

## Case Law Updates – April 2010

*Shaw v. Workers' Compensation Appeal Board (Melgrath Gasket Co.)*, No. 1871 C.D. 2009, filed April 21, 2010.

**Issue:** Whether a URO properly issued a Determination that treatment was unreasonable and unnecessary due to the provider's failure to send records where records were timely sent to the URO on a password-protected CD-ROM.

**Holding:** The URO properly determined that a provider's treatment was neither reasonable nor necessary where the provider sent records to the URO on a password-protected CD-ROM, as the provider failed to disclose the password to the URO.

**Facts:** Claimant sustained a work injury on December 5, 1988. He has been receiving TTD benefits since that time. On November 17, 2007, Employer filed a UR request for "any and all prescription medications prescribed to Claimant." On November 27, 2007, the Bureau issued a Notice of Assignment of UR Request to the URO. That same day, the URO sent a letter to Dr. Alan Bailer, the provider under review, requesting all medical records from December 5, 1988 to the present. The letter indicated that Dr. Bailer must include the enclosed provider verification forms and the records within 30 days of the date of the request for records. Accordingly, the records must have been mailed by December 28, 2007 to be considered timely. On December 24, 2007, Dr. Bailer mailed a CD-ROM containing claimant's records. In accordance with his practice, in order to ensure claimant's privacy, Dr. Bailer encrypted the records, thereby requiring a password for records to be viewed. The URO received the CD on December 27, 2007, but they could not view the records. On that same day, the URO called Dr. Bailer, and left a voicemail advising him that the records could not be viewed and that he had one day to send the paper medical records. Thereafter, the URO sent the CD back to Dr. Bailer, and made no further attempts to secure the records. The URO then issued a Determination that the treatment under review was unreasonable and unnecessary due to Dr. Bailer's failure to supply the requested records. Claimant filed a UR Petition, and the WCJ granted the UR Petition and vacated the UR Determination. The WCJ found that the URO's determination that the treatment was unreasonable and unnecessary due to lack of records was arbitrary and capricious. The Board reversed, and reasoned that it was the Provider's responsibility to provide the password to open the records. The Court affirmed that Board's Decision.

**Analysis:** In holding that the URO's Determination was proper, the court reasoned that it was the provider's responsibility to ensure that a readable version of claimant's records was sent to the URO. Under Section 127.464 of the Regulations, if the provider fails to mail the records to the URO within 30 days of the request, the URO shall issue a determination that the treatment under review was not reasonable or necessary. Although nothing prohibited the provider from sending the records via an encrypted CD-ROM, the provider acted unreasonably by failing to return the URO's telephone call on December 27, 2007, and/or by failing to provide a letter with the CD-ROM explaining that the records were encrypted and advising how the URO could obtain the password. However,

because the provider did nothing after mailing the encrypted CD-ROM, the URO had no other option than to issue its Determination that the treatment was unreasonable and unnecessary. The Commonwealth Court has previously held that a WCJ lacks jurisdiction to determine the reasonableness and necessity of medical treatment if a UR report by a peer physician is not prepared because the provider has failed to produce medical records to the reviewer. This case puts further responsibility on the provider to cooperate with a URO's request for records. If a provider fails to cooperate and take affirmative steps to ensure that the URO has received records, the provider risks that the URO will issue a negative determination that is not reviewable by a WCJ.

*Kleinhagan v. Workers' Compensation Appeal Board (KNIF Flexpak Corp.)*, No. 2009 C.D. 2009, filed April 22, 2010.

**Issue:** Whether a Notice of Ability to Return to Work was “promptly” sent; and whether an employer must establish, as a part of its prima facie case, that its vocational expert complied with Act 57 regulations.

**Holding:** The court held that a Notice of Ability to Return to Work was timely where it was sent before employer attempt to modify benefits. In addition, the court also reiterated its prior holdings that an employer need not establish, as a part of its prima facie case, that its vocational expert complied with the Act 57 Regulations by sending the earning power assessment to claimant and his counsel. A claimant must raise this issue before the WCJ, and then the burden shifts to the employer to show compliance with the Act 57 Regulations.

**Facts:** Claimant sustained a work injury to his low back. Employer’s expert, Dr. Naftulin, conducted an IME on March 20, 2007. Dr. Naftulin released claimant to medium duty work. At some point, a Notice of Ability to Return to Work (NARTW), dated March 28, 2007, was sent to claimant. On May 4, 2007, the vocational expert conducted a vocational interview, at which time claimant confirmed receipt of the NARTW. The vocational expert issued his report, and a Modification Petition based upon an Earning Capacity Assessment/Labor Market Survey was filed on September 17, 2007. During litigation, claimant agreed that he received a NARTW prior to May 4, 2007. The WCJ granted the Modification Petition, and claimant appealed.

