

## **Legislation Significantly Impacts Practice before Workers' Compensation Judges and the Workers' Compensation Appeal Board.**

**By: Robert J. Baker, Esquire**

On August 20, 2009, the Independent Regulatory Review Commission ("IRRC") approved revised regulations from Department of Labor and Industry ("Department"), which will significantly impact the practice and procedure before the Bureau of Workers' Compensation ("Bureau"), Workers' Compensation Appeal Board ("WCAB" or "Board") and the Workers' Compensation Judges ("WCJ") with respect to the Pennsylvania Workers' Compensation Act ("Act").

The final regulations amend, clarify or add language to two separate chapters within the regulations. More specifically, the final regulations revise Chapter 111, *Special Rules of Administrative Practice and Procedure before the Workers' Compensation Appeal Board* and Chapter 131, *Special Rules of Administrative Practice and Procedure before the Workers' Compensation Judges*. Although the revisions to Chapter 131 are far more extensive, the Chapter 111 revisions are equally significant.

Historically, the Department has developed proposed rules and procedures with respect to the administration of the workers' compensation system through the Rules Committee ("Committee") since 1987.<sup>1</sup> Although multiple revisions to the workers' compensation rules have occurred since the establishment of the Committee, the rules have been in effect in their present form since December 7, 2002. As such, the mere fact that the regulations have been amended is itself significant given the tendencies not to undertake revisions. The current amendments provide guidance for the litigation of matters before WCJs, the Board while also refining existing regulations governing legal practice as necessitated through recent legislative and appellate changes, as well as technological advancements.<sup>2</sup>

Pursuant to the final regulations, the procedures for filing an appeal have been amended pursuant to the improvements in electronic data. While an appeal or cross-appeal may continued to be filed in person or by mail, the same can now also be filed electronically and is complete upon receipt by the Board.<sup>3</sup>

This change is significant as a procedure of electronically filing an appeal is now clearly outlined. The development of this procedure is a noteworthy step forward in the appellate process through embracing available electronic capabilities. Further, the electronic filing of an appeal streamlines the process when compared to filing in person or by mail. More specifically, if filing electronically, the Board will obtain a copy of the WCJ's Decision from the Office of Adjudication.<sup>4</sup> This is compared to the requisite filing of an original, with the inclusion of the WCJ Decision, and two copies of each appeal when filing in person or by mail.

Continuing, the Chapter 131 revisions expands the definitions within the regulations, address the ability of the Bureau to accept electronic filings and significantly modifies the practice of attorney's generally before the WCJ.

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<sup>1</sup> 34 Pa. Code CHS. 111 and 131.

<sup>2</sup> *Id.*

<sup>3</sup> 34 Pa. Code § 111.3.

<sup>4</sup> 34 Pa. Code § 111.12.

With respect to the filing, service and proof of service, the final regulations clarify that service can be completed by delivery in person, by mail or electronically.<sup>5</sup> In a similar manner to the Chapter 111 revisions, the Chapter 131 regulations confirm that service is deemed to be complete when deposited in the mail and postmarked. Additionally, if delivered through electronic submission, the same is complete upon receipt and must include the electronic address to which service was made.<sup>6</sup>

Continuing, Chapter 131 grants greater authority to the WCJ and places additional time constraints and restrictions upon attorneys. First and foremost, the final regulations codify and provide guidance with respect to the previous amendments of the Act.

By way of background, the Act was amended through Act 147 of 2006, which established a mandatory trial schedule at the first hearing with specific deadlines for the presentation of evidence by the parties. The amendments further indicated that deviation from the trial schedule would be permitted only for “good cause.” Likewise, the amendments to the Act required the inclusion of a specific date and time for a mediation conference in the trial schedule. It was noted that this conference must take place no later than 30 days before the date set for filing briefs. The amendments provided; however, if the WCJ concludes mediation would be futile, the obligation to conduct mediation is then waived. The Act 147 amendments also required the creation of a resolution hearing procedure to facilitate the expeditious hearing for approval of a compromise & release agreement.

