

*Sauer v. WCAB (Verizon Pennsylvania, Inc.), No. 1316 C.D. 2010 (Pa. Cmwlth. 2011)*

**Issue:** *Whether the WCJ and WCAB erred in denying Claimant's Reinstatement Petition on the basis that Claimant's loss of earnings were caused by his termination from employment for misrepresenting his physical limitations.*

---

**Issue Answer:** No.

**Analysis:** Here, the Commonwealth Court affirmed a WCAB decision denying Claimant's Reinstatement Petition where Claimant's benefits were suspended after he returned to modified duty work with no wage loss on August 16, 2007 but was terminated from employment on August 17, 2007 for misrepresenting his physical limitations in violation of the employer's code of conduct.

In making the determination that the Claimant's loss of earnings was as a result of his misconduct, the WCJ largely relied on surveillance footage which showed the Claimant performing pool and lawn maintenance, assembling a gazebo, carrying and hauling numerous items and boxes and operating a home improvement business. Also, the WCJ did not make a credibility determination of Claimant's medical expert, who was the only physician to render an opinion regarding disability. Furthermore, the WCJ discredited the Claimant's explanation as to what was taking place in the surveillance videos.

Upon review, the Commonwealth Court cited the applicable standard, which entitles a Claimant working modified duty without wage loss to reinstatement upon separation of said employment, unless the misconduct of the Claimant is the cause for such separation. Second Breath v. WCAB (Gurski), 799 A.2d 892, 900 (Pa.Cmwlth. 2002) (footnote omitted) (citing Vista International Hotel v. WCAB (Daniels), 742 A.2d 649, 658 (Pa. 1999).

The Court then held that the WCJ did not err in not making a credibility determination of Claimant's medical expert as the doctor did not review the surveillance which was so heavily relied upon. Furthermore, the doctor admitted that his opinions regarding disability were based solely on Claimant's subjective complaints.

The Court further held that the Claimant did not need to be aware of the employer's policy against misrepresenting physical limitations in order to be terminated for violation of the same.

**Conclusion and Practical Advice:** Misrepresentation of physical limitations amounts to misconduct for which an employer may terminate a Claimant's employment and therefore not require a reinstatement of benefits. A WCJ is free to make this determination based on surveillance evidence regardless of the uncontroverted medical evidence presented by the Claimant.

*Susan (Naun) Green v. WCAB (US Airways), No. 2539 C.D. 2010 (Pa. Cmwlth. 2011)*

**Issue:** *Whether there was an abuse of discretion by the judge in finding Claimant's medical expert credible but rejected same as unpersuasive in establishing that the Claimant's condition had worsened due to the doctor's characterization of the Claimant's condition as degenerative.*

---

**Answer:** Yes.

**Analysis:** In this case, the Commonwealth Court vacated the WCAB decision affirming the WCJ decision and remanded to the WCJ for a new decision on Claimant's Reinstatement Petition alleging a worsening of her condition with disability. The WCJ found Claimant's medical expert to be credible, but unpersuasive in establishing a worsening of the Claimant's condition with disability solely for the reason that the doctor characterized said condition as degenerative. The Defendant presented no medical evidence in opposition to Claimant's petition.

In reaching this decision, the Court heavily relied on Sewell v. WCAB (City of Phila.), 772 A.2d 93 (Pa.Cmwlth. 2001), where the Commonwealth Court reversed a finding of the WCJ that Claimant's medical expert was credible but not persuasive in establishing disability where the doctor characterized the Claimant's injury as degenerative. In doing so, the Court focused on the fact that the doctor opined that the work injury set the degenerative condition into motion or aggravated said condition.

Here, the Court found that the Claimant's medical expert clearly opined that the work-related trauma set the degenerative condition into motion and found that no other reasonable mind could conclude otherwise.

**Conclusion and Practical Advice:** Simply put, a degenerative condition does not necessarily mean that the condition is not work related, especially when there is medical evidence establishing that the work injury aggravated or hastened the degenerative condition.

