CASE LAW UPDATES
September, 2009

Equitable Resources v. WCAB (Tomas), No. 80 CD. 2009, Commonwealth Court of Pennsylvania, Filed September 2, 2009

Issue: Whether Employer must provide for additional modifications or repairs to Claimant's bathroom to accommodate a wheelchair after they have provided initial funds to do the same if the modifications were performed negligently?

Facts: Claimant injured his back while working on October 18, 1991. As a result of the injury, Claimant is unable to use his legs and suffers from bladder and bowel dysfunction. Claimant was confined to a wheelchair as a result of the injury. Employer required Claimant to live on the premises as part of his employment duties. As such, Employer loaned money to Claimant, at no interest, to purchase a house after the injury. The money was to be repaid upon lump-sum settlement from Employer. Employer made modifications to Claimant's bathroom to accommodate his wheelchair. Employer hired a contractor, who performed the modifications poorly, such that, a leakage caused mold to form in the walls and under the floor. Employer provided for additional repairs, however, the leakage was not fixed. Claimant requested that Employer provide for further repairs, and Employer refused.

Claimant filed a Penalty Petition, alleging Employer is responsible for additional repairs. The WCJ held that the cost of additional repair is approximately $22,000.00, for what he characterized as an "orthopedic appliance," such as a wheelchair. The WCJ found that the claimant is seeking only repairs to existing modifications that were negligently performed, which is akin to remedying a defective wheelchair, for which Employer would be responsible. Therefore, the WCJ held that Employer was responsible for the additional repairs to the bathroom. The WCJ granted a Review Petition, as opposed to the pending Penalty Petition, because the issue of whether Employer is obligated to pay for repairs to a bathroom was a novel one.

Employer appealed, arguing that Employer was only obligated to make a one-time payment to modify Claimant's home to accommodate the wheelchair. The WCAB affirmed the WCJ's order.

Employer Petitioned the Commonwealth of Pennsylvania for review.

Holding: Section 306(f.1)(1)(ii) states that "the employer shall provide payment for medicines and supplies, hospital treatment, services and supplies and orthopedic appliances, and prostheses in accordance with this section." 77 P.S. § 531(1)(ii). The term "orthopedic appliances" includes modifications made to a claimant's home to accommodate his use of a wheelchair. Reiger v. WCAB (Barnes & Tucker Co.), 521 A.2d 84 (Pa. Cmwlth. 1987).

The Court further stated that although Employer provided a large sum of money, including the money to purchase the home and the money to make additional modifications, it has not discharged its obligation under Section 306(f.1) because the orthopedic appliances it provided are defective.

World Kitchen, Inc. v. WCAB (Rideout), No. 1789 C.D. 2008, Commonwealth Court of Pennsylvania, Filed June 25, 2009, Amended September 14, 2009

Issue: Whether a claimant must present medical evidence to defeat the grant of a modification petition where the employer's medical expert testifies that the claimant may work forty hours a week and up to ten hours in a single day and that testimony is credited by the WCJ?

Facts: Claimant sustained a work-related injury on September 26, 2005, in the nature of a back injury when she slipped on Employer's stairs. After the filing of a Claim Petition, she was awarded total disability benefits. Subsequently, Claimant's doctor released her to sedentary duty as of September 6, 2006. Claimant returned to sedentary duty on September 7, 2009. Employer issued a Notification of Modification, modifying Claimant's benefits based on the full-time sedentary position. Claimant challenged the modification of her benefits.

Employer also filed a Modification Petition based on the specific job offer it had made available to Claimant, seeking a modification because the job paid a slightly lower hourly rate than Claimant's pre-injury position. The job was for forty hours a week. Claimant alleged that while she had attempted to work each day following September 6, 2006, she did so with varying degrees of success because of her work injury.

In support of its Modification Petition, Employer presented the deposition testimony of Dr. Beutler, a board-certified neurosurgeon, who testified that based on Claimant's overall examination, the results were normal, except some limitation with her range of motion. Dr. Beutler diagnosed claimant has experiencing an exacerbation of her pre-existing degenerative condition, and released her to full-time sedentary work, which involved limited lifting and standing and walking restrictions. Dr. Beutler viewed videotapes of available jobs with Employer and approved several jobs within those restrictions. Dr. Beutler released claimant on November 3, 2006 to perform the light duty jobs up to ten hours a day.

Dr. Beutler again examined claimant on February 9, 2007, at which time he only found subjective complaints of pain that did not correlate to an actual clinical problem. At that time, he released her to perform duties involving lifting up to twenty pounds, and where she could stand or walk for four to six hours. Employer offered Claimant an "assembler" job which met Dr. Buetler's restrictions. However, since September 6, 2006, Claimant often missed work, came in late or left early, and rarely worked forty hours a week.

Claimant presented the testimony of her treating physician, who claimed she suffered from spinal fractures, which often caused her to have to miss work, although he released her to work eight hours a day. Claimant also testified on her own behalf regarding her back pain. Claimant also admitted that many of her absent days were not because of back pain.

