Case Law Updates – October 2008

Crawford v. WCAB(Centerville Clinics, Inc.) No. 2331 C.D. 2007.

Whether claimant's death rendered the C&R null and void where the requirements of Section 449 of the Act were satisfied prior to claimant's death but where the WCJ did not issue a decision approving the C&R until after claimant's death.

Claimant sustained a low back injury in August, 2001. A C&R hearing was held on 8/24/05. The testimony at the hearing revealed that the claimant had a full knowledge and understanding of all provisions of the C&R and had fully reviewed same with her attorney who answered all questions. On 8/28/05, the claimant died of cervical cancer. By decision and order dated 8/29/05, the WCJ approved the C&R Agreement.

Employer argued that the C&R was null and void pursuant to paragraph 18(f) of the Addendum which stated that the claimant certifies that she is suffering from no known life-threatening or terminal illness(es) unrelated to her work injury and agrees that this C&R is null and void upon her death if not approved by a WCJ.

The case was remanded to the WCJ who held that the C&R was null and void because the C&R was not officially approved until the WCJ issued the decision and order. The WCJ pointed out that if the C&R had not contained such specific language concerning the effect of claimant's death, the WCJ may not have reached the same conclusion.

The claimant appealed and the Board affirmed. The Commonwealth Court also affirmed the WCJ's Decision. The Court noted that the C&R specifically contained an addendum stating that the claimant agrees that this agreement is null and void upon her death if not approved by a WCJ. The Court had previously determined that approval by a WCJ must take the form of a written decision. Strawbridge & Clothier v. WCAB (McGee), 777 A.2d 1194 (Pa. Cmwlth. 2001).

*From now on, I would suggest including language in our C&R Agreements under paragraph 18 (other matters alleged) as follows:

Claimant certifies that he/she is suffering from no known life-threatening or terminal illness(es) unrelated to his/her work injury and agrees that this C&R is null and void upon her death if not approved by a Judge.

Costa v. WCAB(Carlisle Corp.) No. 822 C.D. 2008.

Whether the employer gets a credit for claimant's unemployment compensation if it fails to raise the issue to the WCJ or fails to present evidence that it funded claimant's unemployment benefits.

Claimant asserts that the employer waived the offset by not presenting evidence; however, employer argues that Section 204(a) is self-executing and, because claimant's own testimony established that he was receiving $422/week in unemployment compensation benefits, it was not necessary for employer to present additional evidence. In essence, claimant's testimony established employer's right to an offset.

Section 204(a) holds that compensation benefits will be reduced by the amount of unemployment compensation paid to a claimant. Section 204(a) directs the WCJ to credit the amount of claimant's unemployment compensation benefits against the amount of the compensation benefits paid to the claimant.

The WCJ found as fact that claimant received $422/week in unemployment compensation benefits. Claimant, however, argues that the employer must present to the WCJ any credit it may have during the initial proceedings. However, the Commonwealth Court disagreed.

The Court found that the WCJ can rely on evidence in the record regardless of which party presented the evidence or which party is benefited by the evidence.

Folmer v. WCAB(Swift Transporation) No. 596 C.D. 2007.

Whether the employer can prove a change in a claimant's physical condition where the claimant's work related injury consists primarily of pain and dizziness.

The Board affirmed the WCJ's Decision granting employer's second Termination Petition finding that the employer proved by competent medical evidence that claimant was completely recovered from his work injury.

Although the WCJ denied the first Termination Petition, the WCJ granted the second Termination Petition because he stated that he was "convinced that the claimant has symptom magnification and is a malingerer as testified to by Dr. Senter and as corroborated by the testimony of Dr. Talbot." The WCJ rejected claimant's complaints, as well as claimant's experts, as not credible.

On appeal, claimant argues the Lewis case. In Lewis, the Court held that that in a second termination proceeding, an employer must show that the claimant's physical condition has changed since the prior denial of a termination. *Lewis v. Workers' Compensation Appeal Board* (*Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922 (2007). Claimant also argues that the medical opinions relied upon by the WCJ were incompetent because they failed to address all of claimant's adjudicated work injuries.

