Bufford v. WCAB (North American Telecom), 2 MAP 2009 (Pa. 2010)

Holding: Under a *Kachinski*-style analysis, a claimant who leaves a light-duty job with the time-of-injury employer for a higher-paying position has not necessarily committed "fault" for the purposes of determining whether a continuing suspension of benefits is appropriate. Rather, the burden will remain with the employer to show job availability, and that the claimant unreasonably refused to return to the open and available employment.

Summary: The claimant was injured in the course-and-scope of his employment. Subsequently, the claimant was released back to work on a modified-duty basis, and was offered a position within his restrictions by the time-of-injury employer. The claimant accepted that position and benefits were suspended. The claimant then resigned from his position with the time-of-injury employer and took a position with another employer. Benefits remained suspended as the claimant was then earning more than his time-of-injury AWW. Approximately 4.5 years later, claimant was laid off by the new employer.

Claimant filed a reinstatement petition alleging that he was again suffering a loss of earnings due to the work-related injury. The WCJ denied the petition, concluding that any ongoing lost earnings were caused by the claimant's decision to leave the time-of-injury employer, and not the work-related injury. The Appeal Board and Commonwealth Court affirmed. The Supreme Court reversed.

In doing so, the Court first noted that while a claimant is not required to prove a causal connection between the work injury and the new wage loss to justify a reinstatement of benefits, the claimant must show that his or her earning power was negatively affected by the disability "through no fault of his own". The Court then pointed to their decision in Stevens v. WCAB (Consolidated Coal Co.), 760 A.2d 369 (Pa. 2000). There, the claimant had sustained a work-related injury. The claimant was then released to modified duty, but no modified duty was available with the time-of-injury employer. The claimant found alternative employment within restrictions, and benefits were suspended. The claimant was then fired for unsatisfactory job performance and sought a reinstatement of benefits. The court granted the reinstatement, concluding that fault was tied strictly to the issue of whether the employer met its duty of showing job availability.

The court then addressed the case at bar. It first noted that the Commonwealth Court had distinguished this case from Stevens on the basis that the Stevens claimant had never returned to employment with time-of-injury employer before working for another employer. As such, the Commonwealth Court determined that the case fell under a line of Commonwealth Court cases that held that if an employee returns to work with the time-of-injury employer, and then leaves for better working conditions or higher pay with another employer, any subsequent lost wages was due to the fault of the claimant, in that it would be due to the claimant's choice to pursue employment with another employer.

The Supreme Court concluded that this was an incorrect analysis of the situation, as the burden is on the employer to show job availability in order to maintain a suspension of benefits. The employer must show that there is work available to the claimant and that the claimant

failed to act in good faith in following through on the available work. The Court then remanded the issue to the WCJ for findings in line with their decision.

Aston Township v. WCAB (McPartland); McPartland v. WCAB (Aston Township), 2553 CD 2009, 2607 CD 2009 (Pa. Super 2010)

Holding: (1) Reimbursement to the claimant of costs from a third-party settlement where the settlement is being used as a credit against workers' compensation benefits, are to be paid in proportion to the amount of the settlement that has been credited against workers' compensation payments owed to the claimant; and (2) overpayments made to the claimant in such a situation may be refunded through the supersedeas fund, but not directly from the claimant.

Summary: Claimant sustained a work-related injury, which was accepted through a NCP in 2001. In 2005, the claimant received a third-party recovery of $1,025,000. At that time, a $153,256 workers' compensation lien had accrued, and was reimbursed to the workers' compensation carrier, leaving $871,744 to be paid to the claimant. This acted as an $871,744 advance payment on workers' compensation benefits due to the claimant.

Stemming from the third-party recovery was $345,191.31 in litigation expenses, of which $293.578.98 was to be paid by claimant and $51,612.33 by employer, at the time of the recovery. Moving forward, the claimant would have received, without the third-party case, $644.00 in weekly compensation benefits. As such, employer could expect a $644.00/week credit against compensation benefits due for a period of 1,353.6 weeks (until the $871,744 was fully reimbursed). As such, employer was also to reimburse claimant for the remaining costs associated with the third-party recovery at a rate of $216.88 per week for the 1,353.6 weeks (until the $293,578.98 in costs paid by claimant was reimbursed).