The WCJ ruled that compensation remained modified or suspended depending upon Claimant's actual earnings while performing the modified position. In doing so, the WCJ never actually stated whether it denied or granted Employer's Modification Petition. Employer appealed. The WCAB interpreted the WCJ's Order as denying the Modification Petition, finding that claimant was not capable of performing the light duty position for ten hours, as offered, therefore it affirmed the WCJ's Decision. Employer appealed to the Commonwealth Court.

Holding: Section 306(b) provides that if a claimant has regained some, but not all of her pre-injury earning power, then employer is entitled to a modification of benefits to partial disability.

Furthermore, if the employer has a job the claimant is capable of performing, it shall offer that job to claimant. Section 306(b)(2). Job offers are to be governed under the Kachinski four-part test:

1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition,
2. The employer must then produce evidence of a referral to a then open position, which fits the occupational category for which the claimant has been given medical clearance,
3. The claimant must then demonstrate that he has in good faith followed through on the job referrals, and
4. If the referral fails to result in a job, then claimant's benefits should continue.

Kachinski v. WCAB (Vepco Const. Co.), 516 Pa. 240, at 252 (1987). The Commonwealth Court held that because Employer made appropriate work available to Claimant, it met the Kachinski four-part test for obtaining a modification of benefits based on the offered position, rather than the hours claimant actually worked within that position.

The Court further held that claimant's testimony alone, unlike for Reinstatement Petitions, is insufficient to establish that she missed work due to the work-injury. Specifically, the Court held that Claimant's subjective beliefs, which were not supported by medical evidence, were insufficient in a modification proceeding. *See also* Walk v. WCAB (U.S. Air, Inc.), 659 A.2d 654 (Pa. Cmwlth. 1995); SWIF v. WCAB (Hoover), 680 A.2d 40 (Pa. Cmwlth. 1996). The Court further stated that once the opinion of Employer's doctor was accepted regarding appropriateness of the job position offered, the WCJ cannot deny a Modification Petition. In support of its holding, the Court also cited the lack of clarity surround Claimant's absences. The Court ultimately held that the WCJ and WCAB erred in ordering Employer to pay partial disability benefits based on Claimant's actual earnings. The Court also pointed out that because claimant's benefits were modified originally, albeit incorrectly, the WCJ actually granted the Modification Petition, and hence the Court affirmed the granting the Modification Petition.

Noreen Thompson v. WCAB (Cinema Center), No. 621 C.D. 2009, Commonwealth Court of Pennsylvania, Filed September 24, 2009

Issue: Whether an employer, who denies an injury as work-related on the basis that their landlord owns the parking lot that their business sits upon, has a reasonable basis to contest a Claim Petition, such that an award of quantum meruit attorney's fees is improper?

Facts: Claimant was injured on February 15, 2007, while walking to her car in Employer's parking lot after work. Claimant suffered a severe humeral head fracture, which required surgery, which Claimant underwent, and she returned to work on March 29, 2007. Claimant filed a Claim Petition for the closed period, payment of medical bills, and payment of counsel fees. Despite Employer's argument that this area of the parking lot was not owned by Employer, Claimant was able to prove that her injury occurred on Employer's premises, she was required to be present by the nature of her employment, and the injury was caused by a condition of Employer's premises. The WCJ, therefore, granted the Claim Petition. The WCJ also held that Employer engaged in a reasonable contest because the case law regarding in the course and scope of employment requires certain factual findings by the WCJ. Because he concluded that Employer's contest was reasonable, he failed to award quantum meruit attorney's fees. The WCAB affirmed. Claimant appealed.

Holding: Under Section 440 of the Act, a claimant, who is successful in whole or in part, in litigation, is entitled to an award of attorney's fees, unless the employer had a reasonable contest. Section 440. The employer has the burden of presenting sufficient evidence to establish a reasonable basis for its contest. Frankford Hospital v. WCAB (Walsh), 906 A.2d 651 (Pa. Cmwlth. 2006) Whether an employer's contest is reasonable is a question of law fully reviewable on appeal. Essroc Materials v. WCAB (Braho), 741 A.2d 820, 826 (Pa. Cmwlth. 1999).

A reasonable contest is established where the employer presents medical evidence that is contrary to claimant's evidence and where it is evident that the employer's contest is not frivolous or done to harass the claimant. United States Steel Corp. v. WCAB (Luczki), 887 A.2d 817, 821 (Pa. Cmwlth. 2005). The reviewing court must look at the totality of the circumstances, since reasonableness does not necessarily depending on a conflict in evidence. Majesky v. WCAB (Transit America, Inc.) 595 A.2d 761, 762 (Pa. Cmwlth. 1991) The reasonableness of an employer's contest depends on whether the contest was prompted to resolve a genuinely disputed issue, which can be legal, factual, or both. McGuire v. WCAB (H.B. Devine Co.), 591 A.2d 372 (Pa. Cmwlth. 1991).

The Court here held that although Employer's evidence was not contrary to Claimant's regarding the location and ownership of the parking lot, Employer's contest was still reasonable because whether a particular location comprises Employer's "premises" is a legal question, which requires a legal arena for solution, especially in light of the fact that Employer presented evidence that the parking lot was not within exclusive province of the Employer, nor did Employer have exclusive province over where employees parked. Although the Employer's argument that the parking lot was not part of their "premises" failed, it had a legal basis to make the argument, therefore the Court affirmed the WCAB's order.