The final regulations modify the litigation process from the outset of the first hearing pursuant to Act 147. A WCJ is required to provide at or before the first hearing specific guidelines for the presentation of evidence, dates for future hearings, deadlines for scheduling medical examinations and scheduling of mandatory mediation, unless such mediation would be futile.<sup>7</sup> It is also important to note that the timelines must be documented by written order from the WCJ or on the record.<sup>8</sup> The Pennsylvania Bulletin previously noted that these amendments were intended to “streamline the rule and to incorporate the [A]ct’s mandate that judges create a trial schedule before or during the first hearing on the matter.”<sup>9</sup>

Subsequent to the first hearing, conferences may be conducted at any time, upon request of the parties or the WCJ, in person, by telephone, video conference or through any other electronic media, as directed by the WCJ.<sup>10</sup> Further, while the WCJ may consolidate petitions or issues in a manner that is consistent with the terms of the Act, the final regulations are specific that the WCJ may now also consider bifurcation of issues to promote expeditious resolution, either through motion by counsel or upon the WCJ’s own discretion.<sup>11</sup>

Additionally, a request for a continuance or postponement of a hearing will be granted only in situations where “good cause” has been shown, as determined at the discretion of the WCJ.<sup>12</sup> Previously, the WCJ considered factors such as the positions of each party with respect to the request, the number of prior requests for a continuance or postponement, whether the continuance or postponement would result in an undue hardship to a party, the unavailability of the parties involved, illness or death, the desire to

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<sup>5</sup> 34 Pa. Code § 131.11.

<sup>6</sup> *Id.*

<sup>7</sup> 34 Pa. Code § 131.52.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 34 Pa. Code § 131.53.

<sup>11</sup> 34 Pa. Code § 131.53b.

<sup>12</sup> 34 Pa. Code § 131.13.

obtain counsel by a party remain in effect. Now, consideration must also be given to whether the reason for the request for a continuance of postponement would rise to the level of “good cause” to be a substantial or compelling reason for granting the same.

The final regulations also provide a mechanism for reconsideration of the grant or denial of supersedeas at the WCJ’s own motion in addition to the request of either party.<sup>13</sup>

Likewise, in situations of an employee challenge to a Notice of Suspension or Modification, the regulations limit the issues before the WCJ of whether the claimant has stopped working or is earning the wages stated on the Notice.<sup>14</sup> However, the WCJ may receive evidence and issue a separate decision on the request for supersedeas on separate petitions requesting the same when filed by the employer, but only in situations where the WCJ determines the claimant will not be prejudiced by the introduction of evidence on the request for supersedeas at the time of the challenge proceeding.<sup>15</sup>

The final regulations with respect to the WCJ’s address of supersedeas requests were enacted pursuant to the Pennsylvania Supreme Court Decision *U.S. Airways v. WCAB (Rumbaugh)*, 854 A.2d 411 (Pa. 2004). *U.S. Airways* involved issues regarding the scope of a special supersedeas hearing in the context of a claimant’s employee challenge to a Notice of Suspension or Modification and in relation to a subsequent employer-filed petition requesting supersedeas.

The claimant in *U.S. Airways* sustained a work-related injury, which was accepted via a Notice of Compensation Payable, and temporary total disability benefits were initiated. Claimant was later released by her treating physician and returned to work without restrictions; however, she later stopped working allegedly as a result of the work injuries. The employer disputed the claimant’s disability, arguing it was unrelated to the work injuries.<sup>16</sup>

At the time of claimant’s return to work, the employer issued a Notice of Suspension pursuant to section 413(c) of the Act, 77 P.S. § 774.2.<sup>17</sup> After filing the notice, employer then stopped paying claimant benefits. A hearing was then held on claimant’s challenge to the petition, at the conclusion of which the WCJ rescheduled the supersedeas hearing for another date, without objection by either party.<sup>18</sup>

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<sup>13</sup> 34 Pa. Code § 131.41.

