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## Update on Important Workers' Compensation Case Law News October 2006

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### RECENT SIGNIFICANT COURT DECISIONS June - August 2006

#### Supreme Court of Pennsylvania

#### SUPREME COURT DETERMINES WHEN PAYMENT OF COMPENSATION IS MADE FOR STATUTE OF LIMITATIONS PURPOSES

In *Romaine v. W.C.A.B. (Bryn Mawr Chateau Nursing Home)*, No. 62 EAP 2004, the Supreme Court of Pennsylvania addressed the timeliness of a claimant's request for reinstatement of benefits that had been terminated via a Decision from a WCJ by determining when "payment" is made.

The claimant was injured on July 5, 1990. On December 16, 1994, a WCJ issued a Decision suggesting that the claimant had fully recovered from her work injury as of August 6, 1991. Thus, benefits were terminated as of August 6, 1991. The claimant appealed, and the Workers' Compensation Appeal Board affirmed as did Commonwealth Court.

On December 16, 1997 the claimant filed a Reinstatement Petition alleging that as of December 16, 1997 she experienced a worsening of her work injury. It was determined that the Workers' Compensation Bureau received the claimant's Petition on December 18, 1997.

With respect to the Reinstatement Petition, the WCJ found that the claimant's most recent payment of compensation was a check from the employer dated December 14, 1994. The WCJ afforded the claimant the benefit of the doubt and assumed that the claimant cashed or deposited the check no later than December 19, 1994. Ultimately, the WCJ found that the date of the most recent payment was the date on the employer's check which was December 14, 1994. Since the date on the employer's check was December 14, 1994 and the claimant filed the Reinstatement Petition

on December 16, 1997, the WCJ concluded that the reinstatement petition was not timely filed as it was not filed within 3 years of the date of the most recent payment.

The claimant appealed and the Appeal Board affirmed. Commonwealth Court also affirmed the WCJ. The Supreme Court granted the claimant's appeal to address when, for the purposes of the Act, a payment has been made.

In assessing the issue, the Court first looked to section 413(a) of the Workers' Compensation Act, 77 P. S. §772, which suggests that a Petition to Reinstatement benefits that have been terminated must be filed within 3 years of the date of the most recent payment of compensation.

The Supreme Court then addressed when a payment is made. In so doing, the Court even referenced a case that was issued by the Pennsylvania Supreme Court in 1798. In addition, the Court also looked to decisions from other states.

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Ultimately, after much analysis, the Court determined that payment is conditionally made when the claimant accepts payment by a check from the employer. If the check is honored, the condition is removed and payment relates back to the date of the receipt of the check. Because the date of the receipt of the check is the date of payment, the Court held that the WCJ in *Romaine* was incorrect in finding that the date of most recent payment was the date of the employer's check.

The Court went on to state that the date of receipt of the check constitutes the last payment of compensation, and although payment is conditional on the date of receipt, the condition is satisfied when the check is honored and payment relates back to the date of the receipt of the check. The Supreme Court held that because Ms. Romaine failed to produce any evidence with regard to the date that she received the check, the Court simply had no choice but to find that she did not prove that her reinstatement petition was timely filed.

### Commonwealth Court of Pennsylvania

#### EMPLOYER'S MEDICAL EXPERT ADDRESSED ALL WORK RELATED CONDITIONS DURING EXAMINATION SO OPINION SUFFICIENT TO SUPPORT TERMINATION OF BENEFITS

In *Inservco Insurance Services v. W.C.A.B. (Purefoey)*, No. 2163 C.D. 2005, the claimant argued that the testimony of the employer's medical expert was not competent, because the employer's medical expert failed to acknowledge the accepted work injury. Commonwealth Court disagreed with the claimant.

The claimant injured his left foot in October of 1999. The claim was denied, and in a Decision, the WCJ found that the claimant sustained a post-traumatic tarsal tunnel syndrome and post-traumatic degeneration and instability of his Lisfranc's or tarsometatarsal joints. The WCJ also made a finding that the instability in the tarsometatarsal joint was not going to reverse and was permanent. This Decision was not appealed.

The employer later filed a Termination Petition and their medical expert testified that as of his examination there was no evidence of degenerative arthritis at the Lisfranc's joint and that the claimant had completely recovered from the tarsal tunnel

syndrome. The examining doctor also opined that there was no evidence of instability of the Lisfranc's joint.

The Termination Petition was granted and the claimant appealed. The Appeal Board reversed, concluding that the testimony of the employer's medical expert was less than positive, and the testimony failed to address the first WCJ's finding that the instability in the tarsometatarsal joint was irreversible and permanent.

