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IN THIS ISSUE

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ASSESSMENT OF ATTORNEY FEE DISPUTE SHOULD CONSIDER AN ATTORNEY'S LEGITIMATE EXPECTATIONS OF A REASONABLE LEGAL FEE AS WELL AS CLAIMANT'S RIGHT TO CHOOSE COUNSEL

CASE SUMMARY

On October 24, 1983 Claimant was injured during the course of her employment with Philadelphia National Bank (Employer). Employer began to pay Claimant total disability payments pursuant to a Notice of Compensation Payable. Three years later, Employer filed a Termination Petition. Claimant retained the legal services of attorney Pitt to defend against the Termination Petition and entered into a Contingency Fee Agreement with attorney Pitt on January 20, 1987, wherein Pitt was to receive twenty percent "of any and all compensation paid." The Termination Petition was granted but Claimant later succeeded on a Petition for Reinstatement. In a September 19, 1989 decision, a Workers' Compensation Judge (WCJ) awarded Claimant $221.92 per week in total disability benefits and approved the fee agreement awarding attorney Pitt twenty percent of Claimant's workers' compensation (WC) benefits.

Claimant continued to receive her total disability benefits and attorney Pitt continued to receive a twenty percent fee for more than twenty years. There is no evidence that attorney Pitt performed any legal work for Claimant after September 1989 until April 2012 when settlement negotiations between attorney Pitt, on Claimant's behalf, and Employer's insurance carrier commenced.

On April 27, 2012, attorney Pitt sent a letter to Employer's insurance carrier in which he acknowledged

a settlement offer of $35,000 and issued a counter-offer of "the monetary equivalent of 5 years of wage loss benefits with continuing medical benefits." After additional negotiations failed to bear fruit, attorney Pitt sent a letter to Employer's insurer on June 11, 2012 withdrawing the settlement offer on behalf of Claimant.

On June 13, 2012 Claimant entered into an Attorney Fee Agreement with attorney Cullen (current counsel) granting him twenty percent of Claimant's WC benefits in exchange for representing her interests in her claim. On the same day, Claimant sent attorney Pitt a letter terminating his representation. The following day, attorney Cullen filed, on Claimant's behalf, a Petition for Review seeking resolution of the dispute between himself and attorney Pitt as to which attorney was entitled to receive a fee of twenty percent of Claimant's WC benefits as of June 14, 2012.

A hearing on the Petition for Review was held on October 2, 2012, at which Claimant and her son, Richard Bierman, testified. Claimant testified. Attorney Pitt did not provide any legal services for her from 1989 through 2010 and, since 2010, she spoke to Pitt on four occasions for fifteen minutes each. Attorney Pitt was discharged because Claimant was not satisfied with the settlement Pitt negotiated with Employer's insurance carrier. Claimant also stated that attorney Cullen provided more legal services for her in the previous four months than attorney Pitt has done in the previous ten years.

Mr. Bierman testified he was with his mother at all her meetings with both attorneys. At their first meeting, attorney Cullen advised Claimant to attempt to resolve any issues with attorney Pitt prior to seeking new representation. Mr. Bierman expressed frustration with attorney Pitt for not allowing him or Claimant to see the paper trail of settlement negotiations. Although attorney Pitt allowed him to read items on his computer over his shoulder, Mr. Bierman was not satisfied and felt that Pitt was not forthcoming with all the facts.

> During the pendency of the proceedings on the Petition for Review, Claimant and Employer's insurance carrier entered into a Compromise and Release (C&R) Agreement, which was approved by the WCJ on January 31, 2013. Pursuant to the C&R Agreement, Claimant received $75,000 plus ongoing medical benefits. The twenty percent counsel fee of $15,000 was placed in escrow pending resolution of the Review.

The WCJ circulated a Decision and Order on April 19, 2013 adjudicating the Petition for Review. Therein, the WCJ found Claimant and her son credible and issued the following relevant findings of fact.

> 23. This Judge finds that Attorney Pitt was discharged as Claimant's lawyer on June 13, 2012. The law is clear that a client always has the right to discharge a lawyer, with or without cause. However, a claimant may not simply repudiate a previously approved attorney fee and Attorney Pitt never released Claimant from the contractual obligation under the contingent fee agreement. Therefore, this Judge finds that Attorney Pitt's entitlement to the [twenty percent] Fee continued after June 13, 2012.
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> 24. This Judge finds that the [twenty percent] fee agreement with [Current Counsel] is fair, reasonable and in accordance with the terms of the Act.
>
> 25. This Judge finds that the attorney fee in dispute and held in escrow amounts to $15,000.00. This Judge finds that the entire fee is payable to [Current Counsel]. In rendering this finding, this Judge reasons as follows:
>
> a. It was [Current Counsel] that negotiated this $75,000settlement and represented her through the settlement process. Attorney Pitt asserts that,

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at a minimum, he would be entitled to[twenty percent] of $35,000.00 which was the offer extended through Attorney Pitt in April 2012. However, that offer was rejected. Moreover, on June 11, 2012, the settlement negotiation process was abandoned and terminated when Attorney Pitt advised the carrier that the Claimant was not interested in a settlement and that she preferred to receive the weekly checks(C-Pitt#3). The notion of settlement was rejected while Attorney Pitt was still her lawyer. Therefore, when [Current Counsel]began to represent the Claimant, there was no offer still "on the-table," negotiations were not ongoing and [Current Counsel] began negotiations fresh and anew. Further evidence of this fact is that it took seven months after Attorney Pitt was discharged before the [C&R] Agreement was entered.