<sup>14</sup> 34 Pa. Code § 131.50a.

<sup>15</sup> *Id.*

<sup>16</sup> *U.S. Airways*, 854 A.2d at 413-14.

<sup>17</sup> Section 413(c) states, “Notwithstanding any provision of this act, an insurer may suspend the compensation during the time the employe has returned to work at his prior or increased earnings upon written notification of suspension by the insurer to the employe and the department, on a form prescribed by the department for this purpose. The notification of suspension shall include an affidavit by the insurer that compensation has been suspended because the employe has returned to work at prior or increased earnings. The insurer must mail the notification of suspension to the employe and the department within seven days of the insurer suspending compensation. (1) If the employe contests the averments of the insurer's affidavit, a special supersedeas hearing before a workers' compensation judge may be requested by the employe indicating by a checkoff on the notification form that the suspension of benefits is being challenged and filing the notification of challenge with the department within twenty days of receipt of the notification of suspension from the insurer. The special supersedeas hearing shall be held within twenty-one days of the employe's filing of the notification of challenge. (2) If the employe does not challenge the insurer's notification of suspension within twenty days under paragraph (1), the employe shall be deemed to have admitted to the return to work and receipt of wages at prior or increased earnings. The insurer's notification of suspension shall be deemed to have the same binding effect as a fully executed supplemental agreement for the suspension of benefits.”

<sup>18</sup> *U.S. Airways* at 415.

The second supersedeas hearing was held on claimant's challenge and noted that a Suspension Petition had also been assigned. Given this new assignment, the WCJ decided to first rule on claimant's challenge and then on employer's request for supersedeas<sup>19</sup> pursuant to section 413(a.2), 77 P.S. § 774.<sup>20</sup>

The WCJ ultimately issued a decision and order denying claimant's challenge to the Notice of Suspension. On the same day that the order with respect to claimant's challenge was issued, the WCJ entered a separate order granting employer's request for a supersedeas pending the final adjudication of the employer's Suspension Petition. Claimant appealed from the WCJ's order on her challenge, arguing that the WCJ had improperly found that employer could suspend her benefits after claimant stopped working.<sup>21</sup>

The WCAB affirmed in part, and reversed in part, the WCJ's decision. The Board noted the only relevant inquiry for a WCJ deciding a claimant's challenge to an employer's Notice of Suspension is whether the claimant has returned to work with wages equal to or greater than her pre-injury wages, as the employer has alleged in its Notice of Suspension, and the duration of such a return. The WCAB concluded the employer had properly suspended claimant's benefits pursuant to the Notice of Suspension based upon claimant's return to work without wage loss. The WCAB reversed the WCJ's Decision with respect to employer's ongoing suspension after the date the claimant stopped working.<sup>22</sup>

The employer appealed to the Commonwealth Court, which reversed the WCAB, stating that it could not "agree that a special supersedeas hearing pursuant to a challenge under Section 413(c) is limited to the questions of whether the employee has returned to work without a wage loss, when the employee returned to work and the length of time that the employee remained working."<sup>23</sup> Instead, the Commonwealth Court found that a claimant's challenge to an employer's Notice of Suspension effectively converts the employer's notice into a request for a supersedeas.<sup>24</sup>

The Commonwealth Court held that this approach was consistent not only "with the longstanding rule in workers' compensation cases that the form of a petition should not be controlling[.]" but also with the principle that "the Act is to be liberally construed to effectuate its humanitarian objectives." *Id.* According to the court, "it makes no sense to require a WCJ to turn a blind eye to evidence that the employer is entitled to a supersedeas when all of the parties are already assembled before him or her for an expedited hearing." *Id.*

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<sup>19</sup> *Id.*

<sup>20</sup> [A] petition to terminate, suspend or modify a compensation agreement or other payment arrangement or award as provided in this section shall not automatically operate as a supersedeas but may be designated as a request for a supersedeas, which may then be granted at the discretion of the workers' compensation judge hearing the case. A supersedeas shall serve to suspend the payment of compensation in whole or to such extent as the facts alleged in the petition would, if proved, require. The workers' compensation judge hearing the case shall rule on the request for a supersedeas as soon as possible and may approve the request if proof of a change in medical status, or proof of any other fact which would serve to modify or terminate payment of compensation is submitted with the petition. The workers' compensation judge hearing the case may consider any other fact which he deems to be relevant when making the decision on the supersedeas request and the decision shall not be appealable.

