

## **FEBRUARY 2010 CASE LAW UPDATES**

### **Polis v. WCAB (Verizon Pennsylvania, Inc.), No. 1602C.D. 2009 (Pa. Cmwlth., 2/5/2010)**

**Facts:** Claimant sustained a work-related left knee injury. Claimant worked modified duty, eventually underwent knee surgery, was released to return to work in a modified duty capacity and subsequently returned. Claimant was later informed that his job was being eliminated and was offered an income security plan in accordance with the collective bargaining agreement. Claimant accepted the income security plan.

Claimant then filed a reinstatement petition alleging a worsening of condition and that his work injury caused him lost wages because he was laid off while working modified duty. Claimant testified that he had not worked for any employer but was actively seeking employment; however, Verizon was the only employer that employed people in his type of work. Claimant also presented evidence that his supervisor completed the forms that claimant had retired rather than his position was eliminated or that there was an involuntary separation.

The WCJ concluded that claimant was forced from employment because his job was eliminated, which at the time, was modified duty. The WCJ also found claimant's testimony credible that claimant's supervisor completed the income security plan form. The defendant presented no evidence to rebut claimant's allegations. The WCJ also concluded that claimant did not consider himself retired and that claimant was actively seeking employment. Benefits were ordered to be reinstated from the date the income security plan benefits ceased.

Both the defendant and claimant appealed to the WCAB. Defendant argued that the WCJ should have granted a suspension of benefits pursuant to Pennsylvania State University v. WCAB (Hensal), 948 A.2d 907 (Pa. Cmwlth. 2008). The Board disagreed. Claimant argued that the WCJ erred in awarding the reinstatement from the date the income security plan benefits ceased. Ultimately, the WCAB affirmed the WCJ's Decision.

Defendant then appealed the order of the WCAB to the Commonwealth Court challenging the reinstatement of benefits, arguing claimant did not prove that he was entitled to temporary total disability benefits after his job was eliminated. Claimant cross-appealed arguing the dates benefits were reinstated was erroneous.

Defendant again relied upon Hensal, arguing the same was controlling. Claimant argued that benefits should have been reinstated as of the date his position was eliminated rather than the date the income security plan benefits ceased.

**Issue:** Whether claimant must prove that he sought employment for entitlement to temporary total disability benefits after his job was eliminated.

**Holding:** The Commonwealth Court affirmed the WCAB Decision, noting Hensal is inapplicable in the instant case as claimant was forced to leave the workplace when his position was eliminated and no other work was available within his restrictions and there was no evidence in the record that claimant intended to retire. Because Hensal does not apply as claimant was forced out of his employment and he did not receive a pension, claimant was not required to prove that he sought employment.

Further, claimant's income security plan benefits were severance benefits and if he also received workers' compensation benefits during this time period, he would receive more compensation to which he is entitled under the Act.

**Marx v. WCAB (United Parcel Service), No. 1176 C.D. 2009 (Pa. Cmwlth., 2/9/2010)**

**Facts:** Claimant sustained a work-related injury in the nature of a right knee and right ankle strain and received workers' compensation benefits. Defendant filed petitions to modify/suspend benefits based upon a release to return to work and subsequent labor market survey establishing claimant's earning capacity in accordance with her treating physician's restrictions.

Testimony from the vocational counselor was presented, who was required to perform a hypothetical vocational evaluation because claimant refused to meet with her. The vocational counselor reviewed claimant's job application with employer to determine the vocational and educational background as well as medical records. Job analyses for eight positions were prepared by the vocational counselor and approved by the physician as the positions were within a sedentary capacity. Testimony was also presented from the employer to confirm that employment was not available within claimant's restrictions.

Claimant testified and presented the testimony from a vocational expert, who at the request of claimant's counsel, reviewed the labor market survey that was prepared and interviewed claimant. Claimant's vocational counselor did not attempt to refute the job analyses prepared and agreed that claimant did have some earning capacity.

The WCJ granted the modification petition, which the WCAB affirmed. Claimant appealed the Order of the WCAB. On appeal, claimant argued that the labor market survey contained legal defects, including a position that was not actually available, a position with an incorrect wage, a position with an incorrect address and a position potentially outside the labor market, should have been disregarded by the WCJ. Claimant also alleged the WCJ erred by "cherry picking" one position to determine her earning capacity.

**Issue:** Whether defects contained within a labor market survey render the entire labor market survey incompetent where the survey contains other positions without defects. Whether the WCJ is required to take the average of the positions set forth in the survey, assuming the validity of them all.

**Holding:** The WCJ did not base his determination of claimant's earning capacity on any position that contained an alleged defect. The residual earning capacity computed via labor market survey only approximates a claimant's true earning power.