Commonwealth Court reversed the Appeal Board and reinstated the termination of benefits. The Court did agree that an employer may not re-litigate, by way of a Termination Petition, the original medical diagnosis.

In response to the contention that the instability of the claimant's tarsal/metatarsal joints was permanent and irreversible, Inservco argued to the Court that the duration and extent of a work injury are always at issue in workers' compensation proceedings. When addressing this argument the Court reviewed the first WCJ's Order and not the WCJ's actual findings. Commonwealth Court observed that the WCJ's Order suggested that the claimant was granted compensation benefits as of October 30, 1999 and continuing, "until further Order or Agreement." According to Commonwealth Court, this meant that the WCJ anticipated the possibility of future litigation regarding the compensability of Claimant's injury.

The Court went on to determine that the opinion of Inservco's medical expert was not an impermissible attack on the judicially established work injury. In so doing, the Court noted that the examining doctor was asked to assume that the first WCJ had found as compensable injuries, post-traumatic tarsal tunnel syndrome, post-traumatic degeneration, and instability of the Lisfranc's or tarsalmetatarsal joint, and the examining doctor acknowledged these injuries yet still opined that the claimant had completely recovered.

There is one other interesting point in the Decision that should be brought up because it may be an indication on how the Court will rule in the future with respect to an important issue that to date has evaded decision. In Footnote #5 of the Decision, the Court indicates that they agree with Inservco's argument that unless there was an IRE, specific loss claim or an occupational disease, a WCJ could not definitively establish the duration of an injury. The Court suggested that if a WCJ could make such a definitive determination in a

claim petition, it would foreclose the possibility of an employer ever filing a petition to modify, suspend, or terminate.

The reason that Footnote #5 is important, is because there is a question as to whether a Termination Petition can be filed, after there has been an IRE and the claimant has been given an impairment rating of more than zero but less than 50%. In other words, the question is whether it is inconsistent for a claimant to be “impaired” according to an IRE, and then have the employer file a Termination Petition arguing that the claimant had completely recovered from the work injury. The language of Footnote #5 has no true precedential value, but it very well could be a tip off as to how Commonwealth Court would rule on the issue in the future. Also, it is likely that savvy claimant’s counsel will point to this Footnote and argue to WCJ’s that it proves that Termination Petitions can not be filed after there has been a finding of impairment via an IRE. More on this as the issue develops.

#### **ARGUMENT THAT PERFORMANCE OF IRE FORECLOSES LATER TERMINATION PETITION NOT RAISED BEFORE THE WCJ SO ISSUE WAIVED**

The issue of whether or not a termination can be granted after an IRE has determined that there was an impairment of more than zero but less than 50% was discussed by Commonwealth Court in *McGaffin v. W.C.A.B. (Manatron, Inc.)*, No. 2168 C.D. 2005. Specifically, the claimant asked the Court to address whether a WCJ may terminate benefits when 7 months earlier; the claimant was found to have a whole body physical impairment rating of 26% based upon an IRE. While the claimant asked the Court to address the issue, the Court refused to address the issue on the basis that the claimant failed to properly preserve it before the WCJ.

As for the facts, on August 22, 2001 a doctor found that the claimant had a 26% impairment of his whole body. Since Section 306(b) of the Act, 77 P.S. §512, suggests that an impairment rating of less than 50% results in an employee receiving partial disability benefits, the claimant was not considered totally disabled but only partially disabled.

On May 31, 2002, the employer filed a Termination Petition seeking to stop payment of workers’ compensation benefits as of March 12, 2002. The employer introduced the IRE report into evidence, not

as a medical opinion, but merely as a Bureau document containing background information. Interestingly, the claimant’s counsel questioned the relevancy of the IRE with respect to the Termination Petition. The WCJ did admit the IRE on the basis that it was a Bureau record.

After reviewing the evidence, the WCJ granted the employer’s Termination Petition. The WCJ did not address what effect the IRE might have had on the termination, since the issue had not been raised for the WCJ’s consideration.

The claimant filed an appeal and did not mention the issue surrounding the IRE and a later Termination Petition in his Notice of Appeal filed with the Appeal Board. The first time that the issue was raised was in the claimant’s Appeal Board Brief. The Appeal Board affirmed the WCJ, without addressing this issue.