b. This Judge acknowledges that it was Attorney Pitt's efforts in the late 1980's [(sic)] that preserved Claimant's entitlement [t]o workers' compensation and ultimately allowed her to receive this settlement. However, this Judge finds that Attorney Pitt was reasonably compensated for his past legal services. Attorney Pitt was paid a fee over the course of 26+ years of approximately $60,000.00. Moreover, there has been very little work performed in recent years. Claimant testified that there was basically no interaction between Attorney Pitt and her in the decades of the 1990's [(sic)] and 2000's [(sic)].Since 2010, she met with Attorney Pitt for only 15 minutes on4 occasions and there is evidence of only two short letters from Attorney Pitt to the carrier on her behalf. No testimony or other evidence was presented from Attorney Pitt to refute these facts, to establish the amount of labor exerted on the file or to establish that he was not adequately compensated for his efforts, despite this Judge continuing the matter after the hearing of October 2, 2012 for this very purpose (Notes of Testimony, 10/2/2012, pg 50-52).

c. In this Petition, [Current Counsel] seeks approval of his fee as of June 14, 2012. The fee between this date and the[C&R] has already been paid to Attorney Pitt and this issue is therefore moot. In any event, this Judge finds that limiting [Current Counsel] to the $15,000.00 fee generated from the settlement is fair and adequate compensation for his efforts.[Current Counsel]'s main accomplishment was negotiating the settlement and representing her through the [C&R] process. Therefore, it makes sense to link his fee to the fruit of his efforts, namely [twenty percent] of the settlement which amounts to $15,000.00.

The WCJ then concluded that "Attorney Pitt is entitled to the [twenty percent] fee up to the date of the [C&R Agreement]. [Current Counsel] is entitle[d] to the entire [twenty percent] attorney fee from the settlement amount."

Attorney Pitt appealed to the Board. The Board affirmed the WCJ's decision.

Attorney Pitt then appealed to the Commonwealth Court.

On appeal, Attorney Pitt argued that the WCJ erred by awarding the entire contingency fee derived from the C&R Agreement to Current Counsel instead of equitably apportioning the fee between the two attorneys based in *quantum meruit*. Pitt contended that he should receive, at the least, twenty percent of the $35,000 settlement he negotiated that was rejected by Claimant. Current Counsel responded by contending that the WCJ had the authority to address the fee dispute and fairly allocated compensation for the work performed by the two attorneys.

The Court noted that pursuant to Section 442 of the Workers' Compensation Act (Act), a WCJ has the authority to resolve fee disputes between two successive attorneys in a WC case when "the fee agreement or petition was filed before claimant discharges the attorney," See Hendricks v. Workers' Compensation Appeal Board (Phoenix Pipe & Tube), 909 A.2d 445 (Pa. Cmwlth. 2006), cited by the Court.

The Court concluded, after reviewing the evidence, that the WCJ adequately balanced Claimant's right to select an attorney of her choice with both attorneys' expectations of receiving reasonable legal fees. Claimant was dissatisfied with attorney Pitt's representation during settlement negotiations and discharged him prior to reaching a settlement with Employer's insurance carrier, the Court noted. Attorney Pitt's efforts ceased upon being discharged on June 13, 2012 and Current Counsel worked for seven

months to reach a settlement with Employer's insurance carrier that resulted in the approval of the C&R Agreement on January 31, 2013 under which Claimant received $75,000 plus ongoing medical benefits, the Court said. The Court pointed out that Claimant testified that attorney Pitt did not perform any legal work for her for more than twenty years and Pitt introduced only two short letters sent to Employer's insurance carrier in 2012 in rebuttal. Attorney Pitt was compensated with close to $60,000 during the time he represented Claimant, the Court noted. Attorney Pitt was also compensated for the seven months of fees during which Current Counsel was representing Claimant and negotiating the C&R Agreement, the Court said. Under these circumstances, where no settlement offer was on the table when Current Counsel began to represent Claimant and it was Current Counsel who negotiated the C&R Agreement, the WCJ did not err or abuse his discretion by awarding the twenty percent fee from the C&R Agreement to Current Counsel, the Court held.

The Court therefore affirmed the decision below.

Dolores Bierman v. Workers' Compensation Appeal Board(Philadelphia National Bank); Cmwlth. Ct. of PA; No. 1336C.D. 2014; Opinion by Judge Cohn Jubelirer; Filed April 1, 2015.

DEFENSE PERSPECTIVE

As stated in the past by this writer, Employers need not get involved or take sides in these disputes and should pay according to the WCJ's Order. It is possible, however, that claimant's current or former counsel may attempt to subpoena employers or employees' counsel to strengthen their (claimant counsel's) position as to what efforts they had put in in representing said claimant.

CLAIMANT PERSPECTIVE

I leave it to the reader to decide whether or not it is a good thing for all Claimants' attorneys that one particular attorney seems to be the attorney who is "making the law" as it applies to workers' compensation attorney fee disputes. It would seem that WCJs have a great deal of discretion on this issue. At least this Decision, more so than Mayo v. WCAB ____A.3rd ____ (Pa. Cmwlth. 2003), Bisel Newsletter recited at Volume 20, Issue 3, March, 2015), sets forth certain factors that should be considered, rather than simply giving the second attorney the entire fee. The WCJ must balance the attorney's legitimate expectations of a reasonable legal fee with the right of a Claimant to be represented by counsel of his or her choice. This does not mean that Claimants should be in a position to unilaterally negate responsibilities to the former attorney. It is also noted here that there was, officially, no settlement offer on the table when the second counsel began representation. To this counsel, the evidence that subsequent counsel suggested initially to the Claimant and her son that they try to work out their differences with the initial attorney is the right approach to take here. This counsel does, however, question second counsel's immediate filing, upon undertaking representation, a Petition to Review simply to change who is to receive the ongoing attorney's fee. Such a Petition does not add anything to Claimant's benefits, and effectively seeks solely to receive a fee from prior counsel's efforts. Nothing in the Decision here would prevent a third counsel from entering their appearance with a ten percent (10%) fee, or a willingness to advise Claimant to accept a low offer, and change the equation all the more

