PA WORKERS' COMPENSATION CLIENT ALERT

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Summarized below are several recent decisions that will surely be of interest to workers' compensation professionals and practitioners.

1. AWW

Lenzel, v. WCAB (Victor Paving) (10/13/2011) resolves an AWW calculation when the employee had been laid off during the 52 weeks preceding the injury and received unemployment compensation benefits during that 52 week period. The WCJ calculated the AWW by including the weeks of layoff in averaging the wages earned during each of the relevant quarters but did not include the unemployment compensation benefits received during the same quarters. The Commonwealth Court has agreed,

Under Lenzel it is now clear that when an employee has been employed for more than 52 weeks the unemployment benefits received during periods of lay off are not included, thus reducing the ultimate AWW determined as well as the compensation rate. The Court explained that the Act protects the employee from the economic effects of a work injury but does not protect the employee against the economic effects of business cycle variations.

2. MEDICAL TESTIMONY THAT WILL NOT SUPPPORT TERMINATION

Miller, v. WCAB (Peoplease Corp., Arch Insurance Co. and Gallagher Bassett Services), (10/11/2011). The question addressed by the Commonwealth Court was whether employer's medical expert testified unequivocally that the employee fully recovered and thus supported a termination of benefits as found by the WCJ. The Court found the medical expert's opinion was equivocal (and did not support the termination) since the doctor testified that the work injury related pain was "largely resolved" by the surgery performed (decompressions at C5-C6 and C6-C7); and that a subsequent MRI showed no "significant" pressure on the spinal cord though claimant still had shaking of his right arm and hand. This evidence did not support a conclusion that the employee was fully recovered from the injury or the surgery. It is important when possible to file a suspension or modification based on job offer or earning power assessment if the opinion of full recovery is marginal. This was apparently done by the employer in this case so the ultimate result may still be a suspension or modification of benefits depending on the evidence presented on wages.

3. SUPERSEDEAS FUND REIMBURSEMENT

GMS Mine Repair & Maintenance, Inc. and Chartis Claims, Inc., v. WCAB (Way) (10/7/2011). GMS was found to be the liable employer by the WCJ and filed an appeal. Supersedeas was denied by the WCAB. Ultimately the WCAB held GMS was not the employer but R&R was and should be liable for benefits. GMS filed for supersedeas reimbursement which was defended and ultimately denied. GMS does not have a remedy against the SRF in this instance since another third party is responsible to pay the benefits and thus GMS must seek reimbursement from R&R. R&R, however, was no longer in business and also carried no insurance on the date of injury. This did not dissuade the Commonwealth Court from affirming the denial of supersedeas reimbursement despite the fact that seeking payment from R&R may prove futile. With the advent of the Uninsured Employers Guaranty Fund, the liability of R&R would be secondarily assumed by the Fund and thus the Fund would owe reimbursement to GMS if R&R was unable to pay. The case, therefore, has limited application.

4. SPECULATIVE MEDICAL EVIDENCE

In City of Philadelphia, v. WCAB (Kriebel), (10/19/2011), the Court faced the question of whether medical evidence presented by the employer rebutted the presumption of causation for occupational diseases. The general rule is that if an employee is working in an occupation in which a particular disease is a known risk and is diagnosed with that

condition, then there is a rebuttable presumption that the disease was caused by the employment. In this case, the decedent was a firefighter who for many years acted as a first responder and was exposed to blood and body fluids on many occasions. He contracted hepatitis C which caused cirrhosis of the liver and then a related cancer that caused his untimely death at 52. The widow presented decedent's treating physician who testified that the decedent contracted hepatitis C as a result of his employment as a firefighter/first responder. In addition the widow presented co-employee testimony of decedent being exposed to blood and body fluids of victims, even occasions when the latex gloves he was wearing tore. The widow argued that since hepatitis C is a listed occupational disease and a known risk of first responders the presumption above applied.

Employer presented the testimony of an expert who found that decedent contracted his hepatitis C from drug use and the sharing of needles. This testimony was based on one medical record, a 1972 military medical record, which noted decedent had serum hepatitis (now called hepatitis B) from drug use. The expert reached this conclusion despite the fact that there was no evidence in the subsequent 30 years of medical records of drug use, use of needles to inject drugs, evidence of track marks or any other doctor diagnosing hepatitis B or drug dependency. The defense medical expert assumed needles were used to inject the drugs and that decedent also contracted hepatitis C at the same time. The Court ultimately determined that the opinion was based on speculation and also assumed facts not established in the record. Therefore, the opinion was not sufficient to rebut the presumption of causation.

5. UNINDERINSURED MOTORIST EXCLUSION IS VOID

The UIM case decided by the Supreme Court is very important to carriers and self insured employers as it provides another avenue for asserting subrogation. In Frank D. Heller and Beverly A. Heller, Husband and Wife, v Pennsylvania League of Cities and Municipalities T/D/B/A Penn Prime Trust et seq., (10/19/2011), the Court considered whether UIM policies which exclude claims made by employees eligible to collect workers' compensation are against public policy. The Court ultimately concluded that these exclusions were against public policy.

