MAY 2010 CASE LAW UPDATES

Findley Township & Inservco Ins. Services v. WCAB (Phillis),
No. 1332 C.D. 2009 (Pa. Cmnwlth 5/28/2010)

Facts: Claimant was injured in the course of his duties as a Police Officer on February 1, 2003 when he was struck by a motor vehicle. The injury was accepted as compensable via NCP in the nature of "multiple body contusions" and claimant started receiving TTD benefits. On July 8, 2003 Claimant returned to work and a Notification of Suspension was filed by the carrier. Claimant was sent for psychiatric counseling on October 18, 2003 and missed time from work over the next five months using sick and vacation days. This missed time was related to a psychological condition. Once Claimant's sick and vacation days expired the Township paid Claimant's salary. Claimant's TTD benefits were not reinstated.

On March 26, 2004 Clamant was relieved of his duty as a police officer because of a violent tendencies related to his psychological condition and never returned to work. Claimant continued to receive his full salary from March 25, 2004 through March 31, 2005 when a resignation agreement was entered into by the Township and Claimant. The agreement paid Claimant $9,741.23 in a severance package and the township was released from payments due under the Heart and Lung Act but not under the WC Act. Inservco was not a party to the agreement.

Claimant filed a Petition to Reinstate WC Benefits alleging that the carrier paid WC benefits after March 25, 2004 and then unilaterally ceased paying benefits in violation of the Act; a Penalty Petition was also filed. Claimant also filed a Review Petition to amend the description of injury. Inservco disputed that Claimant sustained a brain injury and mental injury as a result of the work injury and issued an NCD on 1/23/2004 and denied that benefits were ever reinstated after the Notification of Suspension.

For the salary continuation benefits the Township paid to the claimant, Inservco sent checks to the Employer for reimbursement. Checks were issued from Inservco to the Township on May 28, 2004 and November 19, 2004 that covered periods from March 15, 2004 through November 14, 2004. The facts surrounding these payments established that Inservco never agreed to reinstate benefits, and payments were made to the Township only after the township threatened to sue for the payments to reimburse what the Township believed were H&L benefits.

The WCJ decision found that Inservco made payments of compensation after March 28, 2004 and unilaterally stopped benefits in violation of the Act. A 20% Penalty was assessed and benefits were reinstated. Inservco appealed and

the WCAB affirmed the WCJ concluding that payments made to the Township were actually indemnity payments under Kelly v. WCAB (DePalma Roofing), 669 A.2d 1023. Inservco Petitioned to the Commonwealth Court who reversed the WCAB and found no admission of liability was made due to Inservco's payments to the Township and these payments were not equivalent to indemnity payments. The WCJ erred in not placing the burden on Claimant to prove his earning power was again affected by the work injury to prove an entitlement to a reinstatement of benefits

Issue: Whether a carrier's reimbursement of Workers' Compensation Wage loss benefits to a Municipality who is paying H&L benefits equates to an admission of liability and continued obligation to pay WC benefits.

Holding: In this case the Court explained in detail that in order for there to be a determination that indemnity payments that were paid would equate to an admission of liability under Kelly, you must look at the "intent" of the carrier as to why the payments were made. The court concluded that the substantial evidence did not support any conclusion that Inservco intended to accept liability for a reinstatement of benefits but instead was forced to make payments due to threats by the Township to file suit. The Court also distinguished the facts at hand from Kelly because payments were never made directly to Claimant, and that the Township without consulting Inservco continued to make salary payments voluntarily.

Forbes Road CTC v. WCAB (Consola)
N0. 919 C.D. 2009 (Pa. Cmwlth 05/27/2010)

Facts: On February 22, 2007 Claimant sustained work related injuries while working as a teacher for employer. On March 14, 2007 an NCD was issued indicating that an investigation was ongoing, and on April 4, 2007 a corrected NCD was issued indicating that although an injury took place, Claimant was not disabled. On January 22, 2008 employer issued a Medical Only NCP and the parties subsequently entered into an Agreement for Compensation (AFC). A Claim and Penalty Petition was filed on October 29, 2007. On July 14, 2009 the WCJ issued a decision that determined employer did not violate the Act by issuing a second NCD and then a Medical Only NCP but ordered employer to pay a Penalty based on the delay in eventually agreeing to enter into an AFC. The WCAB affirmed the WCJ order and both parties appealed to the Commonwealth Court.

Issue: Whether employer is permitted to issue an NCD to accept Claimant's work injury for medical purposes only.

Holding: The Commonwealth Court held that it continues to be acceptable for an employer to issue an NCD accepting medical liability and denying disability. In reaching this conclusion the Court found it important that the current Bureau documents continue to permit the acceptance of an injury through an NCD and that NCD sufficiently establishes a description of the nature of the accepted injuries. This is an important holding as it affirms the ability of our client to use the NCD versus a medical only NCP thus "forcing" a claimant to file a Claim Petition rather than Reinstatement Petition to establish disability. It has been argued that a medical only NCP places claimant on a suspension status.

ICT Group v. WCAB (Churchray-Woytunick)
No. 2315 C.D. 2009 5/26/2010

Facts: Claimant injured herself on 02/16/2007 in a slip and fall on ice while walking to her car to take her lunch break. Her car was parked in a Corporate Center Parking lot that was not owned, leased or controlled by the employer, but her employer leases several buildings within the office complex. The WCJ decision dated 11/25/2008 found claimant sustained work related injuries to her back, neck and legs and determined that Claimant was in the course of employment pursuant to the "personal comfort doctrine". The WCAB affirmed the WCJ decision finding Claimant was injured in the course of employment because;

1. Claimant was injured on employer's premises;
2. Claimant was required by the nature of her employment to be present where the injury occurred;
3. Claimant's injuries were caused by the condition of the premises.