In June, 2006, the claimant returned to modified duty, and the compensation rate due to the claimant was reduced to $276.80 per week. Employer filed a Modification Petition, which was granted, thereby reducing claimant's compensation rate to that amount. As of February, 2008, following the Judge's Order, employer reduced the claimant's weekly reimbursement rate to $93.22, which was the same reimbursement rate as before, reduced to reflect employer's new weekly offset of $276.80 per week. Claimant then filed a Penalty Petition claiming 50% penalties for the period between the claimant's return to work and the Judge's Decision, even though employer continued to pay at the $216.88/week rate during the pendency of the Modification Petition. Employer then filed another Modification Petition alleging that it was due reimbursement of its overpayment between June 22, 2006 and February 17, 2008 through a recoupment from claimant's future reimbursement payments.

The WCJ denied the Penalty Petition, but also denied employer's second Modification Petition, stating that there was no provision in the act for recoupment of such benefits from either the clamant or the supersedeas fund. Both sides appealed and the Appeal Board

affirmed. The Commonwealth Court then affirmed the ruling on the Penalty Petition, but overturned the ruling on the Modification Petition.

The court found that the employer was permitted to reduce the cost reimbursement rate to the claimant in proportion to the reduction in the weekly benefits that would otherwise be due to claimant if not for the third-party recovery credit, because the claimant's entitlement to reimbursement of third-party litigation costs was proportional to the employer's entitlement to an offset for workers' compensation benefits paid. Therefore, since employer's ongoing credit against workers' compensation benefits due was reduced from $644.00/week to $276.80/week following the modification petition, the amount of costs to be reimbursed to the claimant on a weekly basis was reduced proportionally from $216.88/week to $93.22/week. Employer's duty to reimburse the claimant existed only to the extent that it received a benefit from the third-party settlement.

Regarding reimbursement of overpayments of cost reimbursements made to the claimant, the court noted that a recent line of Commonwealth Court cases have held that reimbursement of such costs constitute "compensation" under the Act, and as such any overpayment may be reimbursed through the supersedeas fund, but not from the claimant.

McKenna v. WCAB (SSM Industries, Inc. & Liberty Mutual Ins. Co.), 454 CD 2010 (Pa. Commw. 2010)

Holding: No penalties may be awarded when an employer withdraws a Petition to Seek Approval of a C&R prior to the Judge's approval of that C&R.

Summary: Claimant was employed by a subcontractor, whose general contractor obtained and purchased workers' compensation insurance for subcontractor's employees during their work on a particular project. Claimant was injured at work, and employer began paying benefits, but then filed a Petition to Modify. The employer and claimant attended a mediation during the pendency the of Modification Petition. At the mediation, the parties reached a resolution and signed a Compromise & Release agreement. During mediation, the claimant agreed to resign his position with employer.

Between the time of the signing of C&R agreement and the C&R hearing, employer's counsel was instructed by a representative of the general contractor to require claimant to also agree to not seek re-employment with the general contractor. Employer's counsel went to the C&R hearing and advised the Judge that the hearing could not proceed unless the claimant agreed to not seek reemployment with the general contractor. Claimant refused to do so, as this would essentially prevent the claimant from seeking re-employment in that industry within the geographic area. As a result, the C&R hearing did not go forward.

Claimant then filed a Penalty Petition, which was granted. In doing so, the Judge found in relevant part that "(1) the Employer violated the workers' compensation statute by refusing to proceed with the C&R hearing after executing the C&R agreement; and (2) Employer violated 34 Pa. Code § 131.13(d)(1) by failing to request a continuance after deciding not to proceed with the C&R hearing". The Judge awarded a 50% penalty plus attorney's fees and costs. Employer

appealed and the Appeal Board reversed. Claimant appealed to the Commonwealth Court, who affirmed the Appeal Board's ruling.

