Werner v. WCAB (Greenleaf Service Corp.), No. 25 C.D. 2011, Filed September 1, 2011

Issue:

Whether the claimant is within the course of employment when he is injured while working from an approved, at-home office outside of the employer's primary work office, when the facts do not establish what activities he was performing while injured?

Answer:

No. When the employee is injured, off the employer's premises, while furthering the employer's business, the injury will be deemed work-related. However, when a stationary employee leaves the employer's premises during authorized breaks for personal reasons, i.e., reasons unrelated to her required job duties, the employee is not within the course of employment. Here, there were not sufficient facts to determine if the claimant was engaged in business affairs, i.e., furthering the employer's business interests, or performing purely personal activities, while at his in-home office when the injury occurred.

Analysis:

The claimant, Brenda Werner, as a result of her husband's death on March 8, 2007, filed a Fatal Claim Petition against the employer. In support of her Petition, the claimant testified that her husband's position was an international sales manager with employer, however, when he was not traveling for work, he worked out of his at-home office, or alternatively, in the Saegertown, Pennsylvania facility.

She testified that the week before March 8, 2007, her husband injured his right hand while on vacation. Accordingly, the business trip to Europe, scheduled the week of March 8, 2007, had been cancelled for him to obtain medical attention, including the removal of sutures. As a result, he was working from his at-home office on March 8, 2007.

She testified that generally, her husband's routine involved working in his at-home office beginning at 8:00 AM, or before. On the date in question, she informed him at 11:30 AM that she was leaving the home and he responded accordingly. She returned at 12:30 PM and once again called out to him about 1:00 PM. He did not respond and she assumed he was on a telephone call. The claimant watched television until 2:00 PM before initiating further contact. At 2:00 PM, she called down to him and obtained no response. She went downstairs to the at-home office and found him nonresponsive in his office chair. She called 911. She stated that she found bloody tissues and blood on the floor in the first-floor bathroom and that the decedent's cellphone was also in the upstairs bathroom. She also observed his glasses and blood outside the home on the sidewalk. She believed that the decedent had exited the home for a cigarette at some point, suffered a nosebleed, and returned inside to wash up.

In support of the pending Fatal Claim Petition, the claimant submitted a packet of eight work-related emails sent by her husband on March 8, 2007, which were time-stamped between 7:52 AM and 10:12 AM.

In opposition to the Fatal Claim Petition, the employer's president, James Greenleaf, testified. He testified that between 2002 and 2003, he required all sales managers to be present in the employer-provided office in Pennsylvania, if they were not traveling on business, rather than allowing them to work from home for productivity reasons.

The defendant also presented the employer's treasurer, David Galey, who testified that the decedent was reimbursed for at-home office costs such as a telephone line and internet access, as were all sales managers.

The defendant also presented the employer's sales and marketing manager, David Rydbom, who testified that if the decedent had been working from home, it was within the decedent's discretion, and not required by the employer. He further testified that the decedent was a salaried employer, so he had a set pay rate, despite the number of hours he worked. He also testified that he considered the decedent to be on sick leave as a result of his non-work-related right hand injury, when the alleged work-related death occurred.

The defendant also presented the employer's human resource manager, Debra Spence, who testified that she also assumed the claimant was on sick leave as a result of his right hand injury.

The defendant also presented the decedent's daughter, Mary Beth Werner Lee, who testified that she emailed and spoke with her father, regarding personal matters, on March 8, 2007.

The WCJ denied the Fatal Claim Petition, finding that the claimant was not within the course of employment stating that "it is impossible to tell what [Decedent] was doing on March 8, 2007 other than he received some business and personal communications that morning. That fact that he was sitting in a chair in his home office when he was discovered by his wife is not enough to prove that he was in the course and scope of his employment at the time of his injury."

The Workers' Compensation Appeal Board affirmed for the same reasons. The claimant appealed to the Commonwealth Court, who also affirmed the Decision. In doing so, the Commonwealth Court cited that "in a fatal claim petition, the surviving family member bears the burden of proving all the elements necessary to support an award under the Workers' Compensation Act." The Court further noted that the first level of analysis would be whether or not the claimant was a "traveling" employee versus a "stationary" employee. A "traveling employee" is given greater latitude with respect to breaks in work-duties being compensable, while a "stationary" employee breaking work-duties for personal reasons is deemed not compensable. Here, the Court found that this claimant was a stationary employee at the time of the injury, given the fact that he was stationed to his at-home office.

