



## FEBRUARY LEGAL UPDATES: WORKERS' COMPENSATION

### **AQUA AMERICA, INC. V. WORKERS' COMPENSATION APPEAL BOARD (JERMON JEFFERS, DECEASED).**

#### Matter

This case centers on whether a Decedent's daughter had a disability that warranted dependent benefits under the Pennsylvania Workers' Compensation Act.

The Decedent-Father was fatally injured in a tractor-trailer accident while working for the Employer. At that time, his daughter was 17 years old and suffered from retinitis pigmentosa (RP), a progressive eye disease that affected her peripheral vision. While the Employer initially awarded Claimant-Wife workers' compensation benefits by issuing a Notice of Temporary Compensation Payable, the widow subsequently filed a Claim Petition for death benefits in which she asserted that the Decedent-Father's daughter was a dependent and disabled.

The relevant portion of the Workers' Compensation Act is Section 307(3) that states, "a decedent's children are eligible for death benefits if they are over 18 years of age but dependent due to disability." Through the Claim Petition, the wife sought death benefits for Decedent's daughter subsequent to her 18th birthday as a result of the daughter's RP.

A medical expert for the family testified RP is both an aggressive and progressive condition. He specifically noted that it is difficult for individuals with RP "to drive or do any kind of...daily function without proper lighting." The Employer's expert testified that the Claimant's daughter could not drive, be on a ladder, or safely play sports; however, he did note that she could do a job that did not require her to drive or use peripheral vision. With respect to her ability to work, the Employer's expert testified that the daughter's condition would not prevent her from attending college or working.

#### Resolution

Ultimately, the WCJ found the family's testimony expert more credible and persuasive than the Employer's. The decision was upheld by the WCAB on appeal.

However, the Commonwealth Court vacated and remanded the Workers' Compensation Appeal Board's decision. In doing so, the Commonwealth Court determined that Claimant offered no evidence relative to whether, and to what extent, the daughter's RP affected her earning power, such that she was dependent because of disability after she turned 18. The Court emphasized the fact that, under Pennsylvania workers' compensation law, disability means loss of earning power, and thus, although a Claimant may suffer a physical disability, it is only if that physical disability occasions a loss of earnings that an individual would be disabled under the meaning of the Act and will be entitled to receive compensation.

Take Away

This case is important because even though an employee/decedent's child may be disabled and in fact suffer from a rare and incurable disability, it is the burden of Claimant to show that the alleged dependent child suffers from a loss in earning power as a result of the disability. Without more, the child is not entitled to death benefits once he or she turns 18 years of age.

**ROGELE INC. VS WORKERS' COMPENSATION APPEAL BOARD (HALL)**

Matter

In Rogele, the Employer petitioned the Commonwealth Court to review the Workers' Compensation Appeal Board's decision, to affirm a portion of the workers' compensation judge's decision granting the Claimant's Petition to Review Medical Treatment and/or Billing. The Commonwealth Court affirmed the WCAB Decision.

The Claimant sustained spinal injury on January 25, 1999. Subsequently, he entered into an indemnity-only Compromise and Release Agreement. In 2008, Employer filed a Petition to Review Medical Treatment/Billing and Review Medical Petition regarding Claimant's prescriptions. As a result of that litigation, Workers' Compensation Judge Robert Vonada found that Claimant's prescribed medications were reasonable and necessary. However, Judge Vonada ordered Claimant to undergo random toxicology screens. Subsequently, in 2010, Claimant received an intrathecal pump. He did not undergo drug screens. As a result, the Employer denied payment of Claimant's prescription medications.

On November 19, 2012, Claimant filed a Penalty Petition due to Employer's failure to pay for medications. The WCJ found that the intrathecal pain pump from October 11, 2011, and ongoing treatment every two months, was reasonable and necessary. On February 19, 2016, Claimant filed a Review Medical Petition alleging that the Employer had not paid medical expenses related to a 2015 pump replacement or the medication refills thereafter. On January 19, 2017, Workers' Compensation Judge Robert Vonada granted Claimant's Review Medical Petition.

The Employer appealed WCJ Vonada's decision to the Workers' Compensation Appeal Board, arguing

1. that the Board lacked jurisdiction and was barred from ordering Employer to pay for Claimant's medical treatment that controlling decisions had declared were not reasonable and necessary; and
2. that the WCJ and the Board erred by ordering Employer to pay for Claimant's intrathecal pump replacement and its refills because a documented electrical shock may have damaged the pump, and Employer should not be required to replace the equipment.

Resolution

The Commonwealth Court rejected the Employer's argument with respect to subject matter jurisdiction. The Court found that it was clear that Claimant's pump, and his attendant medications, were reasonable and necessary as evidenced by prior WCJ Decision. Additionally, the Court rejected the Employer's argument that, because the Employer's doctor did not perform drug screenings, the pump was not reasonable and necessary. In doing so, the Court found that the toxicology screening required by WCJ Vonada was a condition precedent only when Claimant controlled his medications, and not when his medications were administered by the pump. Additionally, Employer argued that the replacement of

replacement of Claimant's intrathecal pump was not Employer's responsibility because the replacement was required due to an at-home incident involving an electrical shock documented in Claimant's medical records, and not due to wear and tear.

