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

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### RECENT SIGNIFICANT COURT DECISIONS September 2006

#### COMMONWEALTH COURT CASES

##### CLAIMANT CANNOT LIMIT AMOUNT EMPLOYER RECOVERS FROM HER THIRD-PARTY LAWSUIT

The employer in *Donna Kidd-Parker v. W.C.A.B. (Philadelphia School District)*, No. 2122 C.D. 2005 filed a Termination Petition in April of 1997 arguing that the claimant had completely recovered from her work injury. The employer request for supersedeas was denied, so the claimant continued to receive her benefits. In October of 1999 the WCJ granted the Termination Petition effective April of 1997. However, since supersedeas was denied, the claimant continued to receive her indemnity benefits which amounted to \$67,154.86. Additionally, employer paid \$26,414.29 in medical benefits. The claimant appealed from the WCJ's decision and when the Appeal Board affirmed, the claimant filed a Petition for Review to Commonwealth Court. In August of 2001 the Court issued an Opinion affirming the termination of benefits.

After receiving Commonwealth Court's opinion, the employer applied for reimbursement from the Supersedeas Fund for reimbursement of the benefits it paid to the claimant after its request for supersedeas was denied. The Fund granted the application and reimbursed the employer the entire amount requested.

While the Termination Petition was being litigated, the claimant received \$184,775.00 as a settlement of her claim against the third-party tortfeasor responsible for her work injury.

The employer then filed a Modification Petition asserting a subrogation lien against the amount recovered by the claimant in the third party lawsuit. In its Petition, the employer acknowledged that it received reimbursement from the Supersedeas Fund. Additionally, the Fund sent a letter brief to the WCJ

asserting its right to recoup monies already paid to the employer.

Before the WCJ, the claimant agreed that the employer had a right of recovery but argued that the employer was only entitled to reimbursement of the benefits paid to her prior to the date that her benefits were terminated. The claimant was of the position that the employer had already been reimbursed from the Supersedeas Fund for any benefits it paid after the termination petition was filed. The WCJ did not accept this argument and found that the employer had established a right to recover \$73,868.54 from the claimant. (The employer could not recover the entire amount of benefits it paid because the employer had to pay its share of the costs that the claimant incurred in the third-party litigation). From the \$73,868.54, the employer was ordered to reimburse the Supersedeas Fund the amount of \$54,725.88.

The claimant appealed and the Appeal Board affirmed.

Before Commonwealth Court, the claimant argued that the employer could only recover the benefits that it paid to the claimant before the termination was granted. The claimant argued that since the WCJ terminated her benefits, this was a finding that the only benefits that were "payable" were those paid to her prior to the filing of the Termination Petition. The claimant made this argument based on Section 319 of the Workers' Compensation Act, 77 P.S. §671, which states that the employer shall be subrogated to the right of the claimant against a third party recovery to the extent of the "compensation payable." The Court looked to this language and determined that it allows for the recovery of all benefits paid to the claimant not just those received prior to the filing of the Termination Petition.

The claimant also argued that the employer's lien should be limited because the employer had already received reimbursement from the Supersedeas Fund. More specifically, the claimant argued that the

employer's acceptance of the money from the Supersedeas Fund, was an "accord and satisfaction" of the employer's subrogation rights. The Court rejected this argument on the basis that the employer's subrogation right is absolute and the employer could not agree to seek recovery from the Supersedeas Fund instead of from the third-party tortfeasor.

Finally, the claimant argued that the WCJ had no authority to order the employer to reimburse the Supersedeas Fund out of the recovery paid to the employer by the claimant. It was claimant's position that the Fund's only recourse was to not grant the employer's application for reimbursement. However, the Court disagreed with the claimant and held that the WCJ's action prevented the claimant from retaining benefits to which she was not entitled so the WCJ was permitted to order the employer to reimburse the Supersedeas Fund.

#### **THE EMPLOYER'S PETITION FOR REVIEW TO COMMONWEALTH COURT NOT TIMELY FILED SO PETITION FOR REVIEW QUASHED.**

In *SPS Technologies v. W.C.A.B. (Marko)*, No. 2486 C.D. 2005, the Appeal Board issued its Opinion on November 15, 2005 so the parties had 30 days from that date in which to file a Petition for Review to Commonwealth Court. The employer prepared a Petition for Review, a Form 3817 certificate of mailing, a check for \$60.00 to cover the filing fee and the employer deposited all the items with the U.S. Post Office on December 14, 2005. However, the Petition for Review was not addressed to Commonwealth Court but instead was addressed to the Appeal Board.

The Appeal Board notified SPS on December 19, 2005 that the Petition for Review had been incorrectly filed and on that same date, the Appeal Board forwarded the Petition for Review to Commonwealth Court.

