



## FEBRUARY 2020 LEGAL UPDATES: WORKERS' COMPENSATION

### **KEYSTONE RX LLC V. BUREAU OF WORKERS COMPENSATION FEE REVIEW HEARING OFFICE**

#### Matter

Claimant sustained a work injury in August 2014. Claimant received medical care from a physician and was prescribed medications, which Claimant filled at Keystone Rx LLC (Pharmacy). Upon filling the prescriptions, Pharmacy billed the Insurer. Three years later, in June 2017, the Insurer filed a Utilization Review (UR) request. The UR determination rendered all ongoing treatment from the physician unreasonable and unnecessary as of November 2, 2016.

In July 2017, Pharmacy filed two applications for the fee review at issue. The Medical Fee Section determined that Pharmacy was owed \$3,616.46 for compound cream and \$887.77 for Naprelan tablets prescribed to Claimant that Pharmacy filled. Because the medications were deemed unreasonable and unnecessary by the UR determination, Insurer contested the determination by the Medical Fee Section. The Hearing Office vacated the Medical Fee Section determination and dismissed Pharmacy's applications. Pharmacy filed a Petition for Review, arguing that its due process rights were deprived when the Hearing Office relied on the UR determination.

#### Resolution

The Commonwealth Court held that for UR procedures occurring after the date of the opinion where an employer, insurer, or an employee requests a UR, a provider which is not a "health care provider" as defined in the Act, such as a pharmacy, testing facility or provider of medical supplies, must be afforded notice and an opportunity to establish a right to intervene under the usual standards for allowing intervention.

#### Take Away

This case will have an impact by adding another party to the UR process, and will allow non-healthcare providers to appear and participate in the process. However, now that non-healthcare providers must be notified of UR proceedings, they will be required to be proactive in their participation. They will no longer be afforded the defense of being unaware that a UR is pending before providing prescriptions, medical equipment, etc. when requesting reimbursement for payment. Additionally, this will affect settlement agreements between claimants and defendants now that there is a third party to consider in the UR portion of settlement negotiations.

**SOTA CONSTRUCTION SERVICES, INC V.WCAB (CZARNECKI, ZAWILLA D/B/A GORILLA CONSTRUCTION, AND UNINSURED EMPLOYERS GUARANTY FUND), RESPONDENTS**

Matter

On August 27, 2012, Claimant initially filed a Claim Petition alleging multiple injuries within the course and score of his employment on October 26, 2009. Claimant learned that Defendant/Employer did not carry Workers' Compensation insurance. As a result, Claimant filed a Claimant Petition with the Uninsured Employers Gratuity Fund ("UEGF"), alleging the same injuries. UEGF then filed a Joinder Petition, alleging that the general contractor, Sota Construction Services, Inc., ("Sota") was insured, therefore was the statutory employer. The WCJ struck the Joinder Petition via Interlocutory Order because it was not timely. An Interlocutory Order was then issued that deemed Claimant an employee of Gorilla Construction ("Defendant/Employer").

On April 13, 2015, a WCJ granted Claimant's Claim Petition, finding that Claimant was totally disabled, and awarded Claimant indemnity benefits from October 26, 2009 through March 1, 2010. Further, the WCJ determined that Claimant provided UEGF with timely notice of the claim, but dismissed the Joinder Petition as an untimely filing. On April 16, 2015, the WCJ circulated an amended decision attaching his interlocutory orders to the decision, and reaffirmed his April 13, 2015 decision. Defendant/Employer and UEGF appealed to the Board. The Board later determined that the WCJ erred when it dismissed the Joinder Petition as untimely because it initially interpreted Section 315 of the Act to serve as a time bar since Section 131.36(d) provides a deadline for a Joinder Petition. However, Section 131.36(i) amends the original claim petition in accordance with the joined party. The Board remanded the matter to the WCJ. The WCJ granted the Joinder Petition based on the assertion that the Joinder Petition merely amended the timely Claim Petition, therefore was timely. Sota appealed the decision. The Board affirmed the WCJ's decision. Sota then appealed again.

Resolution

The Board upheld the WCJ's decision granting the Joinder Petition. The Board ruled that when a joinder petition is filed in a claim petition case, it does not have to follow the deadline set out in Section 315, but the joinder instead amends the Claim Petition. Therefore, if the Claim Petition is timely, the subsequent Joinder Petition is timely. The Commonwealth Court reasoned that if a Claim Petition was filed on the last day of the time limit, the defendant would be barred from joining additional parties, and would have no legal recourse against the liable parties.