COMMON LAW MARRIAGE ESTABLISHED THROUGH NATIVE AMERICAN TRADITIONS WITH DEATH BENEFITS AWARDED TO WIDOW

CASE SUMMARY

On November 10, 2011, Claimant (widow) filed a Fatal Claim petition alleging that Decedent (husband) died on October 11, 2011 as a result of multiple traumatic injuries sustained in a utility-tractor rollover accident. Claimant listed herself as Decedent's wife and their daughters, Shea and Tarwyn Tietz, as dependents. In a subsequently filed Stipulation, Employer agreed that Decedent's death was caused by work-related injuries, that Decedent's daughters were entitled to weekly death benefits of $180.18 under Section 307(1)(b) of the Workers' Compensation Act

(Act) and that their benefits should be paid to Claimant who was their legal guardian. The parties did not resolve whether Claimant was legally married to Decedent at the time of his death. They agreed to submit the issue for the Workers' Compensation Judge's (WCJ's) determination and stipulated that Employer would be entitled to a credit for previously paid death benefits upon the WCJ's determination that Claimant was entitled to death benefits as Decedent's surviving wife.

Before the WCJ, Claimant testified as follows to establish that she and Decedent entered into a common-law marriage contract on June 12, 2004. Claimant is a Native American (Nanticoke and Cherokee). Decedent was also a Native American (Mohawk). As Native Americans, Claimant and Decedent were "very, very much into [their] culture." Decedent previously asked Claimant's parents "for [Claimant's hand in marriage." On Saturday, June 12, 2004, Decedent and Claimant, who had been living together, visited Claimant's parents. Decedent told Claimant's parents that he and Claimant would come back as husband and wife. Claimant's parents responded that they were happy for Decedent and Claimant.

Decedent and Claimant then went down to the field by the stream behind the house of Claimant's parents to have a traditional Native American marriage ceremony. The ceremony involved wrapping a Native American blanket around them, which signified their "joining as one," and exchanging vows. Decedent first asked Claimant to be his wife. Claimant then asked Decedent to be her husband. Decedent prayed that "Creator would watch over [them] and keep [them] safe." Following the Native American tradition, they exchanged wedding gifts. Decedent gave Claimant meat, which signified that he would be the provider for the family. Claimant in turn gave Decedent corn wrapped in red, the Native Americans' favorite color. Although it was not customary for a Native American wedding, they also exchanged silver wedding rings and bands. The marriage ceremony took 30 to 45 minutes.

After the ceremony, Claimant and Decedent went back to Claimant's parents who were outside waiting for them. Claimant's mother took photographs of Claimant and Decedent in the front yard. One photograph taken on the day of the ceremony showed Decedent wearing the silver wedding ring that Claimant gave him during the marriage ceremony. To celebrate the marriage, Claimant's mother prepared the traditional meal of fried bread and venison. Photographs taken at subsequent events showed Decedent wearing the silver wedding ring and band and Claimant wearing the silver wedding ring. Claimant was wearing the silver wedding ring and band at the hearing.

After the marriage ceremony, Claimant and Decedent continued to live together and held themselves out as husband and wife until Decedent's death. They had two daughters born in 2005 and 2011. Claimant also worked for Employer from 2004 until she became pregnant with her second daughter in 2011. She used Morrison-Tietz and Tietz interchangeably as her last name. Decedent and Claimant did not file a joint tax return because they believed that they were required to wait for 7 years before their common law marriage would be recognized by the IRS and other governmental agencies. Claimant's mother, Jean Morrison, a Native American who was familiar with the Native American marriage ceremony, testified corroborating Claimant's testimony.

Claimant also presented numerous documentary evidence. Exhibit C-2 included the Susquehanna County Coroner's report, dated February 6, 2012, listing Claimant as Decedent's wife; the rental application completed by Decedent and Claimant in December 2005, utility bills sent to Decedent and Claimant; the school district's parental consent forms signed by Decedent and Claimant; a 2005 note congratulating "Tara Tietz" on the birth of her daughter; a contract signed by Claimant, "Tara L. Tietz," to perform Pow Wow dance at the 2009 Native American Heritage Mini Pow Wow; the schedule for the Clifford Township Bicentennial Events, listing "Wayne and Tara Tietz" for American Indian Art and Display; a Christmas card that Decedent gave Claimant, stating that "I Thank God for Our Marriage"; and a letter from the Department of Labor, Occupational Safety and Health Administration offering condolences to "Mrs. Tara Tietz" on "the tragic death of [her] husband." The documentary evidence also included the bill for Decedent's funeral services sent to Claimant (Exhibit C-3); the photographs of Decedent, Claimant and their children (Exhibit C-5); and, the bank account ownership change from Decedent to Decedent and Claimant (Exhibit C-9).

On May 3, 2012 the Court of Common Pleas of Susquehanna County, Orphans' Court Division issued a final decree which stated that "Tara L. Morrison (a.k.a. Tara Tietz) is the surviving spouse of Wayne Tietz" and that she "is entitled to receive as an intestate heir of Wayne Tietz." Exhibit C-10. On June 13, 2012, the Register of Wills of Susquehanna County granted Claimant letters of administration for Decedent's estate. Exhibit C-11.