The Court affirmed the decision of the WCAB on all issues confirming Claimant was in the course and scope of employment when the work injury occurred.

Issues:

1. Whether a parking lot not owned by employer could still be considered employer's "premises" as contemplated by Section 301 (c)(1) of the Act.

2. Whether Claimant was injured in the course of employment when walking to her car to take a lunch break.

Holding:

1. The Court cited Epler v. N Am. Rockwell Corp., 393 A2d. 1163 explaining

that the term "premises" as contemplated in the Act does not require employer to have title or control of the location of the injury, but rather whether the site of the incident was so connected to employer's business as to form an integral part thereof. The facts established that employees would walk across the parking lot to go from one workplace building to another, that the parking lot was only 10 feet from the entrance to the workplace and that in order to access the workplace you were required to go through the parking lot. Even if an employer does not control or maintain a parking lot the parking lot nevertheless could be considered employer's "premises" pursuant to Section 301 (c)(1) of the Act.

2. The Court distinguished the fact in this case from Giebel v. WCAB (Sears), 399 A2d. 152 (Pa. Cmnwlth 1979). In Giebel Claimant was found not to be in the course and scope of employment when she was injured while shopping in a retail store on her lunch break. In the instant case, Claimant was required to take a lunch break and was injured in reasonable proximity to the workplace and within the workday hours. The Court followed Allegheny Ludlum Corp v. WCAB (Hines), 932 A2d. Pa. Cmnwlth 2006) and found leaving the workstation for lunch was a necessary part of Claimant's employment and she was in the course of employment when the injury occurred.

Milner v. WCAB (Main Line Endoscopy)
No. 2331 C.D. 2008 (Pa. Cmnwlth 05/18/2010)

Facts: Claimant filed a Claim Petition alleging that she sustained repetitive use injuries to her left middle finger while working as a medical technician. The WCJ issued a decision granting Claimant's Petition, in part, finding that Dr. Jaeger was credible in his opinion that a work injury occurred, but that Dr. Abboudi, employer's expert, testified credibly that Claimant had fully recovered from any work injury as of the date of his examination in October 2007, ten months after the date of injury. The WCJ ordered a closed period of benefits from December 27, 2006 through October 23, 2007 with a Termination based on the full recovery opinion of Dr. Abboudi.

Claimant appealed the decision arguing that the WCJ credited the opinion of Dr. Jaeger who opined that claimant's condition was irreversible and relying on Hebden v. WCAB Betheranbgy Mines, 632 A2d. 1302 (1993) argued the granting of the termination was not appropriate given the facts in the case. The WCAB, as well as the Commonwealth Court, affirmed the WCJ decision explaining Claimant's argument misstated and misapplied the facts in Hebden

which was an occupational injury claim that dealt with an irreversible lung disease and was not controlling. The Court also noted that Hebden dealt with a Termination Petition where the burden was on the employer to offer proof of a full recovery as opposed to this case where the burden was on Claimant to continue to prove ongoing disability throughout the pendency of the claim petition.

Issue: Whether the burden remains on Claimant to prove all necessary elements to support an award of benefits throughout the pendency of the Claim Petition proceedings.

Holding: The court confirmed and followed prior holdings in Inglis House v. WCAB (Ready), 634 A2d. 592 (1993) and Innovative Space v. WCAB (DeAngelis), 646 A2d.51 (Pa.Cmwlth. 1994) that in a Claim Petition the burden remains with Claimant to prove disability throughout the litigation. The Judge remains the ultimate fact finder and is permitted to accept or reject testimony of medical witnesses in whole or in part. In this case the WCJ decision was appropriate finding Dr. Jaeger credible in testifying that a work injury occurred and Dr. Abboudi credible in opining that Clamant had fully recovered from the injury.

Scranton School District v. WCAB (Carden),
No. 1567 C.D. 2009 Published 05/14/2010)

Facts: Claimant sustained work injuries on August 10, 1995. Employer filed a UR request on treatment rendered by Dr. Leroy Pelicci on or after May 15, 2007. On August 20, 2007 the URO determined treatments to be reasonable and necessary. On August 30, 2007 employer filed a UR Review Petition and on October 9, 2007 Claimant filed a Penalty Petition for employer's failure to pay for treatment that was determined to be reasonable and necessary by the URO. On September 8, 2008 the WCJ issued a decision denying Employer's UR Petition and granting Claimant's Penalty Petition for violating the Act by not paying for treatment found to be reasonable by the URO. The WCAB affirmed the WCJ decision and an appeal was taken to the Commonwealth Court.

Issue: Whether Section 306(f.1)(5) and Section 306(f.1)(6)(iv) provides for a Suspension of payment to providers if employer continues to dispute the reasonableness or necessity of treatment via the UR Review process before a WCJ and if Regulation 127.208(e)(g) is consistent with the Act.

Holding: The Court cited to Section 127.208 (e)(g) of the regulations that clearly states the "The insurer's right to suspend payment shall further continue beyond the UR

process to a proceeding before a workers' compensation judge, unless there is a UR determination made that the treatment is reasonable and necessary." The Court explained that the administrative agency's interpretation of the Act is given deference and that the regulations are consistent with the language of the Act. If an employer Petitions to Review an unfavorable URO determination, the treatment that was found reasonable and necessary must be paid throughout the pendency of the litigation before the WCJ or employer will be subject to possible Penalties.