Before Commonwealth Court, the claimant argued that an IRE establishes that the claimant had a permanent injury. The claimant also argued that Section 306(a.2) of the Act, 77 P.S. §511.2, the section of the Act which addresses IRE’s, provides no mechanism by which the employer may seek to prove that a claimant has fully recovered from a work injury subsequent to a determination that he or she is permanently impaired as a result of the same injury. The claimant indicated that the failure to allow for a termination under Section 306(a.2), 77 P.S. §511.2 means that one can not be filed, because doing so would be absurd, and it would be logically inconsistent to believe that a claimant could have fully recovered from the same work injury that had rendered him or her permanently impaired. The claimant went on to argue that Section 306(a.2), 77 P.S. §511.2 suggests that an employer can only demonstrate a change in a claimant’s condition by way of a subsequent IRE or by establishing that the claimant has some level of earning power. The claimant argued that Section 306(a.2), 77 P.S. §511.2 does not allow the employer to prove a change in condition by way of a traditional IME.

Instead of addressing this important issue, Commonwealth Court determined that the claimant did not properly preserve before the issue before the Appeal Board so the issue was waived and could not be raised at a later date.

Thus, Commonwealth Court chose not to address this important issue. However, it appears clear that it soon will.

## **CLAIMANT CAN PROVE THAT BREATHING DIFFICULTIES CAUSED BY TRADITIONAL WORK INJURY INSTEAD OF AN OCCUPATIONAL DISEASE**

Commonwealth Court in the case of *Crafttexmills, Inc. of Pa v. W.C.A.B. (Markowitz)*, No. 1758 C.D. 2005, determined that the claimant did not prove that he was suffering for a specific occupational disease but did prove that he was suffering from a work-related breathing condition.

The claimant was required to clean an air conditioning system at work every 6 months. To do so, the claimant entered a tank that collected 3 inches of “muck” and had a swampy smell. The claimant did this for a number of years and sometime in 2000 he developed breathing problems. The claimant’s treating physician opined that the claimant had hypersensitivity pneumonitis and asthmatic bronchitis as a result of his exposure to thermophilic actinomyces found in the air conditioning unit.

In Section 108 of the Act, 77 P.S. §27.1, there are specific diseases listed that are defined as occupational diseases. Since the claimant’s disease was not one of those listed, he had to establish the existence of the disease under the “catchall” provision, Section 108(n) of the Act, 77 P.S. §27.1 (n), which states that the claimant had to prove: he was exposed to a lung disease by virtue of his employment; there was a causal relationship between his disease and his employment; and that the incidence of lung disease is substantially greater in his occupation than in the general population.

The WCJ found that the claimant failed to prove that the incidence of his lung disease was substantially greater in his occupation than in the general population, so she denied the Claim Petition with respect to the occupational disease. However, the WCJ found that the claimant sustained his burden of proving that he suffered a traditional work related injury under Section 301(c)(1) of the Act, 77 P.S. §411(1). The employer appealed and the Appeal Board affirmed the WCJ.

Before Commonwealth Court, the employer argued that the claimant’s lay testimony was not competent to support the determination that his employment caused his injury because the claimant had no special knowledge with respect to the irritants in the air. The employer also argued that the opinion of the claimant’s

medical expert was incompetent because the medical expert presumed that the irritants were present in the workplace, without a factual basis.

The Court determined that because the claim was not granted under the occupational disease section of the Act, the claimant did not have a presumption that the work environment caused his disability. Instead, the claimant had to provide some evidence as to the nature of the illness or disability and also evidence that a hazard existed in the workplace causing his disability. The Court noted that as for the existence of a disease causing element in the workplace, Courts have accepted lay testimony, but this lay testimony must be based upon personal experience with the illness causing element. The Court concluded that the claimant’s own testimony was not competent to support a conclusion that his disability was related to work, as the claimant was unable to identify the spores that the doctor said caused his illness.

The Court then looked at the testimony of the treating physician and concluded that it was sufficient to prove the claimant’s case. In so doing, the Court pointed out that the treating doctor testified that the claimant was exposed to thermophilic actinomyces in the air conditioning unit. The treating doctor then eliminated other sources of potential exposure, such as exposure to birds, working in the buffing industry, stripping maple bark and/or stripping sequoia bark.

In reviewing the treating doctor’s testimony, Commonwealth Court determined that this testimony alone was sufficient to prove that the claimant was exposed to the irritants at work, and this exposure resulted in his disease. Thus, the claim was granted.