The WCJ found the testimony of Claimant and her mother and the documentary evidence credible. Th3e WCJ concluded that Claimant established that she and Decedent entered into a common-law marriage contract on June 12, 2004 and that she was entitled to death benefits as Decedent's surviving spouse. The WCJ accordingly granted the Fatal Claim petition and ordered Employer to pay death benefits to Claimant and her daughters with a credit to be given to Employer for benefits already paid.

Employer appealed to the Board. The Board affirmed the WCJ's decision.

Employer then appealed to the Commonwealth Court.

The Court noted that in PNC Bank Corporation v. Workers' Compensation Appeal Board (Stamos), 831 A.2d 1269 (Pa. Cmwlth. 2003) it prospectively abolished common-law marriages in Pennsylvania. The legislature, the Court noted, subsequently amended Section 1103 of the Marriage Law, 23 Pa. C.S. §1103, effective January 24, 2005, statutorily abolishing common law marriages in Pennsylvania. Section 1103 provides: "No common-law marriage contracted after January 1, 2005, shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid." In Costello v. Workers' Compensation Appeal Board (Kinsley Constr., Inc.), 916 A.2d 1242 (Pa. Cmwlth. 2007), the Court pointed out, it held that the legislative action of amending Section 1103 superseded the PNC Bank holding and that any common-law marriage contract entered into on or before January 1, 2005 remained valid. Claimant, the Court said, was therefore required to prove that she and Decedent entered into a valid common-law marriage contract on or before January 1, 2005 to be entitled to death benefits as Decedent's surviving wife.

A common-law marriage contract, the Court said, does not require any specific form of words; all that is essential is proof of an agreement to enter into the legal relationship of marriage at the present time. See Estate of Gavula, 417 A.2d 168 (Pa. 1980), cited by the Court. Common-law marriage cases most frequently involve a putative surviving spouse's claim for a share of the decedent's estate and thus present "a fruitful source of perjury and fraud to be tolerated and not encouraged." *Id.* Consequently, common law marriage claims are reviewed "with great scrutiny." *Id.*

The Court noted a party claimant a common-law marriage "bears the burden of producing clear and convincing evidence of the exchange of words creating the marriage contract." See Cooney v. Workers' Comp. Appeal Bd. (Patterson UTI, Inc.). 94 A.3d 425 (Pa. Cmwlth. 2014), *appeal denied*, ___A.3d___ (Pa.., No. 393 WAL 2014, filed February 10, 2015, cited by the Court. If a putative spouse "who is able to testify and fails to prove, by clear and convincing evidence, the establishment of the marriage contract through the exchange of *verba in praesenti*, then that party has not met its 'heavy' burden to prove a common law marriage," the Court said, citing Staudenmayer v. Staudenmayer, 714 A.2d 1016 (Pa. 1998).

If a party is unable to testify as to the exchange of v*erba in praesenti* but proves constant cohabitation and a reputation of marriage which is not partial or divided but is broad and general, a rebuttable presumption arises in favor of a common law marriage, the Court stated, citing Staudenmayer, supra., 714 A.2d at 1020-21. Such rebuttable presumption is "one of necessity" to be applied only in cases of the party's "inability to present direct testimony regarding the exchange of *verba in praesenti*," *Id.* at 1021. There is no basis to resort to the presumption if the claimant is available to directly testify to the words allegedly exchanged with the decedent, the Court said, citing Giant Eagle v. Workmen's Comp. Appeal Bd. (Bahorich), 601 A.2d 387 (Pa. Cmwlth. 1992). The validity of a common-law marriage is a mixed question of law and fact, the Court noted, citing PPL v. Workers' Comp. Appeal Bd. (Rebo), 5 A.3d 839 (Pa. Cmwlth. 2010).

Employer first argued that the WCJ incorrectly required Claimant to establish a common-law marriage

"by substantial evidence," rather than "by clear and convincing evidence," equating the appellate review standard with the applicable burden of proof.

The Court noted that because common-law marriage claims are discouraged and not favored by the courts and are reviewed with great scrutiny, a party claiming the existence of a common-law marriage has the heightened burden of proving the marriage by "clear and convincing evidence." Staudenmayer, supra. Clear and convincing evidence is "evidence that is 'so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts of the issue."' See Rohm & Haas Co. v. Cont'l Cas. Co., 781 A.2d 1172 (Pa. 2001) [quoting Lessner v. Rubinson, 592 A.2d 678 (Pa. 1991), cited by the Court.

Employer argued that Claimant's testimony cannot constitute clear and convincing evidence of a common-law marriage because her testimony was proscribed by the Dead Man's Act, 42 Pa. C.S. §5930, which the Court noted, provides in relevant part:

> Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, … and his right thereto or therein has passed … to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased … party, shall be a competent witness to any matter occurring before the death of said party …

The purpose of the Dead Man's Act, the Court said, is "to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely to the *interest* of a decedent, when the decedent's representative would be hampered in attempting to refute the testimony or be in no position to refute it, by reason of the decedent's death. See In re Estate of Hall, 535 A.2d 47 (Pa. 1987), cited by the Court (emphasis in original). The application of the Dead Man's Act, therefore, requires that "the interest of the proposed witness be adverse to the interest of the decedent's estate," the Court said, citing Punxsutawney Mun. Airport Auth. V. Lellock, 745 A.2d 666 (Pa. Super. 2000).