**MV Transport v. WCAB (Harrington), No. 974 C.D. 2009 (Pa. Cmwlth., 2/25/2010) \*\*\***

**Facts:** Claimant sustained a work-related aggravation of prior injuries to her neck and back. Defendant requested a utilization review of physical therapy treatment received by claimant and listed one therapist as the provider under review, but also requested review of all physical therapy by any and all providers at the location or other locations of the provider. The utilization review ultimately determined the treatment was not reasonable and necessary but limited the determination to the one named therapist.

Claimant filed a petition to review utilization review determination challenging the determination. The WCJ concluded that defendant proved claimant's physical therapy sessions with the identified therapist were neither reasonable nor necessary. The WCJ rejected defendant's argument that the determination should be applied to other physical therapists that also treated claimant.

Defendant appealed to the WCAB, which affirmed the WCJ's Decision. Defendant then appealed to the Commonwealth Court.

Defendant, argued that separate utilization review should not be filed with respect to each therapist when (1) the therapy is all prescribed by one doctor; (2) the therapists are complying with the physician's orders; (3) claimant might see a different therapist depending on the time she had an appointment; (4) there is the possibility of conflicting utilization reviews against the same treatment since the utilization reviews for one therapist in the office would likely be assigned to a different URO than another; and (4) the cost of multiple utilization reviews is prohibitive.

**Issue:** Whether a request for utilization review applies only to the name physical therapist in the request and not to other physical therapists in the practice.

**Holding:** It is unnecessary for defendants to file a utilization review against each individual therapist performing physical therapy in the same office. Rather, to challenge physical therapy in one office, the prescribing doctor and the facility where claimant receives that therapy should be named. Through this process, all physical therapy will be challenge in one utilization review.

The Commonwealth Court distinguished this from Bucks Community College v. WCAB (Nemes, Jr.), 918 A.2d 150 (Pa. Cmwlth. 2007) and Schneck v. WCAB (Ford Electronics), 937 A.2d 1156 (Pa. Cmwlth. 2007) as both Bucks County and

Schneck because they dealt with treatment by physicians who have the power to act independently of each other, whereas physical therapy is prescribed by a physician and performed under the doctor's supervision. When making a request for utilization review of physical therapy, the employer must name the doctor prescribing the physical therapy and the facility where claimant receives that therapy.

**Facts:**

Claimant sustained a work-related injury to his left shoulder and began receiving temporary total disability benefits. Defendant filed a modification petition pursuant to a labor market survey, which was denied by the WCJ and the employer did not appeal.

Defendant filed a second modification petition after claimant underwent an independent medical examination when claimant refused to participate in a second vocational interview. Claimant's refusal came before the Decision in Linto v. WCAB (Amcast Industrial Corporation), 895 A.2d 677 (Pa. Cmwlth. 2006)(Linton I), which established the principle that successive vocational interviews over the course of a claimant's receipt of workers' compensation benefits are permitted pursuant to the Act.

Claimant was directed to attend the second vocational interview. Based upon the results of the second interview, defendant filed a second modification petition, alleging that claimant had an earning capacity and that work was generally available to claimant within his physical restrictions.

Upon the submission of vocational and medical evidence by the defendant and by the claimant, as well as the claimant's testimony, the WCJ credited all of the claimant's witnesses. The WCJ denied the defendant's second modification petition. The WCJ rejected claimant's argument that the second modification petition was barred by the doctrine of *res judicata* or collateral estoppel but awarded unreasonable contest attorney's fees based upon the "weight of the evidence"

Both parties appealed to the WCAB. Ultimately, the WCAB affirmed the WCJ Decision that defendant did not meet its burden of proof as to the modification petition; however, the WCAB also reversed the award of attorney's fees for unreasonable contest, while rejecting claimant's argument that the second modification petition was barred by the doctrine of *res judicata* or collateral estoppel. It did so because the first modification petition was based on a different period of time and upon findings from a different vocational expert. The WCAB also concluded the evidence of record demonstrated a reasonable contest by defendant.

Claimant appealed the denial of request for attorney's fees incurred in defending the modification petition. On appeal, claimant again asserted that the second modification petition was barred by the doctrine of *res judicata* or collateral estoppel. Secondly, claimant asserted that the employer's contest was

unreasonable as a matter of law because the merits of its second modification petition had been adjudicated in the first modification proceeding.

**Issue:** Whether the defendant's modification petition, which was its second, was barred by the doctrine of *res judicata* or collateral estoppel and, as such, unreasonable as a matter of law.

**Holding:** Neither doctrine has application should defendant's second modification petition be based on the discovery of new employment opportunities within claimant's abilities. Defendant's contest was not unreasonable as a matter of law as the contest was undertaken to resolve genuinely disputed issues.