As a result of this case, employees may seek damages under the UIM policy if the employer purchased such a policy. The case also now allows the carrier or self insured employer paying workers' compensation to pursue subrogation against this UIM recovery.

6. VIOLATION OF POSITIVE WORK ORDER

A violation of positive orders defense was successfully raised in Habib, v WCAB (John Roth Paving Pavemasters), (10/20/2011). Claimant was working when he and other employees found a bowling bowl. After some shot putting practice a challenge was made to see if one of them could break the bowling ball with a sledge hammer. Claimant took an initial blow but was then told by the foreman to "knock it off" and "if you hurt yourself I am not taking you to the hospital". The employee swung the sledgehammer again causing a piece of the ball to break off and lacerate his eye, resulting in total loss of vision in that eye. The WCJ awarded benefits, finding that although claimant was careless his injury did not arise from a violation of a known positive order. The WCAB reversed holding that employer successfully demonstrated that claimant was injured while in violation of a positive order.

The Commonwealth Court agreed that the violation of a positive order was established because: (1) the injury was caused by the violation of a positive order, (2) the employee actually knew of the order, (3) the order implicated an activity not connected with employee's work duties. This is an important case because it shows that the order need not be in writing. In this case, the foreman's direction was enough.

7. ILLEGAL ALIEN STATUS

In Kennett Square Specialties and PMA Management Corp., v. WCAB (Cruz), No. 636 C. D. 2011, Filed 10/19/2011, the Commonwealth Court issued a decision that clearly places the burden of proving that an employee is an illegal alien on

the employer. Claimant suffered a legitimate injury and both the treating doctor and employer's expert agreed on the description of injury and that claimant was able to perform restricted work from the date of the injury. At hearing the employee refused to answer questions regarding his documentation as an alien and whether he possessed working papers and was otherwise legally in this country. The WCJ suspended wage loss benefits as of the date of injury based on the medical testimony and finding that the employee was not legally in the country and did not have working papers. The WCJ determined that the employee's refusal to answer questions on the subject, taking the "Fifth", allowed an adverse inference that the employee was not here legally and did not have working papers.

The Commonwealth Court has ruled that an adverse inference alone is not sufficient to support a finding of fact that an employee was not legally in the country and was not legally able to accept employment. Other evidence must be presented to support this finding and if present can be supported by the adverse inference. The Court is basically compelling the employer to prove a negative which is always difficult. It is even more challenging when the employee refuses to provide the information. Per federal law the employer must verify the legal status of any foreign national to work in this country and testimony from the employer that the appropriate documentation was requested but never supplied may be sufficient for a WCJ to determine illegal alien status. If an employee admits to the employer he/she is not legally in the country this would be solid evidence, as an admission against interest, of the illegal status. In addition the immigration authorities might be able to cooperate and provide evidence that the person has not established legal status with the agency and does not have the legal right to accept employment in this country. Clearly some imagination will be needed to establish the negative fact that an employee does not have legal status to work in this country but the above represent a few examples for the moment.

8. 50% PENALTY FOR FAILURE TO PAY TIMELY MEDICALS

In CVA, Inc. and SWIF, v. WCAB (Riley) (10/14/2011), the Commonwealth Court upheld a 50% penalty assessed by a WCJ for a carrier's failure to timely pay medical bills that totaled $140,874.00. The employee suffered a knee injury which the carrier did not dispute. The treatments, Therapeutic Magnetic Resonance (TMR), were also administered to the right knee. The carrier downcoded some of the bills which was not part of the penalty petition since a fee review should have been filed by the provider if he disagreed with the downcoding.

Employer argued that since the employee only relied on reports and bills and not testimony of the amount of the treatment and relationship to the work injury, the penalty should be reversed as based on hearsay evidence. Employer also argued that the employee failed to prove the bills were reasonable and necessary. The Court noted that this is employer's burden via a Request for Utilization Review which employer failed to file. As the Court has previously ruled, a WCJ does not have jurisdiction over a UR Request until an initial determination is made and one of the parties or provider files a Petition to Review UR Determination. Even then the burden remains on the employer to prove the treatments were unreasonable and unnecessary.

Employer argued that the 50% penalty was excessive but the WCJ specifically found the delay in payment was unreasonable and thus the Act's language supported the penalty awarded. In addition the Court noted that if the carrier had downcoded all the bills rather than just some of the bills this would have removed the case to the fee review process and there would have been no basis for a penalty petition.

If faced with treatments that appear novel, not accepted by mainstream medicine, or sounding like voodoo; the employer/carrier should still file a UR request to challenge same, downcode the bills or get a legit medical opinion that the bills are unrelated to the work injury. Simply not paying the bills and allowing them to accumulate over a long period of time will expose the employer/carrier to a penalty proceeding and a possible penalty of up to 50% if the length of time the bills are not paid is unreasonable.

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