The Court next noted that with respect to whether or not he was engaging in activities that were furthering the employer's interests at the time of injury, "little is known about the circumstances surrounding Decedent's injury in the present matter. The … record demonstrates only that …he was injured sometime between 11:30 AM and 2:00 PM … The record is unclear as to how Decedent was injured, where Decedent was injured, and at what specific time Decedent was injured. Perhaps more importantly, even if the cause, location, and time of Decedent's injury

was established, there is nothing in the record demonstrating what Decedent was doing when he was injured."

Ultimately, the Commonwealth Court held that "the WCJ and the Board, therefore, did not err in determining that Claimant failed to establish that Decedent was injured in the course and scope of his employment."

Conclusion and Practical Advice:

Course of Employment cases are very fact-intensive and involve a legal analysis on multiple levels. The first level of analysis the Court used to determine if the claimant was in the course of employment was whether he was a stationary or traveling employee. The record was well-developed that he was a stationary employee at the time of the injury, while his work duties generally involved significant travel. This is very important as traveling employees are given greater latitude with respect to how and when work-related compensable injuries may be established. Because defense counsel was able to clearly establish that he was a stationary employee at the time of alleged injury, claimant's burden of proof was significantly heightened with respect to proving that the decedent was furthering the employer's business. With respect to stationary employees, other than inconsequential departures for personal comfort, breaks in performing job-related duties, will not be compensable. In a situation such as this, where the employee works alone, there is no clear evidence of the exact activity the claimant was engaging in when he was injured, despite the fact that there was some evidence he engaged in work duties that day, including being discovered in his at-home office chair. The Court will hold the claimant to their burden of proof with respect to the furtherance of employer's business affairs, requiring credible evidence of the exact activities of the employee at the time of injury.

O'Neill v. WCAB (News Corp. Ltd.), No. 2203 C.D. 2010, Filed June 15, 2011 as a Memorandum Opinion; re-filed as Opinion on September 15, 2011

Issue:

Whether defendant's medical expert's opinion in subsequent proceedings that existence of an already accepted work-injury is skeptical or non-existing at the time of an independent medical examination is insufficient to support a termination of benefits?

Whether litigation costs are reimbursable as an award for deposing an expert with respect to claimant's physical condition and ongoing complaints, where the claimant was only successful in proving that mileage was reimbursable with respect to a Review Petition?

Answer:

Yes. The Court has consistently held that a medical opinion that does not recognize the work-relatedness of an injury previously determined to be work-related is insufficient to support a termination of benefits, however, the Court has held that a medical expert need not necessarily believe that a particular work injury actually occurred, and that the expert's opinion is competent if he assumes the presence of a previously accepted work-related injury and finds it to be resolved by the time of his examination.

No. Pursuant to Section 440(a) of the Act, in any contested case, where the employee is successful in whole, or in part, on the matter at issue, a sum for reasonable costs incurred for litigating the same may be awarded. In order for litigation costs to be considered reasonable, they must relate to the matter at issue.

Analysis:

On November 1, 1993, the claimant injured her left wrist in the course of her employment as a stenographer for employer. She received indemnity and medical benefits under an NCP, which acknowledged her injury as left carpal tunnel syndrome. The injury was expanded through previous, unrelated litigation to include cumulative trauma disorder, bilateral carpal tunnel, thoracic outlet, scapholunate ligament injury, and depression. She continued to receive total disability benefits under the Act.

On September 17, 2007, the employer filed a Termination Petition based upon the full recovery opinion of Dr. Cash. Claimant also filed a Review Petition seeking reimbursement for travel expenses related to medical treatment, the payment of unpaid medical bills, and reimbursement for prescriptions.

During litigation, the claimant testified that she continues to suffer from pain and symptoms from her work-related conditions, has not been able to work for the last fifteen years, and has continued to treat with Dr. Fried.

The claimant also presented the testimony of her treating physician, Dr. Fried, who testified that the claimant continues to suffer from her work-related diagnoses and she is not fully recovered.

