



## LAW UPDATE

--

### PENNSYLVANIA WORKERS COMPENSATION December 2007

Michael F. Faherty, Esquire  
Joseph C. Patterson, Esquire  
Robert J. Goduto, Esquire  
Todd C. Hough, Esquire  
*Lavery Faherty Young & Patterson, P.C.*  
225 Market Street, Suite 304  
P.O. Box 1245  
Harrisburg, PA 17108-1245  
717-233-6633 (t)  
717-233-7003 (f)  
[www.laverylaw.com](http://www.laverylaw.com)

---

## COMMONWEALTH COURT

### ***Sims v. WCAB (School District of Philadelphia)***

928 A.2d 363

Decided: June 1, 2007

Defendant did not violate the Act when it did not pay **medical expenses** following Claimant's submission of varied inadequate documentation. The Court stated that, "It is not the burden of the employer to examine a medical invoice, not submitted on the form required to be used in workers' compensation claims and lacking even a date of work injury, and then puzzle out whether the claim might be for a work-related injury. Rather the Act and regulations place the burden upon the claimant to submit medical invoices on the proper form and with all the information needed to permit an employer to ascertain readily that the billed treatment is related to the work injury."

### ***Payne v. WCAB (Elwyn, Inc.)***

928 A.2d 377

Decided: June 8, 2007

The filing of a **motion for reconsideration** does not operate to extend the thirty day period for appeal of the original order. Here, rather than filing a timely appeal of the WCAB's order of November 30, 2006, which affirmed a suspension of her benefits, Claimant filed a Motion for Reconsideration with the Board. On January 23, 2007, the

Board issued an order stating Claimant's Petition for Rehearing was denied. On January 31, 2007, Claimant filed a Petition for Review challenging both orders of the Board but the Court found the only order Claimant timely appealed was the Board's January 23, 2007 order denying reconsideration.

***Gregory v. WCAB (Narvon Builders)***

926 A.2d 564

Decided: June 8, 2007

It was not a violation of the Act for Defendant to withhold **payment of settlement monies** when it appealed the Order approving the Compromise and Release Agreement. The appeal alleged that Claimant did not understand the full legal significance of the Agreement and only agreed to sign the C&R while under duress. The Board's ability to grant supersedeas as to payments extends to settlement monies stemming from a C&R Agreement.

***Weismantle v. WCAB (Lucent Technologies)***

926 A.2d 1236

Decided: June 18, 2007

Defendant is allowed to modify the nature of Claimant's benefits from total disability to partial disability based upon the results of an impairment rating evaluation and this does not act to moot a pending Termination Petition alleging full recovery. Even though IRE found Claimant to be 10% impaired at a point subsequent to the effective date of the alleged full recovery, the **IRE results were not preclusive as to the possibility of a termination.** "The Act gives an employer the right to pursue an IRE and a termination without regard for the other, because IRE remedies...*are in addition to, not a replacement of,* the remedies available to an employer who believes that an employee's loss of wages is not the result of a work-related injury."

***Linda Davis v. WCAB (Woolworth Cooperation)***

928 A.2d 429

Decided: July 5, 2007

The mere passage of time can serve as a reasonable basis for Defendant's request for Claimant to attend a physical examination. The Court agreed with the WCAB who "observed that custom and practice have established six months as a reasonable period of time for a new examination where a claimant continues to receive benefits. The WCAB stated that this custom and practice is reflected in section 306(a.2) of the Act...which permits two impairment rating evaluations during a twelve-month period. **Two independent medical examinations per year** is "an adequate rule of thumb."

***Gadonas v. WCAB (Boeing Defense & Space Group)***

931 A.2d 95

Decided: August 1, 2007

Defendant was unable to take an offset against \$4,500 in **disability pension benefits** received by Claimant and deposited into an Individual Retirement Account. It did not matter that his deposit of those funds into the IRA did not occur within 60 days following his receipt of those benefits, because he relied upon statements made by the employer's benefits administrator that disability pension benefits would have no effect on his concurrent workers' compensation benefits.

***Vaneman v. WCAB (Apollo Moving and Vanliner Insurance Co.)***

931 A.2d 749

Decided: August 6, 2007

Defendant is entitled to a **vocational interview** at any time after the injury. It is reasonable to request a vocational interview even after Claimant has returned to work in a modified duty position where he is earning wages less than his pre-injury wages.