In this matter, the Court pointed out, Employer did not raise the applicability of the Dead Man's Act before the WCJ and did not object to Claimant's testimony regarding the exchange of *verba in praesenti*. Employer, therefore, waived the issue due to failure to properly preserve it before the WCJ, the Court said, citing Clayton v. Workers' Comp. Appeal Bd. (Carpentry Concepts, Inc.), 881 A.2d 51, 53 n.7 (Pa. Cmwlth. 2005). Even had Employer properly preserved the issue, the Court said, Claimant's testimony was not subject to the Dead Man's Act. Nothing in the record suggested that her interest was in any way adverse to the interest of Decedent's estate, the Court stated. Claimant's testimony was not objected to by a representative of Decedent's estate or any other individuals at the hearing, the Court noted. She was later determined to be Decedent's surviving spouse and intestate heir. She was granted the letters of administration and became the representative of Decedent's estate. The record thus established that Claimant's interest was not adverse to the interest of Decedent's estate, the Court said. Hence, her testimony was not proscribed by the Dead Man's Act, and she was competent to testify at the hearing, the Court concluded.

Finally, the Court pointed out that in a workers' compensation case, credibility determinations and the evaluation of evidentiary weight are the province of the WCJ who may accept and reject the testimony of any witness in whole or in part. See Clear Channel Broad v. Workers' Comp. Appeal Bd. (Perry), 938 A.2d 1150 (Pa. Cmwlth. 2007, cited by the Court. Claimant's testimony accepted by the WCJ as credible constitutes clear and convincing evidence that she and Decedent exchanged v*erba in praesenti* on June 12, 2004, and created their legal relationship of husband and wife, the Court said. She also presented the overwhelming evidence of constant cohabitation and a reputation of marriage, although she was not required to do so because she established the existence of a common-law marriage through the evidence of exchange of *verba in praesenti*, the Court stated. She established that she and Decedent continued to live together with their children after the marriage ceremony until Decedent's death and that they held themselves out as husband and wife and were recognized as such in the community and at work, the Court noted.

The Court thus upheld this award.

Elk Mountain Ski Resort, Inc. v. Workers' Compensation AppealBoard (Tietz, deceased, and Tietz-Morrison), Cmwlth. Ct. of PA;No. 1017 C.D. 2014; Opinion by Judge Leadbetter; FiledApril 7, 2015.

DEFENSE PERSPECTIVE

Senior Judge Gardner Colins filed a concurring opinion that he would find this a ceremonial marriage as well.

Clearly, the occurrence here preceded the law effective January 24, 2005. However, Senior Judge Gardner-Colins in the concurring opinion raised an issue that may come into play in matters post-dating January 24, 2005, that being whether requiring marriage licenses are constitutional in certain circumstances.

Regarding the Dead Man's Act issue, it is clear the issue must be raised before the WCJ and it must be shown the witness' testimony is somehow adverse to the interest of a decedent.

CLAIMANT PERSPECTIVE

Judge Gardner Colins comments on the "erudite, well-crafted Opinion of the Majority" and the review of the facts supporting the "beautiful marriage ceremony, which conformed to Native American cultural traditions." This writer certainly agrees with Gardner Colins' assessment of the Opinion and review of the marriage ceremony. There did not seem to be, in reading the Opinion here, any dispute regarding the facts as found by the WCJ. The "Dead Man's Act" issue was truly a non-issue since that Act prevents a party from testifying when their interest is adverse to the right of the deceased. It is hard to imagine how the benefits sought by the purported widow, who lived with decedent and was raising two (2) children with him, would be adverse to his interests. Substantial evidence, found credible, certainly supported the Decision of the WCJ here.

EMPLOYER HAS THE BURDEN TO ESTABLISH THAT IT HAS A RIGHT OF SUBROGATION, AND ONCE IT DOES SO, BENEFITS CAN BE SUSPENDED UNTIL AND UNLESS CLAIMANT PROVIDES INFORMATION REGARDING ANY THIRD PARTY RECOVERY

CASE SUMMARY

On or about July 31, 1985, [Joseph Reed] filed a Claim Petition alleging he sustained a work-related occupational disease in the nature of lung disease, shortness of breath, including, but not limited to, asbestosis on June 27, 1985, while in the course and scope of his employment as a pipe fitter for [Employer]. Employer filed a late answer denying the allegations. In a Decision and Order circulated February 18, 2004, the Workers' Compensation Judge (WCJ) granted [Joseph Reed's] Claim Petition after finding Employer failed to file a timely answer. However, the WCJ suspended benefits as of November 29, 1990 after finding [Joseph Reed] failed to follow through on work that was available to him within his restrictions as of that date.

The matter ultimately went to the Commonwealth Court which issued an unpublished decision Reed v. Workers' Compensation Appeal Board (Allied Corporation and Travelers Insurance Co., (Pa. Cmwlth., No. 688 C.D. 2006, filed April 4, 2007) (Reed I), which held, *inter alia*, that WCJ Seelig did not err in suspending partial benefits for the closed period of June 27, 1985 through November 29, 1990, until Claimant disclosed the amount of monies recovered in the third-party tort action. Claimant petitioned for allowance of appeal of Reed I, which the Supreme Court denied. Reed v. Workers' Compensation Appeal Board (Allied Corporation and Travelers Insurance Co., 944 A.2d 759 (Pa. 2007) (order denying petition for allowance of appeal)).

Not long after, Claimant filed Review, Modification and Reinstatement Petitions. The WCJ dismissed the Petitions because Claimant failed to disclose the third-party settlement amounts.

The matter was appealed to the Board, which affirmed the dismissals.

Donna Palladino (Claimant), Executrix of the Estates of Joseph Reed and Alice Reed, deceased, appealed to the Commonwealth Court.

Claimant raised a number of issues on appeal, as follows: (i) the WCJ's findings of fact are not supported by substantial evidence; (ii)) the WCJ demonstrated a capricious disregard of competent evidence; (iii) the WCJ failed to issue a reasoned decision; and (iv) the WCJ erred by placing the burden of proof on Claimant to demonstrate that no third-party monies were recovered for purposes of subrogation under Section 319 of the Workers' Compensation Act (Act).