To prevail in its second termination petition, employer had to present medical evidence to show that after 5/31/01, claimant's condition changed. In other words, employer's case had to begin with the adjudicated facts found by the WCJ in the first termination petition. Claimant argues that where claimant's injuries consist of symptoms that do not have objective support, the employer's must show a change only with evidence that the claimant no longer had complaints; discontinued medical treatment; the claimant's own doctor believed he recovered; or surveillance videotapes showed the claimant engaging in activities beyond his abilities given his work injury. The Court rejected this proposal.

Claimant's second argument is that Employer failed to meet its burden of proof for a termination because its medical experts did not acknowledge the accepted work injuries and attempted to re-litigate the issue of what is included in the work injury. The testimony was found to be fully competent to meet employer's burden of proof.

Nickel v. WCAB(Agway Agronomy) No. 719 C.D. 2008.

Whether a WCJ has jurisdiction to penalize an employer for violations of the Act when dealing with medical fees and whether the employer violated the Act and a C&R Agreement when it failed to pay claimant's medical expenses in accordance with Section 306 of the Act.

Claimant filed a Claim Petition and employer denied liability. DPW paid the outstanding medical bills at a sum less than the workers' compensation schedule, which the provider accepted. The parties entered into a C&R whereby the employer agreed to pay all reasonable, necessary and related medical bills in accordance with Section 306 of the Act. Per the C&R, employer's obligation to pay medicals was ongoing.

DPW then asserted a lien which the employer paid. Claimant filed a Penalty Petition for failure to pay or reimburse claimant for medical expenses. Claimant asserted that employer violated the Act by satisfying only the DPW lien rather than pay the bills at the re-pricing amount in accordance with the higher rates set forth in Section 306 of the Act.

The WCJ granted the Penalty Petition and found that the employer violated the Act and the C&R Agreement. The Board reversed and determined that the WCJ lacked jurisdiction to resolve fee disputes.

The Commonwealth Court found that the WCJ had proper jurisdiction. The provider did not challenge the amount or timeliness of the insurer's payment. Rather the issue was whether the provider was entitled to collect from employer the difference between the provider's charges as re-priced and the lien. Claimant argued that the employer's refusal to pay per the Act constituted a violation of the Act and the C&R. It was, therefore, properly raised before the WCJ.

Next, claimant asserts that employer violated the Act and the C&R because it did not reimburse the provider in accordance with the fee schedule. Claimant maintains that the provider was entitled to recover the difference from the repriced amount and the lien. The Court disagreed. A medical provider is prohibited from attempting to collect from the claimant the difference between the charge and the amount paid by the carrier.

In Westinghouse Electric Corp. v. Workers' Compensation Appeal Board (Weaver), 823 A.2d 209 (Pa. Cmwlth. 2003), this Court held that when medical expenses incurred for treatment of any injury are initially paid by a health insurer and the injury is subsequently determined to be compensable, the employer is obligated to pay the provider any difference between the re-priced amount to which it is entitled under the Act and the amount it actually received. Unlike in Westinghouse, where the employer was ordered to reimburse the providers the difference between the repriced amount and the payment by claimant's private health insurer, here, the providers accepted the DPW's payment for Claimant's medical expenses.

By accepting DPW's payment, the provider accepted as compensation in full for medical services to Claimant, the payment amount specified in the Medicare Act. The provider was not authorized to recover any additional amounts from either the Claimant or the Employer.

In sum, once a medical provider accepts the DPW's Medicaid payment, it is not entitled to recover from the employer the higher rates set forth in Section 306 of the Act.

Accordingly, Employer did not violate the Act or the C&R Agreement by refusing the provider's demand for payment. The Board correctly denied and dismissed Claimant's Penalty Petition.

Waronsky v. WCAB(Mellon Bank) No. 367 C.D. 2008.

Whether the claimant was in the course and scope of her employment when she was injured while crossing the street after exiting the parking garage prior to the start of her work shift.

Claimant filed a Claim Petition. The parties agreed to bifurcate the issues of compensability and disability. They litigated whether claimant was in the course and scope of her employment. The WCJ denied the Claim Petition and found that claimant was not in the course and scope of her employment.

