

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
APRIL 2017 AT A GLANCE
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COLLATERAL ESTOPPEL/ HEART AND LUNG ACT

- An arbitrator's award of Heart and Lung benefits did not collaterally estop the WCJ from making her own determination as to Claimant's disability because Employer did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.
- To employ the precept of collateral estoppel in a workers' compensation proceeding following a Heart and Lung determination, there must be a two-part inquiry into the amount at risk and the governing procedure.

The amount at risk – The amount at risk in a Heart and Lung claims differs from what is at risk in a workers' compensation claim. This is because Heart and Lung benefits cease when the claimant's disability is determined to be permanent. The absence of a specified time limit does not transform the temporary nature of Heart and Lung benefits into lifetime benefits. This means benefits under the Heart and Lung Act are temporary, i.e., until the claimant returns to work or is found to be permanently disabled, but benefits under the Workers' Compensation Act may last a claimant's lifetime.

The temporary nature of Heart and Lung benefits, as opposed to potential lifetime benefits under the Workers' Compensation the Act, renders the amount in controversy between the two schemes incomparable.

Governing procedure- The governing procedure in a Heart and Lung case differs from the governing procedure in a Workers' Compensation Case. The Heart and Lung Act requires an arbitration proceeding that is more ad hoc and informal when compared to a proceeding governed by the Workers' Compensation Act. This is most notable with regard to the standards for the admission of medical evidence and the level of detail required in a WCJ's decision.

- Collateral estoppel, also known as issue preclusion, prevents relitigation of questions of law or issues of fact that have already been litigated in a court of competent jurisdiction. The doctrine of collateral estoppel is based on the policy

that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise.

Collateral estoppel will foreclose relitigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication is identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior action; and (5) the determination

Merrell v. WCAB (Commonwealth of Pennsylvania Department of Corrections) No. 493 C.D. 2016 (Decision by Judge Leavitt, April 3, 2017) 4/17

ATTORNEY FEES/ MEDICAL BILLS/PENALTY

- The employer improperly denied medical bills resulting in the imposition of penalties and unreasonable contest attorney fees where its denial was premised upon its belief that the entity billing for the physical therapy was different than the entity performing the physical therapy and it failed to submit any evidence contrary to billing entities position that the treatment was rendered by that entity in connection with a joint venture that was entered into between it and another physical therapy group, which was the basis for the Employer denying the bills.

In this matter PTI, who was the billing entity, leased space and employees from pt Group for PTI's Workers' Compensation business and PTI then paid a flat rate to the pt Group for use of the facility and use of their employees. The leased employees were employees of the pt Group but were independent contractors with respect to PTI under a staffing lease agreement.

There was no information from CMS, the Bureau or any state or federal law enforcement agency indicating that the arrangement between PTI and the pt Group was unlawful or fraudulent.

- Pursuant to Section 440(a) of the Act in any contested case where an insurer contests liability in whole or in part, a WCJ shall award counsel fees to an employee in whose favor the matter has been finally adjudicated unless the employer provides a reasonable basis for the contest. Section 440 is intended to deter unreasonable contests of workers' compensation claims and to ensure that successful claimants receive compensation undiminished by costs of litigation.

The issue of whether an employer's contest is reasonable is a legal conclusion based on the WCJ's findings of fact is a legal conclusion based on the WCJ's findings of fact.

In this matter Employer's failure to provide any evidence that establishes the alleged illegality of the joint venture or PTI's status as a health care provider, supported the WCJ's finding that Employer engaged in an unreasonable contest and the award of attorney's fees was proper.

- The WCJ did not err by awarding a penalty of 50%. This is because Section 435(d) (i) of the Act gives a WCJ discretion to impose a penalty which may be increased to fifty per centum in cases of unreasonable or excessive delays.

Here, the WCJ did not abuse its discretion in imposing a 50 percent penalty where Employer persisted in denying PTI's bills and, as the WCJ found, then failed to submit any evidence or credible testimony to refute PTI's status as the provider or demonstrate that there was anything illegal or improper about the leasing arrangements between PTI and the pt Group.

Derry Township Supervisors and Selective Insurance Company of America v. WCAB (Reed), No. 751 C.D. 2016 (Decision by Judge Pellegrini, January 30, 2017)4/17

SUBROGATION

- Pa. Supreme Court grants employer's Petition for Allowance of Appeal and agrees to address the following issues:
 - (1) Is compensation payable pursuant to Article III of the Pennsylvania Workers' Compensation Act, when the Claimant suffers a work related injury and is concurrently entitled to benefits under the Pennsylvania Workers' Compensation Act and the Heart and Lung Act?
 - (2) Did the Commonwealth Court err in its determination that a self-insured municipality [sic] is not entitled to subrogation, to the extent of the compensation payable pursuant to Article III of the Pennsylvania Workers' Compensation [Act], when it has concurrent obligations to an injured State Trooper under the Pennsylvania Workers' Compensation Act and the Heart and Lung Act?
- It will be recalled that the Commonwealth Court had held that the employer was not entitled to subrogation against the claimant's third party recovery resulting from a motor vehicle accident although the claimant stipulated to such right where Claimant was a public safety employee and his benefits fell under the Heart and Lung Act.

This was because pursuant to Section 1722 of the MVFRL a claimant is precluded from recovering the amount of benefits paid under the Heart and Lung Act from the responsible tortfeasors. There can be no subrogation out of an award that does not include these benefits.

Pennsylvania State Police v. WCAB (Bushta), No. 483 WAL 2016, (Decision by PER CURIAM, April 18, 2017) 4/17