The defendant presented the deposition testimony of Dr. Cash, who testified that as of August 7, 2007, the date of his examination of the claimant, she had fully recovered from her work-related injuries, and accordingly, was capable of returning to full, unrestricted activities. To support his opinion, he testified that there was no objective basis for her ongoing complaints and that her medical history was positive for a high degree of symptom magnification.

The WCJ found Dr. Cash to be more credible, accordingly, he granted the Termination Petition. He also ordered the reimbursement of claimant's travel expenses to seek treatment for her thoracic outlet syndrome because the evidence that she could not find a local specialist went unrebutted. The claimant appealed to the Board, which affirmed the WCJ's Decision. Claimant further appealed to the Commonwealth Court.

The Commonwealth Court affirmed the below Decisions. In doing so, the Court noted that a review of Dr. Cash's entire testimony revealed that he did not outright reject that any work-related injury occurred, that claimant's medical history revealed symptom magnification, and that he rather opined, within a reasonable degree of medical certainty, that the claimant's current complaints were not related to any of the accepted work injuries, accordingly, she was fully recovered. A further review of the record indicated that Dr. Cash acknowledged medical records that included a diagnosis of thoracic outlet syndrome, and after examination of the claimant, found no abnormalities in the upper extremities to buttress her subjective complaints. Additionally, Dr. Cash included the diagnosis on his Physician's Affidavit of Recovery.

Ultimately, the Court held that "a medical expert need not necessarily believe that a particular work injury actually occurred, and that the expert's opinion is competent if he assumes the presence of a previously accepted work-related injury and finds it to be resolved by the time of his examination."

As a secondary argument, the claimant argued that Dr. Cash's opinion was equivocal because he recognized the existence of her subjective complaints of pain in his report and testimony. However, the Court quickly rejected her argument by stating that "even if a medical expert admits to uncertainty, reservation or lack of information with respect to medical details, the testimony remains unequivocal so long as the expert expresses a believe that, in his or her professional opinion, a fact exists."

The claimant also appealed the denial of her request for reimbursement of litigation costs for Dr. Fried's deposition testimony. She argued that because she was successful on her Review Petition seeking the reimbursement of travel expenses for treatment related to her thoracic outlet syndrome, she was successful in part, entitling her to the costs of litigation. However, the Court noted that the only evidence submitted in support of her Review Petition was her own testimony that she could not locate a local physician to treat the thoracic outlet syndrome. Accordingly, the Court affirmed the previous Decision denying the reimbursement of litigation costs.

Conclusions and Practical Advice:

When scheduling and preparing file contents for an independent medical examination, it is vitally important that the expert is aware of the accepted work-related injuries. When preparing the cover letter and medical records for mailing to the expert, it would be a good idea to bold and/or highlight the exact accepted injury.

While there may be some skepticism in the expert's testimony as to the existence of the work-related injury at the time of their examination, as long as the expert acknowledges the injury and does not flatly reject that it occurred, the Court will err on finding a legally competent opinion.

Expert testimony is often several thousand dollars. Practitioners and Adjustors should scrutinize submitted costs in conjunction with the evidence proffered in order to ascertain whether a particular expert or cost is related to the claimant's success on a matter at issue.

McClure v. WCAB (Cerro Fabricated Products and PMA Group), No. 388 C.D. 2011, Filed September 15, 2011

Issue:

Whether a company found not to be a successor-in-interest to a previous company where the claimant worked for several years will be responsible for one hundred percent of claimant's binaural hearing loss and related medical expenses, if the claimant last worked with the subsequent employer?

Answer:

No. The general rule is that of non-liability, specifically, that when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the sellers property. However, this general rule can be overcome if the subsequent company, through its acquisition of the previous company, becomes a successor-in-interest, by (1) expressly or implicitly agreeing to assume liability, (2) consolidating or merging, (3) merely continuing the business of the selling corporation, (4) fraudulently attempting to escape liability, or (5) not providing adequate consideration for the acquisition without making provisions for creditors of the selling corporation.

Analysis:

Claimant began working for Accurate Forging Corporation/Delta American, Inc. (Accurate) as a press operator in 1972. In 2000, Accurate's assets were acquired by Cerro Fabricated Products (Cerro). Claimant continued working at the plant until he was laid off by Cerro in 2003. In 1997, audiometric testing was performed on the claimant revealing a binaural hearing loss of 18.1% and subsequent testing in July, 2004 revealed binaural hearing loss of 24.69%. In 2004, the claimant filed a Claim petition alleging that as of August, 2004, he suffered hearing loss with Accurate and/or Cerro. The WCJ issued an Interlocutory Order dismissing Accurate as a party as Cerro was the successor-in-interest. The Claim Petition was granted against Cerro for claimant's 24.69% binaural hearing loss.