The Commonwealth Court also addressed the Petitioner's argument that allowing a claimant to amend a Claim Petition allows a claimant to assert a new cause of action. The Court explained that when an Amended Claim Petition does not change the theory of recovery, it does not contain a new cause of action. Therefore, amendments to a Claim Petition are not time-barred under Section 315 of the Act, as long as the original Claim Petition is filed within the statute of limitations, and the amendment does not change the nature of the original Claim Petition so much that it could be construed as a new cause of action.

Take Away

It is important to distinguish that, although Section 315 of the Act requires the parties to file a claim within three years of the injury, a Joinder Petition filed more than three years after the injury is not barred as long as the Claim Petition is filed within the three-year time limit. This ruling outlines that Section 131.36(d) and (h) of the Board's Regulations are the applicable sections when a timely Claim Petition is already filed. The Claim Petition essentially stops the clock, and makes Section 315 inapplicable in situations where a Joinder Petition is filed subsequent to a Claim Petition.

**SCHOOL DISTRICT OF PHILADELPHIA V. WCAB (BRUNO)**

Matter

Claimant was a teacher for the School District of Philadelphia when she sustained a head injury resulting in a loss of consciousness as a result of an attack by a special needs student in 2009. Subsequently, in 2013, Claimant sustained a second injury when she was repeatedly kicked in the head and abdomen, resulting in a loss of consciousness. The 2013 work injury worsened Claimant's preexisting symptoms from the 2009 date of injury. Defendant/Employer accepted Claimant's 2013 injury. Claimant returned to wages equal to or greater than her time-of-injury wages in December 2013, resulting in a suspension of benefits.

Claimant remained symptomatic following her return to work. In January 2016, Claimant ceased working because of her symptoms. Claimant used her sick leave, applied to receive wage continuation benefits, and requested two health sabbaticals. In July 2017, Claimant filed a Petition to Reinstate Compensation Benefits, alleging a decreased earning power as of January 4, 2016. Defendant/Employer requested a credit for the sick leave, wage continuation payments, and health sabbatical payments. Claimant's payroll records did not indicate whether her pay was attributable to her sick leave, wage continuation, or health sabbatical. Defendant/Employer did not enter evidence into the record to supplement Claimant's payroll records to reflect that pay should be categorized as either sick leave, wage continuation payments, or health sabbatical payments. Because of this, the WCJ found that Defendant/Employer could be entitled to a credit for Claimant's wage continuation payments but could not get a credit for the sick pay or sabbatical leave. Defendant/Employer appealed the WCJ's denial of credit for wage continuation and health sabbatical payments.

Resolution

Defendant/Employer is not entitled to credits from benefits that Claimant could have utilized for a non-compensable injury. As such, Defendant/Employer is not entitled to a credit for sick pay because Claimant could have used her sick days for a non-compensable injury. The same was applied to Claimant's sabbatical.

Additionally, Defendant/Employer did not offer sufficient evidence to categorize Claimant's payments as sick leave, wage continuation payments, or health sabbatical payments. Although Defendant/Employer sought to offer additional evidence to supplement the wage records, it was not allowed because the evidence was available to Defendant/Employer at the time the record closed, therefore was not after-discovered evidence.

Take Away

It is important to know how a claimant is being paid while off work due to a work-related injury. Although employers are entitled to credits for overpayment of disability benefits, claimants can accrue paid sick days (as we saw in this case) or other vested benefits—such as pensions—from which employers are not entitled to receive credits. Employers are not entitled to receive a credit for overpayment when claimants accrue benefits that could be used for reasons other than the work injury.

An example of when employers are entitled to a credit is when a claimant returns to work and is entitled to a Temporary Partial Disability payment, but is accidentally paid Temporary Total Disability. Since these are both payments that result solely from the work-related injury, the employer would be entitled to a credit. However, as we saw here, if a claimant takes a sick day, which is presumably a fully-paid day, the employer is not entitled to the difference between a fully-paid day and the claimant's compensation rate, because the claimant could have used that benefit for a non-work related reason. Additionally, this case highlights that evidence admitted into the record may not be explained using evidence not admitted into the record, unless it is after-discovered evidence.