In the case before the WCJ, Claimant Palladino testified that her parents Joseph and Alice Reed had resided together until Joseph Reed was admitted to a nursing home in 2004, which the WCJ found was in direct conflict with Alice Reed's will, which stated that she and Joseph Reed had been separated for over thirty (30) years. Due to this conflict, the WCJ found that Claimant's entire testimony was called into question, "particularly her responses to questions concerning the Third Party Recovery," including her testimony that she had no knowledge of any recoveries and that she had shredded all records for her mother's estate and assumed her mother had done the same for her father's estate. The WCJ also found that the Joint Tort Release executed by Joseph and Alice Reed releasing Owens, Illinois Corporation, and others from liability "for the sole consideration of $1.00, and other valuable considerations to them in hand paid," established that the 1985 Court of Common Pleas case was settled, but failed to establish the amount of the settlement or Third Party Recovery. The WCJ found the testimony of Claimant's counsel's former and current secretaries credible, but only to the extent that neither secretary had any information to offer, stating that their testimony was credible as with "any good secretary she sees nothing and hears nothing."

Employer had presented the testimony of Eric Kadish, Esquire, an employee of Maron, Marvel, Bradley and Anderson, the law firm representing the defendants in the Third Party Tort Action. Mr. Kadish was not personally involved in the Third Party Tort action. The WCJ summarized Mr. Kadish's testimony as follows:

> He testified that there was a group settlement involving six[c]laimants in 1992. He testified that on behalf of Owens Illinois, the Reed File indicated that there was a settlement with [Claimant's counsel] on behalf of Mr. Reed, and a number of other [of Claimant's counsel's] clients. The witness further went on to present a Release signed by Mr. Reed for the amount of $1.00, and testified that it was common practice in asbestos litigation for all releases to be in the amount of$1.00 "and or other consideration" and frequently more than a $1.00 was involved, with each individual plaintiff getting different amounts. The common practice was in group settlements; the division of the funds was left to the discretion of [c]laimant's attorney with the understanding that all clients consented. In this group, there were six plaintiffs.

The WCJ found Mr. Kadish's testimony credible and stated "I overrule all objections to this testimony, and find as a fact that Mr. Reed received something as part of a group settlement." In addition to Mr. Kadish's testimony, Employer submitted the docket entries of the Third Party tort action, which demonstrated that the action was settled after five (5) days of trial, but which the WCJ found "unfortunately are of no help in determining the amount of settlement." Employer also submitted a letter addressed to Claimant's counsel that sought the amount of the Third Party Recovery so that the workers' compensation benefits owed to Claimant could be calculated. The WCJ concluded that the previous WCJ decision and order placed the burden on Claimant to establish the amount of the Third Party Recovery, that Claimant could not shift the burden of proof onto Employer by filing the Petitions at issue, and that Claimant had failed to carry the burden by accounting for the monies received as a result of settling the Third Party Tort Action.

The Court noted that Claimant's individual issues present variations on a single argument: the evidence supported the conclusion that Claimant received a nominal $1.00 for settling the Third Party Tort Action and the WCJ erred by concluding otherwise.

Employer contended that the Modification, Reinstatement and Review Petitions that Claimant filed were nothing more than, "a conspicuously contrived effort to overturn an earlier February 18, 2004 suspension order by WCJ Seelig, which had been affirmed by

every available appellate body including the [Pennsylvania] Supreme Court." Simply put, Employer argues that the issues raised by Claimant are without merit and the Board should be affirmed.

The Court first addressed Claimant's argument that the WCJ erred by placing the burden on Claimant to establish the amount of the Third Party Recovery. Claimant argued that under Section 319 of the Act, Employer has the burden to establish that the automatic subrogation provision has been triggered. Claimant misconstrues the first WCJ's ruling, the Court said. Said WCJ concluded that Employer satisfied its burden under Section 319, thereby triggering the automatic subrogation provision, the Court said, noting it affirmed and the Supreme Court declined to review that decision. The only question remaining is the amount of the recovery, the Court stated.

The Court noted that Section 319 of the Act provides, in pertinent part, as follows:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the **employer shall be subrogated** to the right of the employee, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer…

77 P.S. §671. The Court noted that the Supreme Court has held that this "statute is clear and unambiguous. It is written in mandatory terms and, by its terms, admits of no express exceptions, equitable or otherwise. Furthermore, it does more than confer a 'right' of subrogation upon the employer; rather, subrogation is automatic." See Thompson v. Workers' Compensation Appeal Board (USF&G Co.), 781 A.2d 1146, (Pa. 2001), cited by the Court.

The text of the statute clearly and unequivocally establishes the contour of the employer's burden, the Court stated, citing Dale Manufacturing Company v. Bressi, 421 A.2d 643 (Pa. 1980). An employer must demonstrate that it is compelled to make payments for a claimant's work-related injury by reason of the negligence of a third party and that the funds the employer is seeking to recover were paid to the claimant for the same compensable injury for which the employer is liable under the Act, the Court said, citing Kennedy v. Workers' Compensation Appeal Board (Henry Modell & Co., Inc.), 74 A.3d 343 (Pa. Cmwlth. 2013). Once an employer's burden has been satisfied, subrogation is automatic, the Court said. The statute does not make subrogation contingent upon an employer demonstrating the amount of recovery, the Court stated. Moreover, the statute would be wholly undermined if a condition was read into the text to make subrogation dependent upon an employer proving the amount of recovery, the Court said. Such a condition would require an absurd reading of the text and in practice would be unworkable, the Court added.

