

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JULY 2014 AT A GLANCE
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PENALTIES/ MEDICAL BILLS/ UTILIZATION REVIEW

- The employer did not violate the Act where it stopped paying medical bills that were the subject matter of a UR Request where the claimant argued the violation was premised upon the fact that the URO did not notice claimant's counsel on the Utilization Review Determination Face Sheet.

This is because, although Section of the Regulation 127.476 (c) requires that the URO's Face Sheet be served upon the attorneys for the parties, if known, Section 127.476 imposes no service requirement on Employer. Rather, the plain language of this section, including its title, imposes the requirement on the URO to serve the determination on all of the parties.

Because Section 127.476 does not impose a service requirement on Employer, Claimant could not establish that Employer violated the Act or its regulations solely based upon the violation of section 127.476 by its cessation of the payment of the claimant's medical bills that were the subject matter of the Utilization Review Request.

Marek v. WCAB (Logistics Express, Inc.) No. 2128 C.D. 2013 (Decision by Judge McCullough, July 16, 2014) 7/14

UTILIZATION REVIEW/ REASONED DECISION

- The WCJ did not issue a reasoned decision where she dismissed claimant's Petition to Review a Utilization Review Determination premised upon her finding that the URO examiner and Independent UR Examiner appointed by the WCJ credibly opined that the contested physical therapy was not reasonable or necessary because there was no evidence that Claimant had objectively or functionally improved.

This is because functional improvement is not required for palliative medical treatment to be deemed reasonable and necessary and, in the context of assessing whether the treatment was palliative, the WCJ also failed to make any credibility findings with respect to Claimant's testimony about his positive response to treatment.

- In the context of denying a Petition Seeking Review of a UR Determination the WCJ's decision was also not reasoned where upon issue a finding assessing

Claimant's treating physician, the WCJ simply stated that his opinions were "not convincing," with absolutely no explanation as to why. The WCJ's lack of elucidation was problematic because the treaters clinical observations of Claimant's response to treatment conflicted with the employer's expert observations, and the WCJ did not state why the URO examiner and Independent UR Examiner were more convincing.

- The Reasoned Decision provision of section 422(a) of the Act requires some articulation of the actual objective basis for the WCJ's credibility determination for the decision to be a 'reasoned' one that facilitates effective appellate review.

While the WCJ is the sole arbiter of credibility and evidentiary weight, he or she must provide an adequate basis for rejecting or accepting a witness's testimony when the witness does not testify live before the WCJ.

Objective factors that may support a WCJ's credibility determination include whether the expert's opinion is based on erroneous factual assumptions; whether the expert had less interaction with the claimant; whether the expert has a bias or interest in the matter; and whether the expert is more or less qualified than the opposing party's expert.

Cucchi v. WCAB (Robert Cucchi Painting, Inc.) No. 108 C.D. 2014 (Decision by Judge Friedman , July 17, 2014) 7/14

CLAIM PEITION/ UNDOCUMENTED WORKER/ EVIDENCE/ ADVERSE INFERENCE

- The Pa. Supreme Court affirms the Commonwealth Court and holds that an adverse inference about a claimant's immigration status cannot be drawn by the WCJ solely from a Claimant's invocation of his Fifth Amendment right against self-incrimination.

This is because the invocation of this right does not, by itself, constitute substantial evidence to support the WCJ's finding that Claimant was not a United States citizen, and was not otherwise authorized to work in this country.

The inference to be drawn from a party's failure to testify serves to corroborate the evidence produced by the opposing party. A party could not satisfy its burden of proof in a civil cause solely through reliance on the defendant's failure to testify.

In this matter the Claimant's invocation of his Fifth Amendment right against self-incrimination did not relieve Employer of its burden to present independent

and probative evidence regarding Claimant's citizenship status and his corresponding employment eligibility.

- A Claimant who has filed a Claim Petition does not have the burden of proof to establish his employment eligibility/immigration status under federal immigration law. Therefore the WCJ committed an error of law by suspending the claimant's compensation based upon his immigration status where the employer presented no independent evidence of Claimant's work eligibility status, nor was there any other evidence of record on this point.

The claimant only carries the burden of proof of establishing two things: (1) he or she was injured while in the course of employment, and (2) the injury resulted in a loss of earning power.

Once the claimant fulfills his burden in support of his Claim Petition the burden shifts to the employer, to produce evidence that Claimant's benefits on the basis that his loss of earning power was not related to his work-related injury. The employer is not required to file a Petition for Suspension during the litigation of the Claim Petition.

This is because in the context of a Claim Petition the WCJ may simultaneously adjudicate an employer's request to suspend any benefits for which the judge determines the claimant is eligible. The Employer's failure to file a formal suspension petition does not preclude the WCJ from also considering, after making a determination that Claimant was eligible for benefits, whether Employer was nevertheless, entitled to a suspension of those benefits.

Therefore, once claimant establishes that a work-related injury prevents a return to the time of injury job, a loss of earnings capacity is established. Once such a loss has been demonstrated, the claimant should generally be entitled to benefits, unless the employer can demonstrate that employment is available within the claimant's restrictions or continuing disability is not related to the work injury.

Kennett Square Specialties v. WCAB (Cruz) No. 69 MAP 2012 (Decision by Justice Todd, July 21, 2014) 7/14

SUSPENSION/MODIFICATION/ VOCATIONAL

- In order for an employer to modify a claimant's benefits under Section 413 of the Act the employer must demonstrate with medical evidence that the claimant's current physical condition has changed since the time of the last disability adjudication. The necessary change in condition has been defined as any change in the claimant's physical well-being that affects his ability to work. It can be the total recovery from an illness or merely that the symptoms have subsided.

Thus, where modification based upon earning capacity is sought, it is not necessary to demonstrate that a claimant's diagnoses have changed since the last proceeding, but only that his symptoms have improved to the point where he is capable of gainful employment.

- A diagnosis of malingering can be a sufficient change in condition as a matter of law to support a modification of benefits if it leads the medical expert to conclude that the claimant's disability or ability to work has changed.

Simmons v. WCAB (Powertrack International), No. 2168 C.D. 2013 (Decision by Judge Leadbetter, July 24, 2014) 7/14