The Commonwealth Court upheld the WCAB's Decision and Order. In doing so, the Commonwealth Court noted that, despite a shock documented in the medical records, the WCJ found that no physician offered a specific opinion that the electrical shock was a substantial contributing factor to the failure of the pump. The Commonwealth Court found that the WCJ's Decision was reasoned, and as such, the WCJ's Decision should not be disturbed upon appeal.

### Take Away

This case illustrates the importance of having sound medical evidence to show that the replacement of a medical device is required as a result of an intervening event, and not general wear and tear. Without having sound expert evidence unequivocally linking the failure of a device to an intervening event, it is unlikely that an employer will be successful in denying payment of an equipment replacement.

## **THE HARTFORD INSURANCE GROUP ON BEHALF OF CHUNLI CHEN V. KAFUMBA KEMARA, THRIFTY CAR RENTAL, AND RENTAL CAR FINANCE GROUP**

### Matter

The Pennsylvania Supreme Court reviewed this matter to determine whether a workers' compensation insurance carrier may bring a third-party action against an alleged tortfeasor to recoup the amount paid in workers' compensation benefits where:

- the employee did not independently sue the tortfeasor,
- did not join the insurer's action, and
- did not assign the cause of action to the insurer.

### Resolution

The Supreme Court of Pennsylvania held that, unless the injured employee assigns his or her cause of action or voluntarily joins a litigation as party plaintiff, the insurer may not enforce its statutory right to subrogation by filing an action directly against the tortfeasor.

Additionally, the Court held that an employer/workers' compensation carrier cannot move forward with an injured employee's cause of action against a tortfeasor by:

- merely captioning the complaint on behalf of the employee and/or
- including in the complaint independent claims of the employee in addition to the claim for subrogation of workers' compensation benefits.

The Court reasoned that the cause of action belongs to the injured employee, and Section 319 of the Pennsylvania Workers' Compensation Act grants the employer/insurer a right to subrogation if, and only if, there is a recovery by the employee from which the insurer could subrogate. Therefore, because Claimant in this matter did not file a third-party lawsuit, the insurer was not entitled to a right to subrogation.

## Take Away

This case illustrates the ways in which an insurance carrier may obtain subrogation rights against an alleged tortfeasor. An insurance carrier must either obtain an assignment from the claimant or join the claimant in litigation. If the claimant does not exercise his or her right to a third-party action, then the insurance carrier's opportunity for subrogation does not exist.

## **FIREDEX OF BUTLER, INC. AND STAR INSURANCE COMPANY V. WCAB (WARNER)**

### Matter

This unreported case is significant because it discusses the burdens of proof regarding Review and Termination Petitions. The case also discusses when a party may expand the description of a Claimant's work injury following the approval of a Compromise and Release Agreement.

In this case, the Claimant sustained a work injury in the form of an accepted left ankle sprain, and the parties entered into a Compromise and Release Agreement that resolved all of Claimant's benefits with the exception of Claimant's future medical benefits.

The employer subsequently filed a Review Medical Petition and a Termination Petition. Through the petitions, the employer challenged its responsibility for payment of Claimant's treatment for reflex sympathetic dystrophy/complex regional pain syndrome (RSD/CRPS), and fought to terminate Claimant's medical benefits regarding his left ankle sprain.

The WCJ issued a Decision and Order denying the Employer's Review and Termination Petitions. In doing so, the WCJ credited Claimant's medical experts and rejected the Employer's medical expert. The WCJ specifically found that the Claimant's work injury was not limited to the accepted left ankle sprain, and held that the burden of proof regarding both petitions was the Employer's. The Employer appealed the WCJ's Decision to the WCAB.

### Resolution

After the WCAB affirmed the Decision of the WCJ, the Employer appealed. The Commonwealth Court held that the WCJ erred in expanding Claimant's work injury beyond the injury set forth in the Compromise and Release Agreement and in denying the Review Petition. However, the Court concluded that the WCJ did not err in denying the Employer's Termination Petition. With respect to the Review Petition, the Commonwealth Court noted that a Claimant could not expand or modify the description of the acknowledged injury in an approved Compromise and Release Agreement without expressly reserving the right to do so in an Agreement.

In finding that the WCJ erred in denying the Employer's Review Petition, the Commonwealth Court held the burden of proof regarding the treatment for symptoms not included in the accepted work injury is not automatically on the Employer or the Claimant. Rather, the burden of proof lies:

- with the Employer when the causal connection to the accepted work injury is obvious and
- with the Claimant when the causal connection is not obvious.

When applying the law to the facts of this case, the Commonwealth Court determined that because Claimant had non-work related left-ankle injuries, including a 2007 left-ankle fracture, the casual connection between Claimants RSD/CRPS was not obvious, and that the burden lied with the Claimant.

With respect to the Termination Petition, the Court noted that it is the Employer's burden to prove that the Claimant's disability has ceased, or that the disability from which the Claimant suffers is not work related. Accordingly, the WCJ did not err when it rejected the Employer's medical evidence regarding the Termination Petition.

Take Away

This Case provides good examples of the respective burdens of proof in Review and Termination Petitions. It also illustrates how a description of injury cannot be expanded after the approval of a Compromise and Release Agreement without an express reservation of the right to do so.