*Mills v. WCAB (School District of Harrisburg), No. 1958 C.D. 2010 (Pa. Cmwlth. 2011)*

**Issue:** *Whether the use of Form 3817 (Certificate of Mailing) may establish timely filing of an appeal to the WCAB.*

---

**Answer:** Yes.

**Analysis:** In this case, Claimant's Review, Reinstatement and Penalty Petition were denied by a WCJ on November 5, 2009. Claimant mailed her appeal to the WCAB using Form 3817, which showed a date of November 25, 2009, which was the day before Thanksgiving. The Board did not receive the appeal until the following Monday, November 30, 2009. The Board subsequently quashed the Claimant's appeal as untimely.

Section 423(a) of the Act establishes that a party has twenty (20) days to file an appeal to the WCAB. Once the appeal period lapses, the Board is divested of jurisdiction to hear the matters on appeal. Sellers v. WCAB (HMT Contr. Servs., Inc.), 713 A.2d 87 (Pa. 1998). Under Section 113 of the Special Rules, an appeal is considered filed as of the date which appears on U.S. postmark on the envelope but is not considered filed until receipt by the Board when there is a private postmark.

However, the Court cited D. Torrey & A. Greenberg, Workers' Compensation Law & Practice (3<sup>rd</sup> ed.) §22:79, which recognized that it has become standard to use Form 3817s as proof of mail in workers' compensation litigation matters. In addition to recognizing this, the Court held that in order for the appeal to be considered filed as of the date of said postmark, (1) the form must identify the case to which it pertains and (2) the party must include the form in the mailing, or mail it separately to the prothonotary.

Here, the Claimant failed to meet both requirements as she failed to include the case name on the form and failed to include a copy of the form in her appeal documentation or mail it separately to the prothonotary. The only evidence of the date of mailing was the private postmark on the envelope.

**Conclusion and Practical Advice:** While not necessarily supported by the Act or Special Rules, an appeal will be considered filed on the date of private postmark with the use of a Form 3817 so long as (1) the form identifies the case to which it pertains and (2) the party must include the form in the mailing, or mail it separately to the prothonotary.

*Grady v. WCAB (Lutz t/a Top of the Line Roofing, Uninsured Employers Guaranty Fund and ACS Claims Service), No. 16 C.D. 2011 (Pa. Cmwlth. 2011)*

*Issue: Whether the WCJ erred in awarding unreasonable contest attorney's fees as of the date the bifurcated threshold issue of independent contractor was decided when Defendant did not begin payment compensation benefits until the WCJ's later decision ordering payment of benefits.*

---

**Answer:** Yes.

**Analysis:** In this case, the Claimant appealed the Board's reversal of the WCJ's order for unreasonable contest attorney's fees. The Defendant denied Claimant's Claim Petition based solely on the contention that the Claimant was an independent contractor and not an employee. The Claimant and Defendant entered into an agreement stating that they were not contesting the medical issue and consequently only awaiting the decision regarding the independent contractor versus employee issue. The WCJ bifurcated the issue and in a July 2008 interlocutory decision found that the Claimant was indeed an employee. In this July 2008 decision, there was no order for the Defendant to begin paying benefits. Because there were outstanding issues with respect to average weekly wage calculations outstanding, the WCJ did not order payment of benefits until her final order in January 2009.

The Claimant argued that the Board's reversal amounted to a reversal of longstanding case law that held that an employer's contest can become unreasonable when the basis for the contest disappears. See, e.g., Yeagle v. WCAB (Stone Container Corp.), 630 A.2d 558, 559 (Pa.Cmwlth. 1993). Claimant agrees that the Defendant's contest for the employment issue was reasonable but argued that the reasonable contest disappeared when the issue was decided and therefore the obligation to pay workers' compensation benefits accrued prior to the WCJ's final order.

The Commonwealth Court disagreed on two grounds. First, they made it clear that if the duty to pay benefits arose as of the July 2008 order, the proper remedy sought would be penalties for violation of the Act as opposed to unreasonable contest fees, which are awarded for unnecessarily prolonging litigation. Furthermore, the WCJ did not order the payment of said benefits in the 2008 order, making the argument fail on this separate ground.

**Conclusion and Practical Advice:** A Defendant does not become liable for payment of workers' compensation benefits when a WCJ issues an interlocutory order deciding the only contested issue but does not order payment of benefits. Furthermore, unreasonable contest attorney's fees are not the proper remedy for failure to pay benefits when such an obligation arises. The avenue for recourse in such a case is a Petition for Penalties.