Cerro appealed. On remand, the WCJ found that the Claim Petition against Accurate was time-barred because his employment with this company ended in 2000 and his Claim Petition was not filed until August, 2004, more than three years after he was exposed to noise with Accurate. The WCJ also found that Cerro was responsible for 6.57% of claimant's hearing impairment due to noise exposure with this company. The WCJ ordered Cerro to pay all of claimant's medical bills.

Claimant and Cerro both appealed the WCJ's Remand Decision. The Board held that while the same medical treatment and costs would be required no matter the percentage of hearing loss, had the claimant timely filed against Accurate, the indemnity benefits would be pro-rated between the two companies. Accordingly, the Board held that Cerro was responsive for 6.57%

of the hearing loss and 26.61% of all medical costs awarded under the Act. The claimant appealed.

The Commonwealth Court affirmed the Order of the Board. In doing so, the Court stated that whether Cerro was a successor-in-interest to Accurate depends on the totality of the circumstances in how the business was acquired, and if the facts establish that the new owner is a successor-in-interest, it shall not be deemed a new employer.

In deciding this issue, the Court looked to its precedence established in LTV Steel Co., Inc. v. WCAB (Mozena), 727 A.2d 160 (Pa. Cmwlth. 1999), wherein the claimant suffered hearing loss from 1957 through 2000 while working with Jones & Laughlin Steel. LTV had acquired J&L in 1974 by acquiring 100% of the stock and merging with the company, so J&L was a wholly-owned subsidiary of LTV. During the later-litigated Claim Petition for hearing loss, LTV argued that most of claimant's hearing loss occurred when the claimant worked with J&L, however, the WCJ determined that LTV was a successor-in-interest and was not a new employer. The WCJ noted that this was a stock sale and not an asset sale and that LTV continued operations with all of J&L's previous employees. Further, LTV further agreed to assume liability for outstanding workers' compensation matters with J&L employees. The Supreme Court further buttressed the WCJ's original finding by noting that the company continued to operate under the J&L name.

The Commonwealth Court, *sub judice*, enumerated the Supreme Court's test for determine successor liability. In Pennsylvania, "it is well-established that 'when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the sellers property.' . . . This general rule of non-liability can be overcome, however, if it is established that (1) the purchaser expressly or implicitly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transaction was without adequate consideration and no provisions were made for creditors of the selling corporation."

In the instant case, there was no merger or consolidation of Accurate and Cerro. Instead, the Purchase Agreement between the two companies explicitly denied Cerro's responsibility for Accurate's creditors. There was an enumerated section in the Purchase Agreement for retained liabilities of the seller (Accurate), of which, workers' compensation matter was included. Accordingly, the Court held that the Board properly determined that Cerro was not a successor-in-interest and not responsible for 100% of claimant's binaural hearing loss.

Cerro also argued that pursuant to Section 30(c)(8)(iv), which provides that an employer shall only be liable for hearing impairment caused by such employer and that if hearing impairment is established at or prior to employment, the employer shall not be liable, whether or not compensation was previously paid or awarded. The Commonwealth Court agreed stating that "the statute specified that in a hearing loss case, when there is more than one employer responsible for a claimant's hearing loss, each employer shall be liable only for the hearing impairment caused by each employer." Accordingly, the court affirmed the WCJ's Order determining that Cerro was only responsible for 26.61% of claimant's medical expenses.

Conclusion and Practical Advice:

A Practitioner and Adjustor should always investigate whether a particular company was acquired as a successor-in-interest, or whether new employer status has been achieved in cases where injuries are cumulatively sustained. If that is the case, investigation would be required to determine each company's liability. Claimant's medical history will be vitally important in apportioning liability between previous companies and new employers. The outcome of the case may have been different in limiting liability for Cerra if the claimant had not previously undergone a hearing impairment test while working with Accurate.