<sup>21</sup> *U.S. Airways* at 415-16.

<sup>22</sup> *Id.* at 416-17.

<sup>23</sup> *Id.* at 417-18, citing *U.S. Airways & Reliance National v. WCAB (Rumbaugh)*, 808 A.2d 1064, 1068 (Pa. Commw. Ct. 2002).

<sup>24</sup> *Id.* at 418.

Ultimately, the Supreme Court affirmed the Commonwealth Court, but on different grounds. The Court concluded the language of section 413(c) was clear and unambiguous, reiterating that section 413(c) grants insurers the right to immediately suspend a claimant's benefits where the claimant has returned to work without a wage loss and the insurer is not required to first provide notice to the claimant of the suspension or seek preliminary approval from a WCJ. Further, if the claimant does not challenge the Notice in a timely manner, the Notice has the binding effect of a Supplemental Agreement. However, if the claimant's challenges the suspension, a special supersedeas hearing is held.<sup>25</sup> The Court reasoned that where an employer appropriately filed a Suspension Petition and an accompanying request for a supersedeas and claimant's own actions demonstrated that there is no hindrance in the ability to litigate the request for a supersedeas in conjunction with a challenge to an earlier Notice of Suspension, the WCJ is not in error in considering claimant's challenge and the employer's request for a supersedeas in a single proceeding.<sup>26</sup>

Applying this case to the final regulations, it is clear the intent of the revisions is to address this specific situation where multiple requests for supersedeas may be pending before the WCJ pursuant to separate sections of the Act. The final regulations not only attempt to codify the decision of *US Airways*, but also further streamline the litigation process and eliminate unnecessary hearings before the WCJ.

Returning to the final regulations, provisions have been added to formally address the withdrawal of appearance by legal counsel.<sup>27</sup> Attorneys will now be permitted to withdraw his or her appearance without leave when another attorney's appearance is simultaneously entered on behalf of the party. An attorney must formally submit a written request to the adjudicating WCJ, but representation may not be withdrawn until the request is granted.

Additional burdens are placed upon the WCJ in such situations. First, an interlocutory order granting the request of the withdrawal of appearance must be issued, unless there would be prejudice to the parties or to the proceedings. Further, upon withdrawal of appearance, the WCJ has explicit authority to resolve disputes arising with respect to counsel fees and costs, so long as the fee agreement or petition has been filed before discharge or withdrawal of counsel.

Mediation has also been significantly impacted by the final regulations, through alternative dispute resolution, as well as voluntary and mandatory mediation. Mandatory mediation and other forms of alternative dispute resolution may be utilized by the parties and will not be limited in purpose to achieving a compromise settlement, but may have as a goal conventional adjustment of the claim, the narrowing of issues by means of stipulation for decision" by the WCJ.<sup>28</sup> It is now clear that mediation is not to be used for the exclusive purpose of claim resolution; but rather, mediation is also intended for use to address outstanding issues in pending litigation, again in an effort to narrow the facts in dispute and streamline the process. As such, it is anticipated the WCJs will not necessarily conclude mediation is futile if the facts in dispute can be narrowed. In such a scenario, mediation may be scheduled by the WCJ even in the absence of settlement authority.

Voluntary settlement conferences remain available to the parties, which may be conducted by the adjudicating WCJ may subsequently render a Decision on the merits of the litigation if the matter is not resolved amicably.<sup>29</sup> However, the provisions clarifying mandatory mediation are explicit that mandatory

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<sup>25</sup> *Id.* at 420.