## **CLAIMANT CONCURRENTLY EMPLOYED WHEN PERFORMING UNION DUTIES AND CLAIMANT DID NOT HAVE TO PRODUCE MEDICAL EVIDENCE THAT HE WAS DISABLED FROM UNION DUTIES BECAUSE CLAIMANT HAD TO BE WORKING TO CONTINUE UNION DUTIES.**

In *Akers National Roll Company v. W.C.A.B. (Whaley)*, No. 2344 C.D. 2005, the claimant wanted his wages from his union activities to be included in his AWW calculation. The claimant worked as a maintenance person for Akers and he was also a union grievor for other workers at Akers. When he was called upon to perform union business, the claimant would punch out from his maintenance position with Akers and then begin his union duties. The claimant was not paid by

Akers for his union work, but instead the claimant would tell the union how many hours he spent performing union activities and the union would pay him for the hours that he missed working for Akers. The union paid the claimant at the same hour rate that he received from Akers.

After his work injury, the claimant did not work for Akers but he did perform his union grievor duties. However, the union did not pay him any money because he was not actually losing any wages from his work with Akers. Eventually, the union told the claimant that he could no longer perform his activities as a grievor, because he had to be actually working on Akers' premises to perform the grievor duties and because he was not working at Akers, he could not be a grievor.

Meanwhile, the employer presented evidence that it had no policy that required the claimant be working to perform his grievor duties. Instead it was a union policy to require that the claimant be working in order to perform his union duties. Also, the employer presented evidence that the claimant was never advised that he was not permitted on the employer's premises.

The WCJ found that the claimant was concurrently employed and found that the claimant was disabled from his time of injury position with Akers and also from the union grievor position. While the WCJ found that the union grievor position was sedentary in nature, the WCJ found that the claimant did not have to produce medical evidence that he was disabled from the union grievor position. Because he had to be working to perform his union duties and he was not working, the claimant was awarded temporary total disability benefits for both jobs.

The employer appealed and the Appeal Board affirmed the WCJ.

Initially, the Court determined that the claimant was concurrently employed on the basis that he split his time between his duties with Akers and his union activities. Thus, the wages from both employers were included in his AWW calculation.

Before the Court, Akers argued that the claimant failed to introduce medical evidence that he was disabled from the union grievor position. However, the Court disagreed, finding that the employer acknowledged a work injury disabling the claimant from his time of injury position with the employer which prohibited him

from performing his duties for his concurrent employment. Thus, the claimant was awarded temporary total benefits for disability from both positions, even though there was medical evidence that the union grievor position was sedentary in nature and the WCJ found that the claimant could perform the position from a physical standpoint.

#### **CLAIM FOR DISFIGUREMENT DUE TO 1985 INJURY TIMELY MADE BECAUSE CLAIMANT STILL RECEIVING BENEFITS WHEN CLAIM MADE**

In *Penn Beverage Distributing Company and Cincinnati Insurance Company v. W.C.A.B. (Rebich)*, No. 1698 C.D. 2004, the work injury was suffered in 1985 and in 1999 the claimant filed a petition for facial disfigurement. The employer defended on the basis that the claimant did not suffer any disfigurement of an unsightly nature and the employer argued that the petition was barred by the statute of limitations.

The WCJ did find that the claimant suffered a serious and permanent disfigurement to his skull and neck but also found that the claim was time-barred because the petition was not filed within 3 years of the date of the injury. The claimant appealed to the Appeal Board and the Board reversed the WCJ holding that the petition was timely filed. The employer filed a Petition for Review with Commonwealth Court.

In assessing the issue, Commonwealth Court first had to determine if the claimant's petition was filed under section 315 of the Act, 77 P.S. §602 which bars the filing of a new claim unless it is filed within 3 years of the injury or if the petition was filed under section 413(a) of the Act, 77 P.S. §771-772 which suggests that no notice of compensation payable, agreement or award can be reviewed, modified or reinstated unless a petition is filed within 3 years of the date of the most recent payment of compensation.

The Court determined that the petition for disfigurement was an attempt to review and/or modify the nature of the original work injury so section 413(a), 77 P.S. §771-772 was used to determine whether the petition was timely filed. The Court noted that at the time that Mr. Rebich filed his petition, he was still receiving workers' compensation benefits due to the original injury. So it was obvious that the claimant filed his petition within 3 years of the date of the most recent payment of benefits.

## **MODIFICATION PETITION GRANTED, BUT WITH NO MODIFICATION OF BENEFITS PAYABLE**

The employer in *Select Security, Inc. v. W.C.A.B. (Kobrin)*, No. 1600 C.D. 2005 filed a Modification Petition that was granted by the WCJ. While the petition was granted, the WCJ did not modify benefits because the WCJ found with respect to the modification petition that the claimant had a potential weekly earning capacity of \$750.00 but because the AWW was \$1,714.25 the claimant was still entitled to the maximum weekly compensation rate.

