Claimant argued that if an MRI had been performed, it would have strengthened his medical expert's testimony. However, the Board indicated that it saw no reason why any failure to pre-authorize medical treatment would change the fact that the WCJ found Claimant to be fully recovered. The Commonwealth Court agreed.

With respect to the WCJ's denial of the Claimant's Penalty Petition alleging that the Employer violated the Act when it unilaterally failed to pay compensation benefits to Claimant following the Stipulation, the Court found that the WCJ abused his discretion. The Court cited to Section 428 of the Act providing employers with a thirty day grace period to make payment on a compensation award without the assessment of penalties. The Employer paid Claimant's benefits eighty-one days late in excess of the thirty days set forth in Section 428 and gave no reason for the late payments and the length of time involved; therefore, this Court concluded that the WCJ abused his discretion when he failed to award penalties for this delay in the payment of benefits.

Lastly, this Court affirmed the WCJ's decision denying the Claimant's Penalty Petition alleging unpaid medical bills as the Court found sufficient evidence to support the WCJ's conclusion. There were no unpaid bills that were submitted to the Employer. Therefore, the WCJ properly concluded that the Claimant failed to establish a violation of the Act.

Conclusion and Practical Advice: Employers' have a thirty day grace period, under Section 428 of the Act, to issue payment on a compensation award without the assessment of penalties. A WCJ can issue penalties if the employer fails to issue payment timely and provides no reasoning for the late payment.

Stephen Wisniewski v. WCAB (Kimbob, Inc., Word Processing Services, Inc., Selective Insurance Co. of the Southeast, Hartford Fire Insurance Co., and PMA Management Corp.), (Pa. Cmwlth. No. 228 C.D. 2015, filed September 8, 2015)

Issue: Whether the Board erred in determining that Claimant's Review Petitions were time-barred under Section 413(a) of the Act when the Claimant did not file his petitions for specific loss within 500 weeks of the suspension of his benefits.

Answer: No.

Analysis: Claimant was injured while performing construction work on the PA Turnpike when a tri-axle dump truck ran over both of his legs, resulting in fractures of the right femur, the right and left fibulas, the tarsal ones of the foot, and the pubic ramus of the pelvis. Claimant returned to work in a light duty position but was laid off. Claimant received partial wage loss during that time. Claimant then went on to work for Word Processing Services, Inc. as a full time copy service technician. Claimant entered into a Supplemental Agreement with Kimbob suspending Claimant's benefits as of February 20, 1990.

In September of 2011 Claimant underwent a below-the-knee amputation of his right leg. PMA, Kimbob's insurance carrier at the time of injury, then filed a Petition to Review medical treatment indicating that although it was liable for the original work injury it was not liable for the amputation. Claimant then filed Review Petitions against Kimbob's insurance carrier (Selective Insurance), at the time of amputation, and Word Processing Services insurance carrier

(Hartford), at the time of amputation, seeking specific loss and related medical benefits based on his leg amputation.

The WCJ granted the Claimant's Review Petitions concluding that the Claimant sustained a specific loss of his right leg and that the specific loss arose from his original work injury. The WCJ also granted Kimbob's Joinder Petition against Selective, finding Selective was the insurer liable for Claimant's specific loss.

Kimbob and Selective appealed to the WCAB, which reversed the WCJ's decision. The Board concluded that Claimant failed to file his Petitions for specific loss within 500 weeks of the suspension of his benefits as required by Section 413(a) of the Act and; therefore, his Petitions were time-barred. Claimant then filed an appeal to the Commonwealth Court.

The Court cited to Romanowski v. WCAB (Precision Coil Processing, 944 A.2d 127 (Pa. Cmwlth. 2008) in discussing a claimant's obligation to file a petition for specific loss within 500 weeks of the date of suspension where a claimant's benefits have been suspended based on a return to work. The Court noted that if the claimant fails to file a petition for specific loss within the 500 weeks, his claim is time-barred. The Court reiterated that Claimant's benefits were suspended as of February 20, 1990 pursuant to a supplemental agreement. Claimant did not file his petitions for specific loss until 12 years after the expiration of the 500 week period. As such, this Court held that the Claimant's review petitions were time-barred.

Conclusion and Practical Advice: Petitions for specific loss benefits must be filed within 500 weeks from the date of the suspension where the claimant returned to work or the claim is time-barred.