SPS filed a Petition for Review *nunc pro tunc* and/or to preserve the filing date of December 14, 2005. SPS argued that even though the Petition for Review was not mailed to the Court, the mailing to the Appeal Board on December 14, 2005 meant that the Petition for Review was timely filed. The claimant argued that the Petition for Review was not timely filed because it was sent to the wrong place.

Commonwealth Court observed that the Pennsylvania Rules of Civil Procedure contain a section, 42 Pa. C.S. §5103, that suggests that if an appeal is filed with a court or magisterial district of the Commonwealth that does not have jurisdiction over that appeal, then the court or the magisterial district judge is to transfer the appeal to the appropriate tribunal where the appeal should have been filed. If the appeal is transferred, the original filing date is preserved.

In ruling against SPS, Commonwealth Court held that the Workers' Compensation Appeal Board does not qualify as an agency under 42 Pa. C.S. §5103 that would be permitted to transfer the appeal to the appropriate tribunal, so the Appeal Board could not forward the Petition for Review to Commonwealth Court with the original filing date being preserved. Since SRS's Petition for Review was not received by Commonwealth Court until December 19, 2005 the Petition for Review was dismissed as it was not filed within 30 days of the Appeal Board's Decision.

#### **PENNSYLVANIA SECURITY FUND NOT RESPONSIBLE FOR PAYMENT OF PENALTIES AS IT WAS NOT AN INSURER**

The claimant in *Constructo Temps, Inc. and Workers' Compensation Security Fund v. W.C.A.B. (Tennant)*, No. 1562 C.D. 2005, was injured in March of 2000 and at that time Constructo Temps was insured by Reliance Insurance. Some time thereafter Reliance was placed into liquidation. Because of Reliance's insolvency, the Workers' Compensation Security Fund became the successor in interest to Reliance and it began administering the injury claim. This was the case, because the Security Fund was created under the Workers' Compensation Act to assure that claimants entitled to benefits under the Act are protected when the workers' compensation insurer becomes insolvent.

In November of 2004 the claimant was awarded, among other things, 20% penalties by a WCJ due to the failure to pay for some of the claimant's medical expenses. The employer appealed and the Appeal Board affirmed. The Security Fund then filed a Petition for Review to Commonwealth Court.

In front of Commonwealth Court, the Security Fund argued that it can not be assessed penalties because the Workers' Compensation Act only allows for an

assessment of penalties against “insurers” and “carriers”. Commonwealth Court looked to the definition of “insurer” and determined that the Security Fund was not an insurer. Thus, the Court concluded that the Security Fund was not subject to an assessment of penalties because penalties can only be assessed against an insurer and the Security Fund was not an insurer.

In a Dissent by Judge Friedman, the Judge agreed that the Security Fund was not subject to penalties. However, Judge Friedman was of the position that Constructo Temps could be liable for penalties because the Act does allow for an assessment of penalties against employers.

#### **DISFIGUREMENT OF MOUTH ASSESSED WITHOUT DENTURES IN PLACE**

The claimant in *Agnello v. W.C.A.B. (Owens-Illinois)*, No. 629 C.D. 2006, fell at work and suffered injuries to her neck, jaw and teeth. The employer accepted the injury and started payment of temporary total disability benefits. The claimant ultimately required removal of three teeth from her lower jaw due to the work injuries. In addition, the claimant decided to have the remaining teeth of the lower jaw removed for non-work-related reasons and replaced with a full lower denture.

The claimant then filed a claim for disfigurement. The WCJ viewed a picture of the claimant taken before the work injury and the WCJ made a finding that the claimant had a “large, toothy grin.”

Eventually, the WCJ denied the claimant’s petition on the basis that she failed to demonstrate a permanent disfigurement. Specifically, the WCJ noted that he asked the claimant to recreate the smile seen in the pre-injury picture and when the claimant did so, the WCJ was unable to see the claimant’s lower teeth above the lower lip and the WCJ was unable to see any difference with or without the dentures. Finally, the WCJ noted that pre-injury, the claimant was already missing several of her lower molars.

The claimant appealed and the Appeal Board affirmed on the basis that the absence of the three lower teeth attributable to the work injury was not

noticeable because the claimant had a lower denture.

Before Commonwealth Court, the claimant argued that her disfigurement should have been assessed without her dentures. The Court agreed, because the Court determined that the dentures were a prosthetic device and past case law has held that a loss of use or a disfigurement is to be determined without the use of prosthetic devices because they are not permanent. The Court determined that when the claimant removed her dentures, this detrimentally affected her overall appearance. Thus, the Court held that when assessing disfigurement involving teeth, the WCJ needs to view the claimant without dentures. The Court suggested that only without dentures could the WCJ get a true idea of the disfigurement. Thus, the case was sent back to the WCJ for additional findings.