The employer appealed to the Appeal Board which affirmed the WCJ.

Before Commonwealth Court the employer argued that the WCJ erred in not modifying the claimant's compensation rate. In denying this argument, the Court observed that the testimony of the employer's vocational expert, that the claimant had an earning capacity of up to \$60,000, was rejected. However, the Court also observed that the WCJ accepted the testimony of that same witness that the claimant had a potential weekly earning capacity of \$750.00. Thus, the WCJ's decision to not modify the benefits being paid to the claimant was upheld.

The employer also argued that the WCJ erred in awarding the claimant litigation costs because the employer was successful in showing that the claimant had an increased earning capacity of \$750.00 per week. However, the Court determined that both parties prevailed because the claimant was successful as his benefits were not modified to the extent that the employer wanted. The Court did remand the matter to the WCJ so that a finding could be made as to the reasonableness of the claimant's litigation costs.

## **CLAIMANT MUST STILL PROVE THAT INJURY CAUSED REMOVAL FROM ENTIRE LABOR MARKET TO BE ENTITLED TO BENEFITS AFTER RETIREMENT.**

In *Pries v. W.C.A.B. (Verizon Pennsylvania)*, No. 1870 C.D. 2005, the claimant suffered a work injury in 1989 and on May 24, 2001 a supplemental agreement was issued reinstating the claimant to temporary total disability benefits. On August 30, 2001 the claimant returned to work for one day so that he could retire and receive a \$60,000.00 retirement package from

the employer. The claimant signed a resignation letter as part of the retirement process.

The employer then filed a Suspension Petition based on the claimant's voluntary withdrawal from the labor market. Meanwhile, the claimant argued that he felt pressured to take the retirement package. However, the claimant acknowledged that he has not looked for work since his retirement.

The WCJ concluded that the claimant was forced into retirement due to the work injury and as such the employer's Suspension Petition was denied. The employer appealed and the Appeal Board reversed.

The claimant filed a Petition for Review with Commonwealth Court and the claimant asked that the Court overturn its decision in *County of Allegheny v. W.C.A.B. (Weis)*, 872 A.2d 263 (Pa. Cmwlth. 2005). In *Weis*, Commonwealth Court held that to be entitled to an award of benefits after a retirement, a claimant must prove that the work injury forced a retirement from the time of injury position and a claimant must prove that the work injury forced a retirement from the entire labor market. In *Weis*, the Court acknowledged that when a claimant is not able to perform the time of injury position, an employer must generally show job availability to be entitled to a suspension of benefits; however such a showing of job availability would be useless when a claimant has retired and has no interest to returning to work in any capacity.

With respect to Mr. Pries, Commonwealth Court refused to overturn its decision in *Weis* and Mr. Pries' benefits were suspended because he failed to prove that he was forced to retire from the entire labor market due to the work injury.

## **WCJ CAN NOT ORDER PAYMENT OF ONLY 50% OF MEDICAL BENEFITS FOR AN ACCEPTED WORK INJURY.**

In *Huddy v. W.C.A.B. (U.S. Air)*, No. 1031 C.D. 2005, the claimant filed a Review Petition to amend the NCP to add depression and anxiety to his accepted neck injury. The claimant's treating psychiatrist testified that the claimant had a familial predisposition for depression but the chronic pain from the work injury resulted in the claimant's need for ongoing psychiatric treatment. Meanwhile, the employer's examining psychiatrist opined that

between 1993 and 1996 the claimant was suffering from depression related to the work injury but after 1996 the claimant's mental condition was linked to non-work-related factors.

The WCJ concluded that the claimant proved that the depression was partially related to the 1993 work injury and the employer was successful in establishing that the work injury was not the sole and exclusive factor contributing to the claimant's need for psychiatric treatment. The WCJ granted the review petition in part and ordered that the employer pay 50% of the bills related to the psychiatric treatment. Both parties appealed.

The Appeal Board reversed on the basis that the claimant was unable to establish that the 1993 work injury was a substantial contributing factor in the development of his mental injury. The claimant then filed a Petition for Review to Commonwealth Court.

Commonwealth Court reviewed the record and concluded that there was substantial evidence to support the WCJ's amendment of the NCP to include depression. The Court then dealt with the WCJ's determination that the employer was only liable for payment 50% of the bills related to the psychiatric treatment. Not surprisingly, the Court held that the WCJ had no authority to reduce an employer's obligation to pay for work-related medical expenses. In light of the fact that the psychiatric treatments were determined to be work-related, the Court ordered the employer to pay the entire cost of the claimant's psychiatric treatments, subject to repricing.

