Frazier v. W.C.A.B. (Bayada Nurses, Inc.) --- A.3d ----, 2012 WL 4465855 (Pa., September 28, 2012)

Issue: Whether the immunity provisions of Section 23 of Act 44 apply to "subrogation and/or reimbursement claims sought against an employee who has entered into a third[-]party settlement with a Commonwealth [p]arty such as Southeastern Pennsylvania Transportation Authority ('SEPTA').

Answer: The portion of Section 23 of Act 44, which provides that government shall "benefit from sovereign and official immunity from claims of subrogation or reimbursement from a claimant's tort recovery," bars any claim made by the employer, for the recoupment of workers' compensation benefits it paid in this case. Accordingly, the PA Supreme Court reversed the order of the Commonwealth Court.

Essentially, an Employer is not entitled to subrogation under Section 319 of the Act if the third party tortfeasor is a qualifying entity for the official immunity.

Analysis: On March 1, 2005, Lillian Frazier (Claimant) fractured her right ankle when a SEPTA-operated bus, on which she was a passenger, was involved in a motor vehicle accident. At the time of the accident, Claimant was employed by Bayada Nurses, Inc., and the accident occurred in the course and scope of Claimant's employment with Bayada Nurses. Accordingly, Claimant filed a claim for workers' compensation, which was ultimately granted by a workers' compensation judge.

Thereafter, on May 11, 2006, Claimant filed a third-party lawsuit against SEPTA, contending that it was liable for the injuries she sustained in the bus accident. Eventually, on July 26, 2007, Claimant settled her lawsuit with SEPTA for $75,000. As part of the settlement, SEPTA included language in the settlement agreement that it would "defend, indemnify and hold Claimant harmless with respect to any claim, suit, petition or other action brought against Claimant ... for payment of [the] workers' compensation lien" filed by Bayada Nurses. Bayada Nurses filed a claim petition and asserted its Section 319 rights in the amount of $47,351.93, which equaled the amount of workers' compensation benefits Bayada Nurses had paid Claimant up to the time of the settlement agreement. Claimant opposed the petition, claiming that Bayada Nurses was attempting to collect from money paid to Claimant by SEPTA and that SEPTA was immune from claims of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits under Section 23 of Act 44.

This case concerns the interpretation of two pieces of legislation: Section 319 of the Workers' Compensation Act and Section 23 of Act 44. In sum, this case presents two competing absolutes: the right of subrogation and reimbursement in workers' compensation, and the constitutionally provided immunity of the sovereign and its subdivisions. Through Section 23 of Act 44, the General Assembly relegated the right of subrogation and reimbursement to the sovereign's immunity through a narrowly tailored exception to a general rule.

Bayada Nurses asserted that application of Section 23 of Act 44 to this case will nullify the tripartite purpose of subrogation/reimbursement-the prevention of double recovery; the avoidance by employers of payment for injuries that are the fault of others; and ensuring liable third-parties are held responsible for their negligence. The Court determined that Section 23 of Act 44, as applied to this case, in actuality strikes an ideal balance between these three goals and the primary purpose of sovereign immunity, protection of the public treasury. First, double recovery will be prevented upon the proper structuring of settlement agreements and judgments. Next, negligent governmental entities will not escape liability, as they will pay some damages either by settlement or verdict award; indeed, SEPTA in the instant appeal paid Claimant $75,000. Finally, while it is accurate that employers will be required to make some compensation payments despite the negligence of a governmental entity, this is occurring as a matter of legislative prerogative to protect the public treasuries.

Therefore, the Pa Supreme Court reversed the Commonwealth Court and held that the Section 23 of Act 44 does act as a bar to the Employer's subrogation rights when the settlement agreement is properly crafted.

Conclusion and Practical Advice: This case would be significant in evaluating the value of a case in the event that the claimant's third party case is against a Governmental entity. Please assess the statute as to what entities qualify under Section 23 of Act 44. The important distinction is going to be the precise language of the settlement agreement. The main focus of this case is on the legislative intent. However, a key factor in the Courts Decision was the fact that the Agreement specifically addressed the indemnification of the workers compensation case.