#### **THE PENNSYLVANIA WC ACT APPLIES TO INJURY SUFFERED BY DOCK WORKER WHO IS ALSO COVERED BY THE FEDERAL LONGSHORE AND HARBOR WORKERS’ COMPENSATION ACT**

The claimant in *McElheney v. W.C.A.B. (Kvaerner Philadelphia Shipyard)*, No. 806 C.D. 2006 worked as a pipe fitter/welder for Kvaerner at the Philadelphia Shipyard. The claimant injured his right knee, right shoulder and right foot as a result of a fall at work. The claimant received benefits under the Longshore and Harbor Workers’ Compensation Act (LHWCA) from February 1, 2003 until June 1, 2004--when these benefits ended.

The claimant then filed a Claim Petition under the Pennsylvania Workers’ Compensation Act. The employer defended on the basis that because the claimant was injured while repairing a ship in dry dock, the LHWCA was the claimant’s sole source of benefits. The WCJ agreed with the employer and found that the claimant’s exclusive remedy was under the LHWCA and the Appeal Board affirmed.

In reviewing the issue, Commonwealth Court stated that in Pennsylvania, whether a maritime worker, who is not a seaman, has access to the Pennsylvania Workers’ Compensation system is determined by whether the claimant’s job duties are sufficiently land-based or those job duties are not primarily maritime in nature. Commonwealth Court did note

that the U.S. Supreme Court has held that there can be concurrent federal and state jurisdiction for land-based injuries suffered by shipyard workers.

Before Commonwealth Court, the claimant argued that he was injured while he was working on a ship that was in dry dock and not afloat or even over water, so his job duties were land-based and were not maritime in nature. The Court agreed with the claimant and held that the claimant had access to LHWCA benefits and Pennsylvania Workers' Compensation benefits. The Court did remand the matter to the WCJ for a determination as to whether or not the claimant is entitled to benefits under the Pennsylvania Workers' Compensation Act.

**EMPLOYER COULD NOT ARGUE CLAIMANT'S BENEFITS SHOULD BE MODIFIED AS OF A DATE THAT WAS PRIOR TO THE DATE IN A SUPPLEMENTAL AGREEMENT THAT THE EMPLOYER AGREED THAT CLAIMANT WAS TOTALLY DISABLED.**

The claimant in *Sharon Tube Company v. W.C.A.B. (Buzard)*, No. 2354 C.D. 2005, returned to sedentary duty with the employer on July 21, 2003 and by July 28, 2003 he stopped working. On August 1, 2003 the parties entered into a Supplemental Agreement indicating that as of July 28, 2003 the claimant was entitled to temporary total disability benefits.

On October 8, 2003, 2 months after the Supplemental Agreement was signed, the employer filed a Modification Petition seeking a reduction of the claimant's benefits as of July 21, 2003. The Petition did acknowledge that the claimant had stopped working as of July 28, 2003 but that, "Claimant has earning capacity." In the Answer to the Modification Petition, the claimant argued that in the Supplemental Agreement signed on August 1, 2003 the employer stipulated that the claimant became totally disabled as of July 28, 2003 so the employer was estopped from seeking a modification of benefits as of July 21, 2003.

At the first hearing before the WCJ, the claimant moved to dismiss the Modification Petition for the reasons set forth in his Answer. Meanwhile, the employer argued that the Supplemental Agreement merely reflected the reality of the situation that as of July 28, 2003 the claimant stopped working and became entitled to temporary total disability benefits. The WCJ denied the motion to dismiss and ultimately

held that the sedentary work made available to the claimant as of July 21, 2003 was within his restrictions so the claimant's benefits were modified as of July 21<sup>st</sup>.

The Appeal Board reversed on the basis that the Supplemental Agreement reinstating the claimant to temporary total disability benefits as of July 28, 2003 was binding on the parties. The Appeal Board went on to state that to be entitled to a modification of benefits, the employer was required to prove that at some point after July 28, 2003 the claimant regained some or all of his earning capacity. Because the employer failed to do so, the Appeal Board reversed the modification of benefits as of July 21, 2003.

Before Commonwealth Court, the employer again argued that the Supplemental Agreement was not binding because it merely reflected the fact that the claimant had stopped working as of July 28, 2003. In support of its argument, the employer pointed the Court to the case of *Norris v. W.C.A.B. (Hahnemann Hospital)*, 726 A.2d 1 (Pa. Cmwlth. 1999). In *Norris*, the employer filed a Termination/ Modification/ Suspension Petition averring that the claimant had completely recovered from the work injury as of March of 1994. While this Petition was being litigated before the WCJ, the parties executed five Supplemental Agreements that reflected the periodic changes in the claimant's weekly wages. The WCJ eventually granted the Termination Petition and the claimant appealed. One of the arguments that the claimant made was that the Supplemental Agreements executed during the proceedings before the WCJ precluded the employer from arguing that the claimant had fully recovered because in the Supplemental Agreements the employer had stipulated that the claimant was partially disabled. However, Commonwealth Court in *Norris* held that the Supplemental Agreements executed by the parties, at least with respect Mr. Norris, were nothing more than an acknowledgment of an undisputed fact that the claimant was entitled to partial disability benefits while his case was pending.