PA Liquor Control Board v. WCAB (Kochanowicz), No. 760 C.D. 2010, Filed September 20, 2011

Issue:

Whether a liquor store manager being subjected to an armed robbery, who suffers undeniable post-traumatic stress disorder as a result of the incident, is a compensable injury?

Answer:

No. Here, the occurrence of an armed robbery was a foreseeable event within the course of managing a liquor store, such that, the employer provided training and education to the employee about this specific type of occurrence, as well as the fact that the employer disseminated information about surrounding robberies at the same facilities in the same region of the State.

Analysis:

Claimant worked for the LCB for thirty years as a general manager of the Morrisville, Pennsylvania liquor store. He was working the evening shift on April 28, 2008 when the store was robbed by a man brandishing two guns. During the robbery, the perpetrator pointed both guns at the claimant and prodded the back of his head with one of the guns. The perpetrator stole money and duct taped the claimant and his co-worker to chairs before fleeing. Claimant alleged that he suffered anxiety, depression, flashback, and as a result, could not return to work. He was diagnosed with post-traumatic stress disorder (PTSD), and filed a Claim Petition for the same.

On cross examination, the claimant admitted that the store was not in a "low risk" area, had a high volume of shoplifting, had customers on a daily basis considered to be safety risks, that he knew of procedures for dealing with emergencies such as robberies, and had received training on the same. Furthermore, he received a manual entitled "Building a Safe Work Place, Preventing Work Place Violence" and a manual entitled "Things You Need to Know About Armed Robbery," as well as ongoing training and meetings with respect to handling these types of situations on many different occasions throughout his employment. He also admitted that he was aware of other State-owned liquor stores being robbed prior to this incident.

Both parties presented medical evidence that the claimant suffered PTSD as a result of the work-related incident, however, defendant's expert, Dr. Michals, testified that at the time of his examination of the claimant, the claimant had shown some improvement as a result of the treatment he received and that he was not disabled on a psychiatric basis and could return to his pre-injury position.

The employer also presented the deposition testimony of Charles Keller, employer's training specialist and SEAP (State Employee Assistance Program) coordinator for the southeastern region of the Commonwealth. He testified that the violence training program was established in the 1980s due to employees being subjected to robberies, thefts, and fights in their retail stores. The goal was to raise awareness and educate employees on how to react. He further testified that the employer gave its managers several booklets, including the booklet entitled "Things You

Need to Know About Armed Robbery," which specifically educated employees on how to act in the event of the same. Mr. Keller personally trained the claimant on September 21, 2001 and April 5, 2005 for robbery situations, instructing employees to be as calm as possible, to do what the suspect said, to get the suspect out of the door as fast as possible, and lock the doors after their departure. Mr. Keller testified that the claimant followed the directives step by step during the robbery at issue. Mr. Keller also testified that the claimant also received monthly training from his district manager regarding incidents at other stores and refresher training on workplace violence and thefts. Mr. Keller also testified that stores in five counties had suffered a total of 99 armed robberies since 2002.

The WCJ found that the armed robbery was an abnormal working condition and granted the Claim Petition. Employer appealed to the Board, which affirmed the WCJ's Decision. Employer further appealed to the Commonwealth Court.

The Commonwealth Court reversed the two previous Decisions. In doing so, the Court cited the appropriate burden of proof, noting that the claimant has the burden of proving that "he was exposed to abnormal working conditions and that his psychological problems are not subjective reaction to normal working conditions." The Court noted that "psychic injury cases are highly fact-sensitive and the working conditions must be considered in the context of the specific employment." The court further noted that "while there is no bright-line test or a generalized standard, we consider whether the working conditions were foreseeable or could have been anticipated." The Court has consistently held that "if the employer provided training to its employees on how to handle a specific working condition, that working condition could have been anticipated."

Within the legal standard, the Court noted that here, the employer provided claimant with training on workplace violence, some of which was geared to robberies. The employer provided educational tools, such as manuals, which addressed the handling of a robbery situation. The employer also provided incontrovertible evidence of the frequency of the occurrence of robbery, which was 99 since 2002, equating to 15 robberies a year, or a little over one a month. As a result, the Court found that being subjected to a robbery was foreseeable, and accordingly, a normal working condition.