#### **EMPLOYER NOT SUCCESSOR IN INTEREST BUT STILL LIABLE FOR CLAIMANT'S ENTIRE HEARING LOSS.**

The claimant in *Hayduk v. W.C.A.B. (Bemis Co., Inc)*, No. 230 C.D. 2006, filed a Claim Petition alleging a work-related hearing loss. The evidence demonstrated that the claimant worked as a maintenance man in the same plant for 27 years and during those 27 years, the plant had a number of different owners. The plant where the claimant worked was acquired by Bemis in 1993 as part of an asset purchase agreement from Princeton Packaging Holdings.

Before the WCJ, Bemis introduced serial audiograms performed on the claimant. An audiogram performed in 1992, before Bemis purchased the plant, showed a

binaural hearing loss of 6.25%. An audiogram from January of 1994, after Bemis purchased the plant, showed that the claimant had a binaural hearing loss of 12.1%. When the claimant retired in 1999, his audiogram showed a binaural hearing loss of 12.18%.

Based on these audiograms, Bemis' medical expert opined that the hearing loss attributable to Bemis was only 5.93% (6.25% before Bemis' purchase and 12.18% at time of retirement so hearing loss was 5.93%). Bemis argued that the 5.93% hearing loss for which it was responsible was below the 10% threshold set forth in the Act. Therefore, it was Bemis' position that the claimant did not suffer a compensable hearing loss during the period that it owned the plant.

In granting the Claim Petition, the WCJ credited the opinion of Bemis' medical expert that the claimant had a binaural hearing loss of 12.18%. The WCJ then found that Bemis was a successor in interest to Princeton Packaging so it was liable for the entire hearing loss, not just the 5.93% loss it claimed.

Bemis appealed and the Appeal Board reversed on the basis that Bemis was not a successor in interest to Princeton Packaging. More specifically, the Appeal Board held that Bemis purchased assets from Princeton Packaging but did not purchase any of its liabilities. The Appeal Board went on to state that because Princeton Packaging continues to do business, the claimant was free to pursue a claim against Princeton Packaging. The claimant filed a Petition for Review with Commonwealth Court.

In front of Commonwealth Court, the claimant argued that the Appeal Board erred in concluding that Bemis was not a successor in interest to Princeton Packaging. However, Commonwealth Court affirmed the Appeal Board's finding that Bemis was not the successor in interest. In so doing, the Court observed that the undisputed evidence was that Bemis purchased the assets of Princeton Packaging but none of its liabilities. The Court also observed that Bemis purchased the plant from Princeton Packaging but did not purchase any of Princeton Packaging's stock. Finally, the Court observed that Bemis specifically excluded workers' compensation liabilities that arose prior to the purchase of the assets. Thus, the Court held that Bemis could not be held liable for any work injuries that arose prior to its purchase of the plant.

However, this determination by the Court did not exclude the claimant from receiving benefits. The Court went on to find that the claimant was entitled to benefits with respect to noise exposure that he experienced during his employment with Bemis. While it was true that Bemis' medical expert opined that in 1992 the claimant experienced a 6.25% hearing loss before his employment with Bemis, the Court determined that the opinion of Bemis' medical expert was not competent because the opinion was based on a faulty premise. Specifically, the Court pointed out that the Act states that the percentage of hearing loss can only be established via an audiogram that has been performed according to OSHA Occupational Noise Exposure Standards.

The Court held that Bemis failed to prove that the audiogram performed in 1992, which established a hearing loss of 6.25%, was performed in accordance with OSHA standards. Because Bemis failed to prove that the earlier audiogram was performed in accordance with OSHA regulations, the Court held that Bemis failed to meet its burden of establishing a hearing loss attributable to a previous employer. The Court then went on to hold that because the WCJ credited the opinion of Bemis' medical expert that the claimant had a 12.18% hearing loss, Bemis was liable to pay the claimant for the entire hearing loss.

**WCJ'S DECISION NOT MANIFESTLY UNREASONABLE, THE RESULT OF BIAS, PREJUDICE AND/OR PARTIALITY SO UPHELD BY COURT BUT COURT REFUSED TO GRANT ATTORNEY'S FEES FOR A FRIVOLOUS APPEAL**

In *Frankford Hospital v. W.C.A.B (Walsh)*, No. 2320 C.D. 2005 the WCJ credited the testimony of the claimant and her medical experts to conclude that the claimant met her burden of proving that she was suffered a work injury that continued to disable her. The WCJ awarded counsel fees and penalties. The Appeal Board affirmed the award of compensation but reversed as to the award of counsel fees and penalties.