The Court found no error on the burden of proof issue.

Next, the Court addressed the "reasoned decision" issue and Claimant also argued evidence was capriciously disregarded. The Court said the WCJ's January 27, 2012 decision identified and reviewed the evidence and discussed the rationale for each finding of fact and conclusion of law. Regarding the present and former secretaries of Claimant's counsel, the WCJ discussed their testimony individually and found each credible but found that the testimony lacked any probative value, the Court noted. For example, regarding Claimant's counsel's former secretary, the WCJ found she had not seen any of the documents concerning this case, the Court said. She does not know where Claimant's counsel keeps the Reed file, and was unaware of where the litigation bank accounts might have been located. Similarly, regarding Claimant's counsel's current secretary, the Court said, the WCJ found that "she did not see any records pertaining to the Reed's Third Party Tort Action, and that Claimant's counsel decides when to close filed, and which files to destroy. She is unaware of the location of counsel's bank accounts as she makes no deposits." The WCJ did not capriciously disregard the testimony offered by Ms. Rocca and Ms. Nasto, he simply found it unhelpful, and he explained why sufficiently to satisfy the reasoned decision requirement, the Court said.

Regarding the testimony of Mr. Kadish, who testified live before the WCJ, Claimant argued that this testimony was uncorroborated hearsay. The Court noted the WCJ concluded that Mr. Kadish's testimony was supported by the settlement releases executed on December 2, 1992, which were signed by Mr. and Mrs. Reed, as well as their counsel, and notarized. Even if the release in the Third Party Tort Action did not corroborate Mr. Kadish's testimony, the testimony was

not hearsay, the Court said. The WCJ would not allow Mr. Kadish to testify to the sum involved in the group settlement and restricted his testimony to the law firm's business records and common practices in asbestos litigation. See Pa.R.E. 803(6) cited by the Court (business record exception rule against hearsay). As a result, the Court noted, although the WCJ based his finding on Mr. Kadish's testimony as corroborated by other evidence in the record, Mr. Kadish's testimony alone was competent to support a finding of fact.

Next, the Court pointed out, the WCJ discussed the testimony from Claimant's deposition and rejected Claimant's testimony as lacking credibility because her characterization of her parents' relationship conflicted with the probate documents from her mother's estate. Credibility determinations are within the sole province of the WCJ and will not be disturbed on appeal, the Court said. The WCJ discussed Claimant's testimony and clearly articulated why he rejected that testimony and the WCJ did not deliberately disregard Claimant's testimony, the Court stated. Likewise, the WCJ did not rely on incompetent evidence in his use of the letter sent by Employer to Claimant's counsel. The WCJ merely noted the fact that Employer had asked for the amount of Claimant's Third Party Recovery and that Claimant's counsel had not responded, the Court said.

In light of the above, the Court agreed Claimant failed to produce evidence to substantiate the claim that the Third Party Recovery was $1.00 and upheld the order of the Board that affirmed the WCJ.

Joseph Reed, deceased, Donna Palladino, Executor of the Estate of Joseph Reed and Alice Reed, deceased v. Workers' Compensation Appeal Board (Allied Signal, Inc. and it's successor in interest Honeywell, Inc. and Travelers Insurance Co.); Cmwlth. Ct. of PA; No. 879 C.D. 2014;Opinion by Senior Judge Colins; Filed April 21, 2015.

DEFENSE PERSPECTIVE

As noted by the Court, Defendant's obligation to pay the compensation awarded remains awaiting satisfactory documentation concerning the settlement of the Third Party Action.

Claimant has the burden of proof to show what was paid in the Third Party Recovery and has failed to meet that burden. What was produced was evidence showing $1.00 "and other valuable considerations." What were the "other valuable considerations?"

If Claimant produces acceptable evidence at some point, Employer should certainly argue no interest should be payable due to Claimant's delay in producing the evidence.

CLAIMANT PERSPECTIVE

The Claim Petition filed by Joseph Reed alleged a work-related occupational disease in the nature of a lung disease, essentially asbestosis. Mr. Reed also filed a third party claim regarding the very same injuries which resulted, after five (5) days of trial, in settlement and the signing of a Release for $1.00. Court Decisions have strongly established an employer's right of subrogation with respect to any third party claim, and this Decision here affirms an assessment that if a Claimant is unwilling, or unable, to disclose the amount of the third party settlement (or recovery) benefits would be suspended. Counsel for Claimant in this matter was also counsel in the third party action. Knowing of an employer's right of subrogation, one has to wonder whether the manner in which this litigation has been pursued complies with, at a minimum, the responsibility of counsel to act with candor toward the Tribunal. If counsel knows, and most assuredly they must, the actual monies paid to Mr. Reed from the third party settlement, it would seem the approach taken here was in violation of certain Rules of Professional Conduct. Judge Gardner Colins noted his concern, directing counsel to various Rules of Professional Conduct.

EMPLOYER PERMITTED TO ISSUE MORE THAN ONE NTCP

CASE SUMMARY

Claimant sustained a work-related injury on March 7, 2011, during the course of her employment as a warehouse worker. On May 9, 2011, Employer issued a Notice of Temporary Compensation Payable—Medical Only (May, 2011 NTCP), by which Employer agreed to pay for Claimant's medical treatment for

her alleged work injuries, identified as left knee, left shoulder, and left hand contusions. Employer also indicated on that May 2011 NTCP that the ninety-day injury-investigation period granted to employers under Section 406.1(d)(6) of the Workers' Compensation Act (Act) began the day after Claimant sustained her injuries—March 8, 2011—and ended on June 5, 2011. On June 13, 2011, the Bureau of Workers' Compensation (Bureau issued a Notice of Conversion of Temporary Compensation Payable to Compensation Payable regarding the May 2011 NTCP, based upon the passing of the ninety-day period, and, thus, the May 2011 NTCP was converted by operation of law to an NCP (medical only).