***Dollar Tree Stores, Inc. v. WCAB (Reichart)***

931 A.2d 813

Decided: August 13, 2007

Defendant was not entitled to a **recoupment of an overpayment** of benefits totaling \$27,164.99, which accrued as a result of an adjustment correcting a mathematical miscalculation of the average weekly wage and corresponding compensation rate. A Judge may only order recoupment when the overpayment is the result of a miscalculation on a Supplemental Agreement or Agreement for Compensation.

***Maxim Crane Works v. WCAB (Solano)***

931 A.2d 816

Decided: August 14, 2007

The calculation of retrospective workers' compensation benefits offset based upon Claimant's receipt of Social Security Old Age Benefits is improper when Defendant failed to notify Claimant of the reporting requirements under Section 204 of the Act until five years after the date of injury and two years after Claimant began to receive workers' compensation benefits. The Act and regulations do not contain any provisions which provide Defendant an absolute right to retrospective offset. Although Claimant does have a duty to report his receipt of Old Age benefits, the regulations place the initial duty upon the employer to notify Claimant of the reporting requirements and provide him with the proper forms. Defendant is only entitled to an **offset from the date Claimant received the LIBC-756** upon which he reported receipt of his Social Security benefits.

***Bureau of Workers' Compensation v. WCAB (US Food Service)***

932 A.2d 309

Decided: August 22, 2007

When a Judge issues an Order approving a Compromise and Release Agreement which "*fully and completely* satisf[ies] employer/carrier's liability," it is an error to issue an Order two weeks later granting a Termination Petition on the same claim, as the matter was moot. **The language of a C&R seeking to preserve a Supersedeas recovery** must expressly contain a provision that a particular petition or issue shall remain open after the C&R is executed and approved. Here, the award of reimbursement from the Supersedeas Fund based upon the Judge's grant of the Termination Petition was in error.

***Boleratz v. WCAB (Airgas, Inc.)***

932 A.2d 1014

Decided: August 24, 2007

The services of a **massage therapist**, who is not licensed or otherwise authorized by the Commonwealth to provide health care services, are not reimbursable under the Act, even if the services are prescribed by a health care provider. The Commonwealth does not currently authorize state licensure of massage therapists. Here, even though the therapist was nationally certified and the services were prescribed by a treating physician, Defendant was not responsible for payment because the therapist did not meet the definition of health care provider under Section 109 of the Act.

***Armstrong v. WCAB (Haines & Kibblehouse, Inc.)***

931 A.2d 827

Decided: August 27, 2007

When Defendant initially issues a Notice of Temporary Compensation Payable (**NTCP**) and then later stops the temporary compensation and issues a Notice of Compensation Denial (**NCD**) acknowledging that an injury occurred, but it is not compensable under the Act, it has, in fact, accepted the injury. This is so even though the Claim Petition is still pending. Thus, the filing of a **Utilization Review** by Defendant challenging chiropractic care received by Claimant is proper even though the Defendant has issued a NCD.

***Kelly v. WCAB (US Airways Group)***

935 A.2d 68

Decided: 9/6/07

Defendant was denied the right to take a credit against wage loss benefits when it paid Claimant a **furlough “allowance”** during a portion of the period of disability. The Court held that a furlough allowance received by a claimant is distinct from severance benefits because the employment relationship continues beyond the furlough, unlike the case when an employee is “severed” from his employment with the employer.

***Cinram Manufacturing, Inc. v. WCAB (Hill)***

932 A.2d 346

Decided: 9/7/07

WCJ has the authority to amend the **description of injury** on an NCP from lumbar sprain/strain to include a herniated lumbar disc during the litigation of a termination of the accepted injury, even though Claimant did not file a Petition to Review Notice of Compensation Payable. As noted by Judge Pellegrini in his dissent, this holding seemingly contradicts the Supreme Court’s decision in *Jeane’s Hospital*.

***Bittinger v. WCAB (Lobar Associates, Inc.)***

932 A.2d 355

Decided: 9/10/07

WCJ did not err in only awarding **unreasonable contest** attorney fees up to the point that the Section 410 Interlocutory Order was entered. The Court reasoned that at that point, the carrier’s contest was not against the Claimant, but against a second

carrier. The carrier should not be penalized for having to litigate the issue of liability when that issue was initially raised by the Claimant in his filing of the Joinder Petition bringing the second carrier into the litigation.

***Galizia v. WCAB (Woodloch Opines, Inc.)***

933 A.2d 146

Decided: 9/24/07

The 90-day window in which Defendant may stop the payment of temporary compensation paid pursuant to a **Notice of Temporary Compensation Payable** begins on the first day of disability rather than the date of issuance of the NTCP or the date of issuance of benefits.