The employer filed a Petition for Review to Commonwealth Court on the basis that the WCJ's granting of the claim petition was manifestly unreasonable and the result of bias, prejudice and/or partiality. More specifically, the employer argued that the WCJ erred in not accepting the opinions of its medical expert.

Commonwealth Court reviewed the WCJ's decision and determined that it was supported by the evidence and the Court held that the WCJ was free to credit the testimony of the claimant and her medical experts and reject the opinion of the employer's medical expert. Under the circumstances, the Court chose not to disturb the WCJ's findings.

Meanwhile, the claimant also filed a Petition for Review to Commonwealth Court from the Appeal Board's reversal of the WCJ's award of counsel fees and penalties. The Court reviewed the record and noted that the employer presented the testimony of a doctor who opined that the claimant did not suffer a work injury. The Court held that even though this testimony was rejected, the employer did present conflicting medical evidence that provided a reasonable basis to contest liability. The Court made note of the fact that the employer presented surveillance videotape that questioned the claimant's credibility. Thus, the Court affirmed the Appeal Board's reversal of the WCJ's award of penalties and counsel fees.

Finally, the claimant filed a motion for counsel fees with Commonwealth Court based on Pa. Rules of Appellate Procedure Section 2744. This Section permits the imposition of counsel fees if the Court determines that an appeal to Commonwealth Court is frivolous or taken solely for delay or that the conduct of a participant against whom costs are to be imposed is dilatory, obdurate or vexatious.

The claimant argued that the employer's appeal to Commonwealth Court raised no meritorious issues and merely challenged the WCJ's credibility determinations and the weight to be given to the evidence. Commonwealth Court refused to grant the request for fees on the basis that the employer's appeal was not so obviously devoid of merit so as to be frivolous. The Court made this determination, even though the employer did not prevail in its appeal to the Court.

**CLAIMANT PHYSICIAN ALLOWED TO ATTEND, BUT NOT PARTICIPATE IN IME**

The employer in *Knechtel v. W.C.A.B. (Marriott Corporation)*, No. 140 C.D. 2006 requested that the claimant attend an IME with a psychiatrist to assess the claimant's work-related depression. The claimant's attorney asked that someone be allowed to

accompany the claimant to the exam and make an audio tape of the exam. The employer refused and the employer then filed a Petition to Compel the exam.

Before the WCJ, the claimant agreed to attend the exam, but wanted a health care provider of her choice to participate in the exam. This request was made in accordance with Section 314(b) of the Act, 77 P.S. §651(b) which states that in the case of a physical exam the employee shall be entitled to have a health care provider of his own selection, to be paid by the employee, participate in such examination.

The WCJ issued a Decision granting the Petition to Compel but rejecting the claimant's request to allow her health care provider to tape record the exam, question the IME physician, make comments or otherwise assist the claimant during the IME. The WCJ did permit the claimant's health care provider to take notes and request brief recesses during the IME to confer with the claimant but the health care provider was not permitted to ask questions of the IME physician or comment on the IME physician's questions.

The claimant appealed and the Appeal Board affirmed the WCJ. The Appeal Board held that to allow the claimant's health care provider to take an active role in the IME would effectively turn the examination into an adversarial procedure with the claimant's health care provider acting as a proxy for the claimant's counsel resulting in an atmosphere in which a fair and reasonable medical examination could not take place.

Before Commonwealth Court, the claimant argued that the language of Section 314(b), 77 P.S. §651(a) of the Act suggests that the claimant's health care provider can "participate" in the IME and this must mean that the health care provider can take an active role in the IME and not merely attend the IME. The Court then tried to determine what degree of involvement qualified as "participating" in the IME in accordance with the Act. The Court ultimately held that allowing the claimant's health care provider to attend and observe the IME to obtain a first hand view of the exam as a foundation for later rebutting the validity of the IME results was sufficient to meet the requirements of the Act.

## Superior Court of Pennsylvania

### APPORTIONMENT OF THIRD PARTY SETTLEMENT TO PERMIT WIFE TO RECEIVE 80% FOR LOSS OF CONSORTIUM CLAIM WAS NOT IMPROPER ATTEMPT TO AVOID REIMBURSEMENT OF WORKERS' COMPENSATION CARRIER'S SUBROGATION LIEN

A decision by Superior Court in the case of *John Urmann, Sr. and Mary Lee Urmann, Husband and Wife v. Rockwood Casualty Insurance v. George Spilka, Timothy Spilka, t/d/b/a The Spilka Wood Products*, No. 1512 WDA 2004 could have a very significant impact with respect to workers' compensation insurers' recovery of their subrogation liens.