Conclusion and Practical Advice:

The record at the trial court level was extremely developed with respect to the occurrences of robberies, as well as the significant amount of training that the claimant had received with respect to the same. Although it is not the defendant's burden of proof, the statistical evidence and fact witnesses undoubtedly made it almost impossible for the claimant to meet his burden of proof. When it comes to psychological injuries, every effort should be made to educate the Practitioner and Adjustor as to the normal working conditions of a particular employer. Visits to the employer's premises, fact witness interviews, statistical data, and other relevant information must be gathered in order to fully develop the record during the original litigation as to what is foreseeable within the course and scope of employment.

Lewis v. WCAB (Andy Frain Services, Inc.), No. 1501 C.D. 2010, Filed April 5, 2011

Issue:

Whether an employee is in the course of employment when he is on the employer's premises, however, he vacates his post and assigned duties to investigate suspicious activities in another area on the employer's premises.

Answer:

No. An employee's actions will be considered within the course of employment only when they further the employer's interests within the employee's job duties.

Analysis:

Claimant was hired by the employer (Andy Frain Services, Inc.), who was contracted to provide various services at the U.S. Open at the Oakmont Country Club. Claimant reported for work on June 9, 2010, for a shift from (7:00 PM to 7:00 AM on June 10, 2007. Claimant's assignment for his shift was to watch an open tent with a Lexus vehicle on display. At 6:00 AM on June 10, 2007, he hears noises and saw lights in the surrounding area. About forty minutes later, the claimant left the tent to explore where he had heard the noises and seen the lights. Although he left the tent area, he was still on the Oakmont grounds. He was injured during exploration.

The claimant presented evidence that he was hired as a security guard, while the employer presented evidence that he was hired as an event ambassador, with the specific duty of remaining in the tent with the Lexus until relieved. The WCJ found defendant's witnesses more credible, noting that the claimant was hired as an event ambassador, with the specific function of remaining in the tent. To buttress the findings, the WCJ cited that the claimant was given a radio to call for help if he needed anything, or if he needed a break. The WCJ found that the claimant violated a positive work order to remain in the tent and was not furthering the employer's interest when he abandoned his post.

The defendant initially denied the compensability of the injury on the grounds that the employee was not employee by the defendant. The claimant subsequently filed a Claim Petition. The employer raised the affirmative defense that claimant's injuries were not compensable because he was outside the course of his employment when the injury occurred. The course issue was bifurcated by the WCJ, who ruled that the claimant was not within the course and scope of employment. The Board affirmed the Decision on appeal. The claimant further appealed to the Commonwealth Court.

The Commonwealth Court affirmed the two previous Decisions below. In doing so, the Court noted that the claimant had the burden of proof with respect to his Claim petition. The Court cited that "an injury is compensable . . . only if the injury arises in the course of employment and is causally related thereto." Furthermore, "where the employee is injured on or off the employer's premises while actually engaged in furtherance of the employer's business or affairs," the injury will be compensable. The Court noted that "determining whether an

employee is acting in the course and scope of employment at the time of an injury is a question of law, which must be based on the findings of fact made by the WCJ."

Here, it was undisputed that the claimant was on the employer's premises at the time of his injury, however, it was undisputed that the condition of the premises did not cause the injury. Accordingly, the claimant must prove that he was engaged in the furtherance of the employer's business affairs, which involves an analysis into the nature of the employment and the claimant's conduct. Here, the claimant was hired as an event ambassador and his job was to remain inside the Lexus tent and watch the car. He was directed to use a radio if problems ensued. Instead, he left the work station and "wandered around the premises." Accordingly, the Court held that he was not within the course and scope of his employment.

Conclusion and Practical Advice:

Again, Course of Employment cases are extremely fact-intensive. The employer developed the record, through the use of fact witnesses, that the claimant's job duties were extremely limited, specifically, that he was only to remain inside the Lexus tent watching the vehicle. In other circumstances, if the employer had not so narrowly and credibly described his job duties, a WCJ may have been free to infer that his investigation of suspicious activities on the employer's grounds were in furtherance of its business affairs. Accordingly, the trial record and evidence did not allow the claimant any leeway to put forth vague arguments about the merit of his "heroic-like" actions in protecting the premises.

Westmoreland Regional Hospital v. WCAB (Pickford), No. 1188 C.D. 2009, Filed September 23, 2011

Issue:

Whether a work-related condition, which is asymptomatic at the time an Impairment Rating Evaluation is performed, but subsequently becomes symptomatic months later, is adequate to defeat a finding that a person's impairment rating is less than fifty percent?