**Facts:** Claimant filed a Claim Petition seeking to obtain benefits for injuries she sustained in an automobile accident that occurred when claimant was driving to the home of a patient to whom she had been assigned by her employer in the capacity as a home health aide.

In performing her work assignment, claimant drove directly from her own home to the patient's home. Claimant encountered ice and slid off the road. Claimant exited her car and was struck by another vehicle, resulting in injuries to her ribs, a knee and her back.

Defendant objected to claimant's petition arguing that claimant was not injured within the course and scope of employment. The parties bifurcated the proceedings in order to resolve the issues of whether claimant was acting in the course and scope of her employment at the time of the motor vehicle accident.

Testimony was taken, which focused upon the details of the employment relationship relating to claimant's drive to and from the patient's home. Although claimant was not required to report to the office, at the end of her work week she would drop off paperwork relating to her job duties. Claimant stated she could take two routes to the patient's home. Claimant also acknowledged that she was not paid for her travel time, that she was paid only for time at the patient's home and that she did not receive mileage reimbursement or other vehicle related costs.

The WCJ found claimant was not on employer's clock or being paid for travel time at the time of her injuries. Further, the WCJ found claimant was not working on a special assignment at the time of the motor vehicle accident, but rather traveling to the same place of work to which she drove from the inception of her employment. The WCJ concluded claimant was not acting in the course and scope of employment at the time she sustained her injuries. The WCAB affirmed, noting there was no evidence to support claimant's assertion that she was a temporary employee or had a fixed place of employment.

Claimant petitioned for review of an order of the WCAB affirming the Decision of a WCJ denying claimant's Claim Petition.

**Issue:** Whether claimant was in the course and scope of her employment when she sustained injuries as a result of a motor vehicle accident. Whether claimant was a temporary or a traveling employee at the time of the motor vehicle accident.

**Holding:** The Commonwealth Court rejected claimant's argument that she was a temporary employee, noting that claimant was never assigned to a different patient and there was no indication that claimant's assignment would terminate at any time in the future. The Court also noted that claimant was not a traveling employee as she was required to drive to a single location to perform her job. Ultimately, the Court concluded that claimant was not within the course and scope of employment when she sustained injuries as a result of a motor vehicle accident.

**Facts:** Claimant sustained a work-related left shoulder strain/sprain, for which he underwent surgery. Claimant returned to work and his benefits were suspended. Post-injury, claimant was involved in a motor vehicle while being driven to an independent medical examination, causing injuries to his neck and back. A revised Notice of Compensation Payable was issued including a cervical and lumbar strain/sprain. Claimant underwent low back surgery and has not returned to work.

Claimant underwent an impairment rating evaluation, which was performed by Dr. Bonner, who concluded that claimant had whole person impairment of 7%. Claimant's benefits were changed from total to temporary via the Notice of Change of Workers' Compensation Disability Status form. Claimant filed a review petition challenging the validity of the impairment rating evaluation. Claimant filed a second review petition challenging the change of his disability status. Believing that claimant had fully recovered from his work injuries, defendant filed a termination petition. During litigation, claimant orally amended his review petitions to expand the description of injury to include more than a strain/sprain of the neck and lower back.

The parties presented medical testimony, including claimant's deposition of Dr. Bonner. After reviewing the evidence, the WCJ credited the testimony of Dr. Bonner, as well as claimant and claimant's medical experts. Therefore, the description of injury was amended to include an exacerbation of pre-existing degenerative neck and low back conditions. Claimant's other review petitions were denied. The WCJ also denied defendant's termination.

The WCAB affirmed the WCJ's Decision. The Board also ordered the defendant to reimburse claimant for his cost to depose the physician who performed the impairment rating evaluation. Both parties appealed to the Commonwealth Court. Defendant appealed the imposition of costs and claimant challenged the results of the impairment rating evaluation.

On appeal claimant argued that the impairment rating evaluation was invalid. Secondly, claimant argued that the WCJ failed to issue a reasoned Decision with respect to Dr. Bonner's testimony. Defendant challenged the propriety of the WCJ's decision to allow claimant to depose Dr. Bonner, the Board's determination that Dr. Bonner's testimony was related to the termination petition and the Board's determination that claimant's deposition of Dr. Bonner was a reimbursable litigation cost.

**Issue:** Whether claimant's counsel can be ordered to reimburse an overpayment of litigation costs previously paid by the defendant when claimant did not prevail during the litigation but payment was ordered by the WCJ in error. Whether claimant must obtain an impairment rating evaluation to challenge the Notice of Change of Workers' Compensation Disability Status form before the change became effective.

**Holding:** The WCAB concluded the impairment rating evaluation was valid, noting that Dr. Bonner satisfied the requirements of the Act during the examination. Further, the Courts concluded the Decision of the WCJ was articulated and well-reasoned.