In doing so, the Commonwealth Court primarily noted that the award was given due to the alleged unreasonable delay caused by employer's refusal to proceed with the C&R hearing as scheduled. The Court then noted that no violation of the Act occurred when employer's counsel refused to proceed with the C&R hearing. In doing so, the Court focused on Section 449 of the Act (77 P.S. § 1000.5) which states that an employer "may" submit an agreement for approval. The Court found that nothing in the Act prevents an employer from refusing to submit such an agreement, and that since the agreement is not final until approved by the Judge, the employer was within its rights to try to change the agreement prior to approval by the Judge. The Court noted that the other alleged violations of the Act had not formed the basis for the penalties. As the only actions identified by the Judge as a basis for penalties had not violated the Act, no penalties could be assessed.

Hall v. WCAB (SSM Industries, Inc. & Liberty Mutual Ins. Co.), 454 CD 2010 (Pa. Commw. 2010)

Holding: IME doctor did not have to have examined the claimant for a thoracic injury, despite its inclusion on the NCP, when the record, taken as a whole, indicated that the claimant was fully recovered from that injury. The court also held that where claimant could not provide proof that treating physician subject to a UR sent records to the URO within 30 days of the URO's request, the WCJ had no jurisdiction to review the determination.

Summary: Claimant suffered a work-related injury in 2004. It was accepted through a NCP which described the injury as follows: "body part affected...low back"; "type of injury...strains to back, aggravation of lumbar disc disease"; "description of injury...lumbar/thoracic/cervical strain & sprain & aggravation of underlying disc disease & aggravation of radicular component at L5".

In February 2006, employer filed a UR of treatment being provided to the claimant. The UR found that the physician subject to the UR failed to provide his medical records for review, and therefore the treatment was not reasonable and necessary. The claimant filed a Petition to Review the UR Determination. Employer then filed a Termination Petition in May 2006.

On the UR Petition, Employer presented a February 22, 2006 letter from the UR to the treating doctor, requesting records, and an April 13, 2006 letter indicating that the UR had received the records on April 10, 2006, after the 30-day deadline. Claimant provided testimony from a representative of the treating physician, who stated that a print-out showed that another employee of the treating physician received the request on March 1, 2006, and that the computer print-out showed the request was completed on March 2, 2006. The records were then re-sent on April 10, 2006. The employee of the treating physician who testified did not have personal knowledge of whether the records had been sent out or not. The Judge found that the records had not been timely sent, and therefore, the UR review was properly dismissed.

Regarding the Termination Petition, the Judge found employer's medical expert to be more convincing than claimant's. Primarily, the IME doctor had failed to examine the claimant's thoracic spine during the IME. As noted above, the NCP specifically referenced the thoracic spine. However, the Court first indicated that the use of a "/" in the "description of injury" section of the NCP indicated a lack of clarity on the part of the employer regarding the location of claimant's injury, and that when taken in context with "low back" listed as the "body part affected", it was a stretch to find that the NCP identified a discrete thoracic injury. This, combined with the claimant's lack of complaints regarding her thoracic spine largely persuaded the court that no thoracic injury was present or had been accepted.

The Court nonetheless gave the claimant the benefit of the doubt, but found that the claimant's treating physician had never treated her for a thoracic injury related to the work-related injury, and as of his last examination had not identified any ongoing thoracic injury. As such, the Court found that the claimant was fully recovered, at a minimum, as of the time of the last examination by the treating physician.

The Court also addressed and dismissed a number of arguments by the claimant regarding the testimony of the IME physician. Specifically, they found no grounds for reversal in the contention that (1) the IME doctor had not specifically recognized a pre-existing condition as work-related, (2) the IME doctor did not make an diagnosis identical to the description on the NCP when the IME doctor nonetheless assumed the injuries on the NCP and declared the claimant fully recovered and (3) the IME doctor used the term "exacerbation" in place of the term "aggravation", because he also assumed an aggravation and opined that the claimant was fully recovered. The Court found that the claimant's argument that the Judge failed to issue a reasoned decision amounted to nothing more than disagreement with the Judge's findings of fact.

Lastly, the Court found that the Judge was justified in determining that the records had not been sent in a timely fashion. Since the individual testifying had no personal knowledge of whether the records had been sent, the Judge was justified in determining that claimant had failed to prove timely provision of the records. As the records had been untimely sent, the WCJ had no jurisdiction to review the UR determination.