Answer:

No. The claimant's physical condition at the time of the Impairment Rating Evaluation governs the validity of the IRE.

Analysis:

The claimant was injured on July 4, 1997, in the course of her employment as a registered nurse. The injury was recognized via an NCP in the nature of "cervical and lumbar sprains." Subsequently, the injury was expanded during litigation of a Review Petition to include cervical disc injuries, brachial plexus strength, a lumbar strain, and reflex sympathetic dystrophy (RSD).

Pursuant to defendant's request, Dr. Klein performed an impairment rating evaluation (IRE) on September 27, 2006, which revealed that the claimant had a whole person impairment rating of 22%. The employer filed a Modification Petition based upon that result.

Dr. Klein testified on behalf of the employer. He found that she had symptoms related to four conditions including chronic discogenic cervical pain, chronic discogenic lower back pain, and bilateral shoulder pain with impingement. As a result, all conditions and symptoms combined, the claimant had a whole person impairment rating of 22%. Dr. Klein did acknowledge that RSD and the brachial plexus injury were accepted diagnoses, but testified that he found no objective evidence of either condition during his physical examination. He testified that the AMA Guides require objective evidence of a condition in order to rate it. For RSD to be rated, it must cause sensory or motor impairment. Accordingly, he gave her RSD condition a zero percent impairment rating. He assigned the same to the brachial plexus injury for the same reason.

Claimant presented the deposition of Dr. Navarro in opposition. Dr. Navarro only testified with respect to claimant's RSD. He testified that it can cause pain in both extremities, skin changes, and temperature changes, and that the latter two symptoms, can wax and wane. He testified that her RSD had progressed and she needed continued pain management as a result of the condition. He testified that he had treated the claimant from 2000 through 2007, noted some RSD symptoms on some occasions, and that he did not perform an IRE of the claimant. Critically, his medical records showed that no objective findings of RSD were present on his examination of September 26, 2006, one day before the IRE.

The WCJ denied defendant's Modification Petition because the evidence of record revealed that the claimant exhibited signs of RSD five months after the IRE was performed. Employer appealed and the Board Affirmed. The employer further appealed to the Commonwealth Court.

The Commonwealth Court reversed the two previous Decision. In doing so, the Court first noted that the Board erred in asserting that Dr. Klein did not address the accepted work injuries in this matter because he assigned them zero percent impairment ratings. The Court noted that the "sole purpose of an IRE is to assess the claimant's degree of impairment." The Court held that Dr. Klein addressed the RSD and brachial plexus injuries, searched for ongoing objective evidence of them, and found that there were none. The Court specifically noted that he did not opine that she never suffered from these conditions and he did not opine that she was fully recovered from the same. He simply followed the AMA Guides in looking for objective evidence of the conditions.

The Court next noted that the Board erred in holding that the IRE physician must assign some impairment rating greater than zero to each work injury in order for the IRE to be valid. The Court stated that the AMA Guides require objective evidence before a condition can be rated. Accordingly, without objective evidence of the RSD or brachial plexus injury, no rating could be established.

The Court next found that the only relevant consideration with respect to an IRE is the claimant's physical condition on the date of examination. In addition to being performed by a qualified physician and pursuant to the AMA Guidelines, the controlling caselaw governing the modification of claimant's benefits when an IRE is requested after receipt of 104 weeks of benefits dictates that "the claimant's benefit status is changed 'as of *the date of the IRE physician's evaluation."*" Ford Motor/Visteon Systems v. WCAB (Gerlach), 970 A.2d 517, 523 (Pa. Cmwlth. 2009). Accordingly, the law dictates that the status of claimant's benefits is to be based upon the claimant's condition on that one particular day.

Conclusion and Practical Advice:

Since the examination on the date of the IRE is the only examination that matters, thoroughly tracking claimant's medical records and progress prior to filing for an IRE is a must. If the claimant's medical records reveal progress, or stability, it would be a good idea to file for the IRE immediately (assuming the remainder of the prerequisites have been met, such as obtaining 104 weeks of benefits and claimant being at MMI). With respect to certain conditions, it would likely thwart a lot of challenges to IRE determinations.