Smith v. W.C.A.B (Caring Companions, Inc. and Uninsured Employers Guaranty Fund), No. 417 C.D.2012 (Cmwlth Ct. September 17, 2012)

Issue: Whether the Employer needs to provide notice of a change in physical condition if the claimant has notice of the restriction set forth by the treating physician.

Answer: The Commonwealth Court, held that the purpose of the notice requirement in the Act, requiring notice be issued if insurer receives medical evidence that the claimant is able to return to work, had already been achieved without the need for additional notification when claimant's own physician informed claimant that she was capable of returning to work.

Analysis: In the instant matter, on February 2, 2009, Claimant's own physician determined that Claimant was capable of performing light-duty work. At the March 11, 2009 hearing, Claimant's counsel admitted to receiving Dr. Mauthe's report and forwarding it to Employer's counsel. The claimant was subsequently offered a job with the pre-injury employer on April 16, 2009. Claimant's counsel appealed the Judge's Determination that benefits should be suspended as of the job offer on April 16, 2009 for failing to provide the LIBC 757.

Section 306(b)(3) requires that Notice must be issued, "[i]f the insurer receives medical evidence that the claimant is able to return to work in any capacity...." 77 P.S. § 512(3). Here, Employer received the new medical information from Claimant herself. The Commonwealth Court held that to mandate Employer to provide Claimant Notice when it was Claimant herself who furnished Employer the information in no way serves the purpose of the notice requirement or Claimant's obligation to return to work. In reliance upon *Ashman* and *Burrell,* the Commonwealth Court upheld a practicable application of the law, especially "under these circumstances [where] the claimant enjoys a superior position to control timely notice." The Court affirmed the Board's conclusion that the purpose of Section 306(b)(3) of the Act had already been achieved without the need for additional notification when Claimant's own physician, the source of the medical evidence, informed Claimant that she was capable of returning to light-duty work.

Conclusion and Practical Advice: This provides another mechanism to get around the LIBC 757 requirement. However, the application of this case is limited in that the claimant did receive a LIBC 757 about a month before the newest medical release based upon medical information from a different provider. This case addressed the implications of the minor changes in medical and did not focus on the other information that the LIBC provides to the claimant. Section 306(b) (3) asserts that if the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following:

> (i) The nature of the employe's physical condition or change of condition.
> (ii) That the employe has an obligation to look for available employment.
> (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.

(iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

Therefore, because the claimant previously received an LIBC 757, extrapolation of this holding to the standard situation where an LIBC 757 was never sent may be limited.

Bedford Somerset MHMR v. WCAB (Turner), No. 1997 C.D. 2011 (Cmwlth Ct. Decided June 6, 2012 Ordered published September 5, 2012)

Issue: Whether the Judge was justified in deeming treatment unreasonable or unnecessary when the treatment was potentially harmful to the claimant.

Answer: A Judge or URO is justified in considering the risks to the patients when deciding the reasonableness and necessity of certain narcotic medication.

Analysis: The claimant in this case had been taking Fentora. The URO rendered the opinion that the medication was neither reasonable nor necessary since the Fentora was only FDA approved for end-stage cancer, due to the addictive nature of the medication. The claimant continued to receive the medication from Innoviant Pharmacy which is a company that specializes in providing medication to individuals in litigation. The claimant's bill by the time Innoviant refused to provide additional Fentora was $170,000.00 and she was taking over $14,000.00 a month in Fentora. The claimant switched to Opana IR at the rate of about $2,000.00 per month which the carrier is currently paying.

The Judge concluded that the defendant sustained its burden by establishing that the treatment was not reasonable or necessary based upon the addictive nature of the medication. The WCAB reversed the Decision of the judge. The Commonwealth Court reversed the WCAB Determination and concluded that a judge or URO is justified in considering the risks to the patients when deciding the reasonableness and necessity of certain narcotic medication. Further, the *Bedford Somerset* case expands case law to confirm that *medication* which is purely palliative in nature is not definitively deemed to be reasonable or necessary. Prior case law on this topic related mainly to chiropractic treatment and physical therapy.

Conclusion and Practical Advice: This Decision could be significant in that it would justify the URO from eliminating narcotic medication if there is a risk to the patient and an alternative exists. This could certainly justify deeming all immediately acting Fentanyl Lozenges (Actiq or Fentora), unreasonable or unnecessary.