The WCJ found that defendant did not provide any parking benefit to its employees. Although it owned the garage in which the claimant did park, and that was located directly across from the facility which the defendant owned, and at which the claimant worked, the claimant was not required to use that particular parking facility. The WCJ concluded that the claimant was commuting to work, and was injured on a public street, and, therefore, claimant failed to meet her burden of proving that her injuries arose within the course and scope of her employment. Claimant appealed to the Board, which affirmed the WCJ's decision. This appeal by claimant followed.

In determining whether an injury occurring at a particular area is on the "premises" of an employer, and hence compensable under the Act, Pennsylvania Courts have examined the control exerted by the employer over the area and looked to whether the area was so connected with the employer's business or operating premises as to form an integral part thereof.

In Epler v. North American Rockwell Corporation, 482 Pa. 391, 393A.2d 1163 (1978), the Supreme Court framed the issue as whether "the site of the accident was an integral part of employer's premises." The Supreme Court indicated that the "actual ownership of the area is not necessarily determinative of the question. The Court is satisfied that there are circumstances where an area can properly be designated as 'on the employer's premises' within the meaning of the Act even though the employer is not the legal owner of that area." The Supreme Court concluded that the critical factor is not the employer's title to or control over the area, but rather the fact that the employer had caused the area to be used by employees in performance of their assigned tasks.

The Court found that the employer neither issued parking directives nor exercised control over the mode of transportation claimant chose to commute to and from work. Claimant was free to park her vehicle where she chose. Claimant was not obligated to park in the Mellon parking garage; claimant could have parked on the street.

The Court found that the Mellon parking garage was not integral to the employer's business and, therefore, it was not part of the employer's premises. Consequently, it may not be said that Claimant was traversing across Sixth Avenue between two parts of the

Employer's premises, as in Epler. Therefore, the WCJ and Board correctly concluded that neither Mellon garage nor Sixth Avenue was an integral part of Employer's premises and Claimant was not injured in the course and scope of her employment. Claimant failed to demonstrate that Employer owned, leased or controlled the area where her injuries occurred such that it was an integral part of her employer's business. The Court affirms denial of Claim Petition.

Patton, et al v. WCAB(Lane Enterprises, Inc.) No. 2363 C.D. 2007.

Whether the rebuttable presumption of Section 301(e) should be considered and applied.

The WCJ denied and dismissed claimant's review and fatal claim petitions as time barred. The Board affirmed. Claimant petitioned for review with the Commonwealth Court that the WCJ erred because claimant was not afforded the benefit of the statutory presumption of causation in Section 301(e) of the Act, that proper weight was not given to the death certificate, and that her petitions were not barred by the time requirements of Section 301(c)(2) of the Act.

The Court remanded the case to the Board to remand to the WCJ to consider the rebuttable presumption that decedent suffered from an occupational disease. On remand the WCJ determined that there was not a presumption. Section 301(e) of the Act provides: "If it be shown that the employee, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive."

With respect to pneumoconiosis, the Court disagreed with Claimant that she established her entitlement to the rebuttable presumption. Both defendant's doctors presented unequivocal medical testimony that Decedent did not suffer from pneumoconiosis based on an examination of a series of x-rays over time. Defendant's doctors both explained that pneumoconiosis does not lessen over time but either increases or remains the same which was contrary to Decedent's x-rays. The WCJ found both defendant's doctors credible. The WCJ credited Employer's medical witnesses and rejected the assertion that Decedent suffered from an occupational disease. The rebuttable presumption requested by Claimant was inapplicable. The WCJ did not err when he considered but rejected the rebuttable presumption

Additionally, the claimant contended that the WCJ failed to consider the death certificate. A death certificate in workers' compensation cases is admissible as proof, though not conclusive proof, of both the fact and cause of death. Hauck v. Workmen's Compensation Appeal Board (Kocher Coal Company), 408 A.2d 555 (Pa. Cmwlth. 1979). Here, the WCJ admitted the death certificate on remand. However, the WCJ rejected the cause of death on the certificate due to the credible testimony of defendant's doctors.