***Enterprise Rent-A-Car v. WCAB (Clabaugh)***

No. 863 C.D. 2007

Decided: 9/27/07

Defendant conducted a prospective **Utilization Review** on remodeling/modifications to Claimant's house. The URO found the modifications reasonable and necessary. The completed work cost \$50,000 more than the estimated cost of the remodeling. Defendant paid the estimated amount and refused to pay the extra amount. The award of penalties by the WCJ based upon Defendant's refusal to pay the higher amount was inappropriate because the issue was the amount of payment, and the remodeling contractor failed to file a Petition for Fee Review. Therefore, WCJ had no jurisdiction to order the award of penalties.

***Lahr Mechanical and State Workers' Insurance Fund v. WCAB (Floyd)***

933 A.2d 1095

Decided: 10/9/07

Claimant, a welder, worked at different rates depending on whether the job he was performing was paid at the prevailing wage under the Prevailing Wage Act. This Court deferred to the WCJ's determination that claimant's **average weekly wage** should be based upon the regular wage rate for forty (40) hours, the overtime rate for fourteen point five (14.5) hours and a travel rate for four (4) hours. The Judge based this determination upon claimant's testimony as to what Claimant worked in the last week prior to sustaining his work-related injury. The WCJ utilized the prevailing wage rate rather than the regular rate because Claimant testified that all of his work during the last week of employment was at the prevailing wage rate. Defendant offered evidence that the prevailing wage rate job upon which Claimant was working ended shortly after Claimant's injury and, thus, Claimant would have been earning his regular wage rate rather than the prevailing wage rate. This Court deferred to the WCJ's determination with regard to weight of evidence in crediting claimant's testimony.

***The City of Philadelphia v. WCAB (Sherlock)***

934 A.2d 156

Decided: 10/10/07

Defendant's payment of **Injured on Duty (IOD) benefits** pursuant to an agreement made in Claimant's separate civil service action, did not relieve defendant

from paying wage loss workers' compensation benefits under the Act. Penalties were appropriate based upon Defendant's failure to pay benefits and the Judge's imposition of fifty percent (50%) penalties was not considered an abuse of discretion.

***Lennon v. WCAB (Epps Aviation, Inc.)***

934 A.2d 153

Decided: 10/10/07

The **average weekly wage** was at issue in a Fatal Claim Petition. Claimant was a pilot and because he flew at night, he was occasionally required to stay overnight in hotels and dine out while working. The WCJ held that because defendant reimbursed claimant for these expenses, rather than advancing these expenses, they should not be included in the calculation of the average weekly wage. This Court found that the Act is devoid of any language suggesting that when the employer pays these amounts is of any significance. Therefore, they reversed the WCJ and found that the reimbursement of expenses should be used when calculating the average weekly wage.

***Delarosa v. WCAB (Masonic Homes)***

934 A.2d 165

Decided: 10/11/07

Defendant denied payment for **psychotherapy bills** when Claimant's accepted injury was described as: "cervical and left shoulder strain, herniated discs of the lumbar spine and nerve entrapment." Defendant denied the bills stating that "psychotherapy as a modality of treatment is a medical service only if it is provided with the supervision or referral of a practitioner *licensed to provide such services.*" Here, an orthopedic surgeon referred claimant to psychotherapy. Defendant maintained that the surgeon was not *licensed to provide such services.* The WCJ determined that claimant received reasonable medical services in the form of psychotherapy under the supervision of the surgeon, who is a duly licensed practitioner of the healing arts. Therefore, Defendant was ordered to pay the medical expenses. However, penalties and unreasonable contest attorney's fees were not awarded based upon the discretion of the WCJ. This Court held that although the medical bills were eventually determined to be payable by Defendant, the Judge was within her discretion in not awarding penalties. The Court found the Judge erred in denying unreasonable contest attorney's fees, reasoning that Defendant's mistake in law was not a reasonable ground to contest the payment of the medical bills.

***Richard Ryndycz v. WCAB (White Engineering)***

No. 318 C.D. 2007

Decided: 10/18/07

WCJ erred in allowing retrospective review of one year's worth of chiropractic treatment when he determined that **Utilization Review** was not filed as part of the Claim Petition litigation. 34 Pa. Code §127.404(b) states that if a defendant seeks retrospective review, the request must be filed within thirty (30) days of the receipt of the bill or the request is waived, but if the defendant contests liability on the underlying claim, the thirty (30) day period is tolled pending acceptance or determination of liability. WCJ also erred in failing to consider palliative value of treatment.