**Analysis:** Consistent with its prior Decisions, the court held that a NARTW must be received before an employer attempts to modify benefits. Because there was no dispute that the NARTW had been received by May 4, 2007 at that latest, which was almost five months before the Modification Petition was filed, the NARTW was timely. Claimant’s argument that the NARTW must be sent “as quickly as possible” was rejected. In regard to claimant’s argument that employer failed to prove that its vocational expert sent a copy of the Labor Market Survey simultaneously to claimant’s counsel at the time it was sent to the employer, the court held that the employer did not have to show compliance with regulations in order to sustain its burden of proof. ***Instead, a claimant must raise the issue as a defense before the burden is shifted to the employer to show compliance.*** In light of this case, it may be good practice to try to ensure that our vocational experts are in compliance with the regulations before filing a Modification Petition in the event that this issue is raised by a claimant’s attorney during litigation.

*Thomas Lindstrom Co., Inc v. WCAB (Braun)*, No. 1815 2009, (Pa. Commw. Ct), filed April 13, 2010.

**Issue:** Whether a medical expert must expressly testify that intoxication was the “cause in fact” of a work injury in order for an employer to successfully present an intoxication defense?

**Holding:** A medical expert is not required to use the phrase “cause in fact,” and his testimony must only convince a fact-finder that the employee would not have sustained an injury had he not been intoxicated.

**Facts:** Claimant was standing on 8-in steel girder suspended 25 feet into the air when he fell and sustained multiple injuries to his head, arm, and legs. Employer initially issued a NTCP, but then issued a NCD after it had investigated the claim and discovered evidence that claimant was intoxicated when he fell. Claimant filed a Claim Petition, and employer presented evidence in support of its intoxication defense. Employer’s expert testified that (1) the fall occurred 25 minutes after claimant returned from his lunch break; (2) claimant had a blood alcohol level of .28% at the time of the fall; (3) claimant’s level of impairment produced slow responses, slurring of speech, grossly impaired fine motor skills and gross motor movements, staggering, loss of reflexes, loss of caution, 80-90% loss of peripheral vision, 70% loss of hearing, loss of deductive reasoning skills, loss of focus, and an extremely short attention span, and (4) claimant was a “very, very significantly alcohol intoxicated disabled person” at the time of the fall. When asked about causation, employer’s expert testified that “without question, that this person was severely intoxicated by alcohol and that level of alcohol was a major and very substantial contributing factor to this unfortunate accident.” The WCJ credited the intoxication defense, and denied the Claim Petition. She specifically found that although the expert’s testimony did not contain the “magic words,” his testimony was accepted to be tantamount to the “but for” standard. Claimant appealed, and the Board vacated the WCJ’s Decision stating that the expert never conclusively opined that the fall would not have happened “but for” his intoxication.

**Analysis:** The testimony of a medical expert need only permit a valid inference that the required causation is present. The use of “magic words” such as “substantial contributing factor” or “materially contributed” or “cause in fact” is not required. A WCJ must credit the expert’s testimony to the extent that an injury would not have occurred “but for” a claimant’s intoxication. In this case, because the expert testified that claimant’s high blood alcohol was the disability that caused the accident, the WCJ’s finding that his testimony was tantamount to the “but for” standard was supported. The claimant had also filed a cross appeal arguing that the NCD and Notice Stopping Temporary Compensation (NSTC) was untimely because claimant received his last TTD payment on 2/11/03, and the NSTC was received more than five days later on 2/21/03. However, because the last TTD payment represented a pre-payment for the period from 2/6/03 through 2/20/03, the NSTC was timely received on 2/21/03.

*Commonwealth of Pennsylvania/DPW v. Workers' Compensation Appeal Board (Harvey)*, Pennsylvania Supreme Court, No. 14 EAP 2009, filed April 29, 2010

**Issue:** Whether an employer may present actuarial testimony, which utilizes assumptions for the rate of return, to support an offset for its contribution to an employee's pension benefits in a defined benefit retirement plan, or whether the employer must present evidence of the actual funding to that specific employee's pension account.

**Holding:** Opinion evidence, which utilizes actuarial assumptions, is sufficient to support an employer's burden of proving an offset for its contribution to a defined benefit plan.

**Facts:** Claimant has been receiving TTD benefits since 2001 following a work injury. In 2002, he began to receive disability retirement benefits through the State Employees' Retirement System (SERS). In 2005, the employer implemented an offset, which reduced claimant's TTD benefits to \$81 per week. The claimant filed a Review Petition, which was denied by the WCJ, who credited the testimony of employer's actuarial expert.

**Reasoning:** The Pennsylvania Supreme Court relied on the Commonwealth Court's Decision in *Penn State/PMA Ins. Group v. WCAB (Hensal)*, 911 A.2d 255, for its determination that the Act does not require an employer to prove the actual amount of its contributions in a defined benefit plan. The court noted that employer's expert testified that the nature of a defined-benefit plan impedes the direct tracing and quantification of employer funding, and that actuarial science offers a rational alternative consistent with the nature of this type of plan. The court stated the purpose behind Section 204(a) is to foster cost containment. Because the Legislature provided for a credit, but left the determination of the formula to calculate the offset to other entities, the court found that it was reasonable for an employer to use opinion evidence that utilized actuarial methods with necessary assumptions.