Meanwhile, the Court in *Sharon Tube* made note of the fact that Sharon Tube executed a Supplemental Agreement indicating that the claimant was entitled to temporary total disability benefits as of July 28, 2003 and then filed its Petition seeking a modification of benefits as of July 21, 2003 while in *Norris*, the employer filed a Termination Petition and then entered into the supplemental agreements. Additionally, the

Court made note of the fact that before the WCJ, Sharon Tube never presented evidence that it entered into the Supplemental Agreement to merely document that the claimant became totally disabled as July 28, 2003 and Sharon Tube never offered any evidence that it contested the claimant's entitlement to total disability as of July 28, 2003. Therefore, Sharon Tube's Petition for Review to Commonwealth Court was denied and the claimant continued to receive temporary total disability benefits.

**BUREAU CAN NOT BE DIRECTED TO ASSIGN A URO ADDITIONAL UTILIZATION REVIEWS TO COMPENSATE THE URO FOR AN IMPROPER REVOCATION OF ITS ABILITY TO PERFORM UTILIZATION REVIEWS.**

Commonwealth Court, in the case of *Chiro-Med Review Company v. Bureau of Workers' Compensation*, No. 2478 C.D. 2005, was asked to determine whether the Workers' Compensation Bureau can compensate a Utilization Review Organization (URO) for the Bureau's improper revocation of the URO's authorization to conduct utilization reviews (UR).

The case started in August of 2003 when the Bureau suspended the assignment of UR's to Chiro-Med based on information that Chiro-Med was not acting within the Bureau's regulations. Chiro-Med disputed the suspension and the matter was assigned to a Hearing Officer. After reviewing the evidence, the Hearing Officer concluded that the Bureau did not abuse its discretion in revoking Chiro-Med's authorization. Chiro-Med appealed to Commonwealth Court and the Court remanded the matter to the Hearing Officer for additional findings.

Upon remand, the Hearing Officer determined that Chiro-Med violated some of the Bureau's regulations involving the performance of UR's, but the Hearing Officer concluded that the violations were minor and did not justify the revocation of its authorization to perform UR's. Both Chiro-Med and the Bureau filed Petitions for Review with Commonwealth Court.

Chiro-Med filed its Petition for Review asking that the Court direct the Bureau to assign extra UR's to Chiro-Med to compensate it for the money lost during the time that its authorization to perform UR's was improperly revoked. In the alternative, Chiro-Med asked the Court to remand the matter to the Hearing

Officer so that the Hearing Officer could direct the Bureau to implement the same remedy.

In response, the Bureau filed a Motion to Quash on the basis that the Petition for Review was barred by sovereign immunity. This defense is allowed by Article 1, Section 11 of the Pennsylvania Constitution and 1 Pa. C.S. § 2310. Section 2310 reads in relevant part that, "The Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive that immunity." Chiro-Med argued that this immunity was not applicable because the proceedings before Commonwealth Court were not the result of a "civil lawsuit" but instead were the result of a Petition for Review.

Commonwealth Court agreed with the Bureau and held that sovereign immunity applies. In so doing, the Court indicated that a party may only bring an action against a Commonwealth agency when the Commonwealth has expressly waived sovereign immunity. The Court concluded that because there is nothing in the Workers' Compensation Act to suggest that the General Assembly intended to waive sovereign immunity for the Workers' Compensation Bureau, the Bureau's Motion to Quash must be granted.

Meanwhile, the Bureau argued in its Petition for Review that the Hearing Officer had no authority to overturn its determination to revoke Chiro-Med's authorization to perform UR's and the Bureau argued that the Hearing Officer was required to defer to its determination with respect to Chiro-Med.

The Court disagreed with the Bureau's argument. In disagreeing, the Court concluded that the Hearing Officer's right of review is created by the regulations of the Pa. Code and the applicable regulation requires the hearing officer to issue a written adjudication, including all relevant findings and conclusions and stating the rationale for the decision. The Court reasoned that that mere fact that regulations of the Pa. Code allow for an appeal to a Hearing Officer implies that the Hearing Officer has the authority to do something other than affirm the Bureau. In other words, if the Hearing Officer was only permitted to uphold the Bureau's determinations, then would be no need to create an appeal process.

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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