Mr. Urmann was severely injured in an automobile accident during the course of his employment. Rockwood started payment of workers' compensation benefits. Thereafter, Mr. and Mrs. Urmann filed a third-party action against the Spilka's on the basis that the Spilka's negligence was responsible for Mr. Urmann's injuries. Part of this third party action included a claim by Mrs. Urmann for loss of consortium.

Instead of going to trial, the parties entered into mediation and by way of this mediation, a settlement of \$300,000.00 was reached. Of this settlement, \$50,000.00 was to be paid for Mr. Urmann for his physical and mental injuries and \$250,000.00 was to be paid to Mrs. Urmann for her loss of consortium claim.

Rockwood opposed the proposed settlement on the basis that too much of the settlement was assigned to Mrs. Urmann for her loss of consortium claim. More specifically, Rockwood's argument was that the proposed settlement, with Mrs. Urmann receiving the majority of the money, was an attempt to reduce its recovery of its subrogation lien.

In light of Rockwood's objection, the trial Judge held an evidentiary hearing to determine how the terms of the settlement were reached. During this hearing, Mrs. Urmann testified that after the accident her husband became a different person and their social life greatly changed. It came out that in addition to the physical injuries; Mr. Urmann also suffered from a major depressive disorder, an organic mood disorder and a cognitive disorder with impaired intellectual functioning. Mrs. Urmann stated that Mr. Urmann was

unaware of the extent of his personality change and that she had to spend a great deal of time and effort caring for her husband including monitoring her husband's daily prescription regimen of 18 pills. Mrs. Urmann testified that she was her husband's sole caregiver and she was unable to leave him alone for any length of time. Rockwood presented no evidence.

After hearing the evidence, the trial Judge determined that the automobile accident fundamentally destroyed the marital relationship so granting Mrs. Urmann 10%, 20% or 30% of the total award, which is typical in civil matters, would inapplicable. The trial Judge ultimately held that the apportionment was based on a good faith attempt to allocate the settlement based on the facts rather than an attempt to reduce or eliminate Rockwood's recovery via its subrogation lien. Thus, the settlement was approved by the trial Judge.

The trial Judge's ruling is significant, because of the Supreme Court case of *Darr Construction Co. v. W.C.A.B. (Walker)*, 715 A.2d 1080 (Pa. 1998), wherein it was held that a workers' compensation insurer can not recover, by way of a subrogation claim, loss of consortium settlements or awards. Thus, the trial Judge's ruling in *Urmann* dramatically reduced the amount that Rockwood could recover. Because of this, Rockwood appealed to Superior Court.

Before Superior Court, Rockwood argued that the Urmann's failed to meet the burden of persuasion for a reasonable apportionment of the settlement. In addressing the issue, Superior Court noted that they could always review questions of law but they were bound by the factual findings of the trial Judge as long as they were supported by competent evidence. Furthermore, Superior Court indicated that with

respect to issues regarding the proper amount of damages, the Court would defer to the fact-finder.

Superior Court reviewed the trial Judge's findings and held that the apportionment of the settlement, with Mrs. Urmann receiving 80% of the settlement, was supported by the evidence. Because the trial Judge's findings were supported by the evidence, the Court chose not to overturn the apportionment.

Rockwood also argued that the apportionment was against public policy considerations designed to guard against the potential for abuse by structuring settlement agreements to reduce or eliminate recovery of a subrogation lien. Again, Superior Court looked to the trial Judge's factual finding that the settlement was made in good faith. Because Superior Court was convinced that the proceeds of the settlement were apportioned in good faith, the Court held that the settlement was not against public policy.

Accordingly, Superior Court's ruling in *Urmann* supports the apportionment of an award or settlement in a third party case to allow for a majority of the money to go to the loss of consortium claim but only if this is done in good faith.

The information contained in this update is intended for general information purposes only, and does not constitute legal advice or options on any specific facts or circumstances. No action should be taken without consultation with legal counsel.

If you have any questions or comments, or would like further information, please contact an attorney in the Workers Compensation Practice Group at Thomas, Thomas & Hafer LLP. Visit us at [www.tthlaw.com](http://www.tthlaw.com) for more information on our Workers' Compensation Practice Group.

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