



PA Workers' Compensation Case Law Updates

Thomas Ollason, Esquire
tollason@laverylaw.com
717-233-6633 ext. 121

Perry D. Merlo, Esquire
pmerlo@laverylaw.com
717-233-6633 ext. 136

Andrew W. Maffett, Esquire
amaffett@laverylaw.com
717-233-6633 ext. 141

June 2020

Voluntary Removal from Workforce:

Because the Claimant acknowledged that there was work he could do, but he chose not to pursue it due to personal financial considerations, the Employer was not required to present evidence of available work within Claimant's restrictions or expert testimony regarding Claimant's earning power. Accordingly, the Court held that a Suspension of the Claimant's wage loss benefits was proper. Philips Respironics v. WCAB (Mika), (Pa. Cmwlth. 2020) May 22, 2020.

Attorney Fees:

The Commonwealth Court held that a 20 percent attorney fee on workers' compensation benefits awarded, **including medical expenses**, is *per se* reasonable, and does not require the WCJ to determine the amount and degree of difficulty of the work performed by the attorney. In this case, the Claimant's Fee Agreement specifically provided for a 20 percent fee on all workers' compensation benefits awarded and the Claimant executed an Affidavit indicating that he understands that the attorney fee includes the amount of medical benefits awarded.

It is unclear from the Opinion whether medical providers may recover the 20 percent deducted from their re-priced bills as attorney fees from the Claimant in a situation where Claimant's counsel takes a fee on medical bills awarded. Neves v. WCAB (American Airlines), (Pa. Cmwlth. 2020) May 14, 2020.

Termination Petition:

On appeal, the Claimant challenged the WCJ's Decision Terminating benefits where the Employer did not file a Termination Petition. The Petition pending before the WCJ was a Review Petition, which was denied. The Commonwealth Court upheld the Termination of benefits on the basis that the Claimant had notice that a Termination of benefits was possible and had a full and fair opportunity to defend against it. The Court indicated that the WCJ may Suspend/Terminate benefits absent a Petition as long as it is not prejudicial to the Claimant. Colagreco v. WCAB (Vanguard Group Inc.), (Pa. Cmwlth. 2020) May 14, 2020.

The Court rejected Claimant's argument that the IME physician, in rendering a full recovery opinion, was obliged to provide an alternate etiology for Claimant's ongoing symptoms aside from the work injury. The Court stated that the IME physician provided sufficient explanation for his finding of full recovery, which was found credible by the WCJ. Further, the Court emphasized that PA does not have a "treating physician's rule", which provides that deference should be given to the opinions of a treating physician. German v. WCAB (Temple Univ. Hosp.), (Pa. Cmwlth. 2020) May 14, 2020 (unreported opinion)¹.

Impairment Rating Evaluation (IRE):

The Commonwealth Court held that the Protz II Opinion, which invalidated Section 306(a.2) of the Act providing for IRE's, is not fully retroactive to provide for a reinstatement of benefits where the 500 weeks of partial disability benefits has expired as well as the three year period from the last payment of compensation. Accordingly, the Claimant's Reinstatement Petition was denied.

The Court did indicate that a Reinstatement Petition based upon the Protz II Opinion could proceed if it is filed within the 500 weeks of receipt of partial disability benefits or within 3 years of the last payment of compensation. Weidenhammer v. WCAB (Albright College), (Pa. Cmwlth. 2020) May 14, 2020.

Hearsay Medical Opinions:

In upholding the Termination of claimant's workers' compensation benefits, the Court stated that the WCJ properly disregarded as hearsay corroborative medical opinions from physicians which did not testify. The Court re-emphasized that if hearsay evidence is objected to, then it is not competent evidence to support any finding. Ciarolla v. WCAB (Astrazeneca Pharmaceuticals LP), (Pa. Cmwlth. 2020) May 12, 2020 (unreported opinion).²

¹ Unreported Opinions are not binding legal precedent but may be cited for persuasive value.

² Successfully litigated to a defense verdict by Lavery Law.

Employee v. Independent Contractor:

The Court found that the Claimant was an Independent Contractor and due to his status as an Independent Contractor, was not entitled to workers' compensation benefits. In support of its conclusion that the Claimant was an Independent Contractor, the Court noted that the Claimant: 1) received a 1099 form and filed it with his taxes; 2) operated his truck business as a sole proprietor; 3) owned his own truck; 4) selected his assignments; 5) was paid by the load; 6) did not wear a uniform; 7) was responsible for obtaining his own insurance; and 8) signed the Agreement designating him an Independent Contractor. Balczarek v. WCAB (Evans Delivery Corporation), (Pa. Cmwlth. 2020) May 11, 2020 (unreported opinion).

Utilization Review:

The WCJ did not have jurisdiction to consider Claimant's presence at the Long Term Acute Care (LTAC) facility, an issue relating to the reasonableness and necessity of Claimant's medical treatment, because no Utilization Review had been performed and no determination had been rendered by a URO. The Court stated that in such situations where the issue in dispute is reasonableness and necessity of medical treatment but the URO refuses to perform a review, the WCJ has the ability to remand the issue to the Bureau with direction that the Bureau refer the utilization review request to a URO. Burgess v. WCAB (Patterson-UTI Drilling Company, LLC), (Pa. Cmwlth. 2020) May 1, 2020.

Bureau Documents:

On January 4, 2017, the Employer issued a Notice of Temporary Compensation Payable (NTCP) paying the Claimant disability benefits. On February 7, 2017, the Employer issued a Notice Stopping Temporary Compensation Payable (NSTC) and Notice of Compensation Denial (NCD). The Claimant filed a Penalty and Reinstatement Petition alleging that the NTCP converted as a matter of law to a NCP because the Employer did not file the NSTC within five days after the last payment of temporary compensation. The Court held that the NTCP did not convert to a NCP because the NSTC was filed within 90 days of the NTCP. The Court also pointed out that the Act does not sanction conversion of a NTCP to an NCP for failure to file an NSTC within five days of stopping payment. Communication Test Design v. WCAB (Simpson), (Pa. Cmwlth. 2020) April 22, 2020.

COVID-19 MODIFICATIONS:

All WCAB Oral Argument hearings have been cancelled throughout the duration of the COVID-19 Disaster Declaration and any appeals that have had their hearings cancelled will be decided by “briefs only”.

All workers’ compensation hearings continue to be held by Skype telephone conference.