The Commonwealth Court also held that the WCJ did not err by permitting the claimant's deposition of Dr. Bonner as the appeal of the Notice of Change of Workers' Compensation Disability Status form was filed before the effective date of the conversion from temporary total to temporary partial disability benefits. As such, the Court concluded that claimant was not required to obtain an impairment rating evaluation of at least 50% before appealing. The Commonwealth Court did agree that the imposition of litigation costs against defendant was in error as claimant did not prevail in the review petition.

Lastly, the Court reversed the portion of the Board's order holding defendant responsible for paying Dr. Bonner's deposition fee. The Court noted that a WCJ can order claimant's counsel to refund the overpayment, which was reinforced by the fact that litigation costs are not available for reimbursement from the supersedeas fund.

**Facts:** Claimant sustained work-related injuries when he tripped over boxes, fell backwards and landed on a concrete floor. Prior to the litigation in question, the parties filed numerous petitions, including, among others, a modification petition and a termination petition (first termination petition). Claimant, through the modification petition, sought to obtain partial disability benefits, alleging that his work-related injuries had worsened, and that he had reduced the hours he worked to four hours per day. Employer, through the first termination petition, sought to terminate claimant's benefits on the basis that claimant was fully recovered and able to return to unrestricted work.

During the pendency of this litigation, defendant issued a Notice of Compensation Payable acknowledging a lumbar sprain/strain. The modification petition was granted and the first termination petition was denied. In the denial of the first termination petition, the WCJ did not specifically amend the description of injury, but did credit the testimony of claimant's medical expert, who diagnosed claimant as having severe stenosis at L4-5 with L4-5 radiculopathy post-fall and mild L3-4 stenosis.

Defendant filed a second termination petition, alleging that claimant had fully recovered from his work-related injuries and was capable of returning to unrestricted work activities. Defendant also filed an offset petition alleging an overpayment as a result of claimant's receipt of workers' compensation benefits and his full salary approximately 30 months prior to the petition.

The WCJ granted the second termination petition and the offset petition, crediting the testimony of defendant's experts and witnesses over the claimant and claimant's medical experts. As to the second termination petition, the WCJ noted that the first termination petition Decision did not specifically amend the description of injury. Further, the WCJ found claimant's work-related injuries were limited to a lumbar strain/sprain and L4-5 radiculopathy.

The WCJ also noted that claimant erroneously received an overpayment of benefits and the payments made by employer were payments in lieu of compensation. The WCJ also noted that employer did not excessively delay its pursuit of an overpayment and claimant would not be prejudiced by employer's pursuit of reimbursement of the overpayment. The WCJ concluded defendant established its right to an offset, but the WCJ did not provide any further instructions in the order regarding how defendant was to collect the offset.

Claimant appealed the Decision, arguing that the first WCJ Decision precluded the WCJ during the second termination petition from limiting the scope of claimant's work-related injuries. The Board rejected the argument explaining the first Decision did not conclude that the description of injury should be expanded.

The WCAB also rejected claimant's arguments that the offset petition should have been denied because the overpayment of benefits was due to an administrative error, as opposed to miscalculation, and because the doctrine of laches barred recovery based upon a theory of unjust enrichment.

The Board affirmed the WCJ's Decision, which granted the employer's second petition to terminate benefits, granted employer's petition to review compensation benefit offset and denied claimant's petition to review compensation benefits.

Claimant appealed to the Commonwealth Court, challenging the grant of employer's second termination petition and employer's offset petition. Claimant presented the same arguments on appeal as those presented to the Board.

**Issue:** Whether, in a termination petition proceeding, injuries not accepted in the Notice of Compensation Payable become part of the accepted injury based upon a conclusion of non-recovery from work injuries, in the absence of a formal review petition. Whether the application of the theory of unjust enrichment is barred by the doctrine of laches because claimant was prejudiced by defendant's delay in filing its offset petition.

**Holding:** Ultimately, the Commonwealth Court vacated and remanded, in part, while affirming, in part.

It was noted that the WCJ erroneously failed to recognize the first Decision, which enlarged the description of injury to include an aggravation of spinal stenosis. It was noted that even in the absence of a formal amendment to a Notice of Compensation Payable, where a WCJ makes findings in a termination petition, based on non-recovery from work injuries not accepted in the Notice of Compensation Payable, those injuries become part of the accepted injury. The WCJ during the first termination petition proceeding implicitly expanded the description of injury to include an aggravation of claimant's pre-existing stenosis, as well as the L4-5 radiculopathy. The WCJ Decision was reversed in this regard.

As to the offset petition, the Commonwealth Court affirmed defendant's entitlement to an offset, rejecting claimant's argument that the overpayment was the result of an administrative error, as opposed to a miscalculation of the average weekly wage. The application of the theory of unjust enrichment is not barred by the doctrine of laches.