<sup>26</sup> *Id.* at 422.

<sup>27</sup> 34 Pa. Code § 131.56a.

<sup>28</sup> 34 Pa. Code § 131.59.

<sup>29</sup> 34 Pa. Code § 131.59a.

mediation will not be assigned to an adjudicating WCJ.<sup>30</sup> Further, if resolution is not achieved, the litigation will then proceed on the merits before the adjudicating WCJ with the explicit exclusion of the mediating WCJ.

Continuing, mandatory mediation is confidential; however, conduct may result in removal of the confidentiality of the proceeding. For example, confidentiality of communications, conduct and/or documents shall not be maintained if a party failed to perform one of the following: appear for a mediation without prior approval of the mediating WCJ; attend mediation in person or by teleconference, as required by the mediating WCJ; or have requisite authority to accept, modify or reject settlement proposals offered at the mediation, whether at the mediation, or within a reasonable period of time after the mediation as established by the mediating WCJ.<sup>31</sup>

Lastly, the adjudicating WCJ is provided with explicit authority to impose sanctions for the failure of the parties to comply with the mediation provisions. In such cases, the WCJ may impose sanctions including modification or denial of supersedeas, assessment of penalties, dismissal of the pending litigation for lack of prosecution or grant the relief sought.<sup>32</sup> Certainly, these regulations create a greater sense of concern when agreeing to mediation. Accordingly, mediation should be considered with caution and a realistic assessment of the case to ensure the avoidance of unnecessary sanctions.

The final regulations also result in the compliance with the Act 147 amendments through the establishment of a procedure for requesting a resolution hearing for the sole purpose of approving a compromise & release agreement. A resolution hearing must now be requested in writing, and if there is pending litigation, the request must be submitted to the adjudicating WCJ.<sup>33</sup>

In situations where litigation is not pending before a WCJ, the request for a resolution hearing must be directed to the WCJ Manager for the judge's office serving the county of the claimant's residence, unless the claimant resides outside of the Commonwealth, at which time the request must be submitted to WCJ Manager for the judge's office closest to the claimant's residence, where it will be assigned for hearing.<sup>34</sup>

In all cases, the resolution hearing will be scheduled within 14 business days of receiving the request.<sup>35</sup> At the time of the hearing, the adjudicating WCJ will require proof that a petition has been filed with the Bureau, which will then become part of the record. Lastly, a Decision will be circulated within 5 business days of the hearing.<sup>36</sup>

Lastly, the final regulations reconcile the Act 109 provisions requiring documentation regarding the confirmation of whether or not child or spousal support arrearages exist. More specifically, in situations that may result in a monetary payment to the claimant, a Decision cannot be circulated by the WCJ until a written statement signed by the claimant is submitted and includes the claimant's full name, mailing address, date of birth and Social Security number. Additionally, the written submission must include whether or not there is an outstanding child support order against the claimant, and if so, whether or not payments are current or in arrears. Lastly, documentation from the Pennsylvania Child Support

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<sup>30</sup> 34 Pa. Code § 131.59b.

<sup>31</sup> 34 Pa. Code § 131.59.

<sup>32</sup> 34 Pa. Code § 131.59b, 34 Pa. Code § 131.13.

<sup>33</sup> 34 Pa. Code § 131.60.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Enforcement System website, or, if no arrears exist, written documentation from the web site indicating no arrears, likewise must be submitted.<sup>37</sup> Again, this revision simply ensures compliance and consistency with the previously implemented amendments to the Act.

As outlined above, implementation of these regulations will significantly impact the practice before the WCJ and at the appellate level before the Board. The final regulations amend the existing regulations to comport to the procedural requirements as outlined by Act 147 of 2006 as well as Act 109. Additionally, the revised regulations further streamline the litigation process from the initial filing through the appellate process. The final regulations will take effect on publication in the Pennsylvania Bulletin, which will likely occur in the coming weeks.

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<sup>37</sup> 34 Pa. Code § 131.111.