Claimant next contends that the WCJ erred when he ruled that the fatal claim petition was barred by the statute of limitations. In the prior opinion, the Court stated, "if the NCP is amended to include injuries which later resulted or were a substantial causative factor in Decedent's death, then the petition was timely filed." On remand, the WCJ denied Claimant's review petition. Because Claimant failed in her attempt to amend the NCP to include injuries which later resulted or were a substantive cause of Decedent's death, the WCJ did not err when he denied the fatal claim petition as untimely.

Dart Container Corp. v. WCAB(Lien) No. 550 C.D. 2008.

Whether the WCAB can modify a disfigurement award and the standard in order to do so.

Employer challenges the disfigurement award for 70 weeks of benefits granted by the WCAB which increased the award granted by the WCJ, which was 22 weeks.

Claimant underwent cervical spine surgery that left a scar on her neck. She filed a review petition for disfigurement benefits. The WCJ viewed the scar and made appropriate findings. Claimant appealed and argued that the award was outside the normal range that most WCJs would select.

The most meaningful evidence in a disfigurement case is the WCJ's view of the disfigurement itself. McCole v. WCAB (Barry Bashore, Inc.), 745 A.2d 72 (Pa. Cmwlth. 2000). However, the claimant may present herself to the Board, so that it may independently view the disfigurement. City of Philadelphia v. WCAB (Mercer), 717 A.2d 26 (Pa. Cmwlth. 1998). Upon the Board's view of the injury, it may modify the WCJ's award. LTV Steel v. WCAB (Rosato), 627 A.2d 285 (Pa. Cmwlth. 1993).

Claimant appeared before the Board who increased the award.

Employer appealed and the Court remanded.

The Board may modify a WCJ award only if it concludes after conducting its own view that the WCJ capriciously disregarded competent evidence by entering an award significantly outside the range of benefits that most WCJs would select.

The Court further indicated that the Board should explain how it determined the acceptable range of disfigurement benefits when it does not dispute the WCJ's description and the grounds on which it relies to conclude that most WCJs would award more than the number of weeks of benefits granted by the WCJ.

The Court found that the Board considered the visual impact of claimant's disfigurement, its location and relative severity of her scarring and explained that based upon its experience the range that most WCJs would select for a similar scar is between 60 to 75 weeks. However, the Board did not describe claimant's scar, did not state whether it rejected the WCJ's description and did not explain why most WCJs would award within the 60 to 75 weeks' range. Therefore, the case was remanded back to the Board for adequate explanation.

The Bullen Companies v. WCAB(Hausmann) No. 409 C.D. 2008.

Whether the WCJ erred in finding that claimant satisfied the requirements of Section 311 of the Act with respect to the time for giving employer notice of an injury and in finding that claimant met his burden of proving that he suffered a compensable occupational disease due to chemical exposure during his employment.

The WCJ granted claimant's Claim Petition and found that the claimant and his medical expert was credible. The Board affirmed the WCJ's ruling concluding that it was based upon substantial competent evidence both as to the relationship between the disease and his work and the timeliness of claimant's notice of his injury.

Employer argues that the claim should have been denied because the notice that claimant gave of his injury was not timely under Section 311 of the Act. Employer argues that claimant's notice was not given within 120 days because he alleged that the disease was contracted in May 2002 but notice was not given until July 2004. Employer accepts that for occupational diseases in 301(c)(2) case law has established that the 120-day notice period begins to run when a doctor advises that the claimant is permanently disabled by a disease and that it is related to the claimant's work. Employer argues that this rule does not apply because claimant's disease is in Section 301(c)(1).

The question of notice for a disease encompassed by Section 301(c)(1) is addressed in Sell v. WCAB (LNP Eng'g), 771 A.2d 1246 (2001). The Supreme Court held that Section 311's discovery rule "calls for more than an employee's suspicion, intuition or belief; by its terms, the statute's notice period is triggered only by an employee's knowledge that she is injured and that her injury is possibly related to her job." The Court held that the 120-day notice period did not begin to run until Sell received a medical diagnosis of her work-related injury.

Here, the record supports the WCJ's finding that claimant did not know that his disease was work related until his doctor advised him in 2005. The Court found that the WCJ's findings were supported by substantial competent evidence and that the WCJ's Decision was reasoned.