On August 4, 2011, Employer issued a second NTCP (August 2011 NTCP). The record did not indicate why the second NTCP was issued but it appeared Employer issued the second NTCP either out of concern for Claimant's loss of wages or out of some abundance of caution regarding liability for a possible left labrum and bicep tear and Employer wanted the opportunity to investigate these other conditions.

With regard to Claimant's potential labrum and bicep conditions, Employer indicated on that NTCP that the ninety-day period for those conditions began on July 20, 2011, and ended on October 17, 2011. The August 2011 NTCP initially included a check mark on the form suggesting that it, like the May 2011 NTCP, was a "medical only" NTCP. That form, however, also (inconsistent with a "medical only" NTCP) listed a weekly compensation rate for Claimant. Employer issued a second "corrected" NTCP (hereafter the August 2011 NTCP) that same day, apparently indicating that it did not intend for the NTCP filed earlier that day to be a "medical only" NTCP. Unlike the earlier NTCP Employer issued that day, the corrected form did not have a check mark indicating that Employer intended to provide compensation only for medical treatment.

On September 15, 2011, Employer issued a Notice Stopping Temporary Compensation (NSTC). Employer checked a box on that Bureau form indicating that Employer "decided not to accept liability, and attached is a notice of Workers' Compensation Denial. If you believe you suffered a work-related injury, you will be required to file a claim petition with the Bureau of Workers' Compensation in order to protect your future rights."

Employer attached a Notice of Compensation Denial (NCD) to the NSTC, indicating that Employer was declining to pay wage loss benefits to Claimant based upon its determination that Claimant had "not suffered a loss of wages as a result of an already accepted injury." The NCD, however, inconsistent with the August 2011 NTCP, identified the alleged conditions as the contusion injuries for which Employer was already liable based upon the earlier converted May 2011 NCP. The NCD provided that Employer would not pay wage loss compensation benefits (which it had only started to pay based upon the additional alleged injuries identified in the August 2011 NTCP).

On or about October 5, 2011, Claimant filed a Claim Petition in which she alleged that she sustained a left rotator cuff tear, left knee injury, and left hip injury during the course of her employment on March 7, 2011. Claimant sought wage loss benefits from March 7, 2011, onward and payment for medical treatment. On or about October 12, 2011, Claimant filed a Penalty Petition against Employer, asserting that Employer

> …violated the Act by misuse of Bureau documents. A Medical Only [NTCP] was filed and rolled over to a Medical Only NCP. When I began losing time from work a second [NTCP] was then filed. The Act does not provide for this. Once I began losing time there was clearly no reason for this to be an investigation stage any further and a [NTCP] was inappropriate. Therefore the [NTCP] has the force and effect of an NCP and I am now out on an open NCP and not being paid wage loss. 50% penalties are sought as well as. . . counsel fees [under Section 440 of the Act, added by the Act of February 8, 1972, P.L. 25, *as amended*,77 P.S. § 996].

On or about January 27, 2012, Employer filed a Termination Petition, asserting that Claimant had fully recovered from her work-related injuries and was able to return to work without restrictions.

Claimant provided testimony to the Workers' Compensation Judge (WCJ). Claimant and Employer each provided the deposition testimony of their medical experts. John Avallone, D.O., testified on behalf of Claimant, and John R. Donahue, M.D., testified in support of Employer's termination petition. The WCJ found both Claimant and her expert to be not

credible and determined that Employer's expert's testimony was credible. The WCJ determined that Claimant's work-related injury consisted of left knee, left shoulder, and left hand contusions, as reflected in the converted June 2011 NCP, but that those conditions had fully resolved as of January 16, 2012. The WCJ also determined that Claimant failed to present credible evidence that Employer owed her any wage loss benefits or that she requires additional medical treatment for her work-related contusion injuries. Nevertheless, the WCJ also concluded that Employer violated the Workers' Compensation Act (Act) by issuing the August 2011 NTCP and NCD, but the WCJ elected not to award any penalties based upon his conclusion that Employer did not owe Claimant any benefits. Thus, the WCJ denied Claimant's Claim Petition and Penalty Petition and granted Employer's Termination Petition.

Claimant appealed to the Board. The Board affirmed the WCJ's decision.

Claimant then appealed to the Commonwealth Court.

In her appeal, Claimant contended that (1) the WCJ and the Board erred in concluding that the August 2011 NTCP did not convert to an NCP, such that Employer is estopped from asserting that it is not liable for Claimant's left labrum and bicep tear injuries; and (2) the WCJ erred in granting Employer's termination petition.

Claimant first contended that, in the absence of affirmative statutory authority for an employer to issue more than one NTCP, once an employer issues a subsequent NTCP and accompanies that issuance with the payment of work-loss compensation, such action results in a de facto acceptance of the injuries identified on the subsequent NTCP.

Employer responded to Claimant's argument by asserting that it was statutorily required to file the August 2011 NTCP under Section 406.1 of Act. Section 406.1(a) of the Act, the Court noted, provides that "the first installment of compensation shall be paid not later than the twenty-first day after the employer has notice or knowledge of the employee's *disability*"—not injury. (Emphasis added by the Court). Pursuant to Section 406.1(d)(1) of the Act, the Court said, "[i]n any instance where an employer is uncertain whether a claim is compensable under this act or is uncertain of the extent of its liability under this act, the employer may initiate compensation payments without prejudice and without admitting liability pursuant to a[n] NTCP]." Section 406.1(d)(3) of the Act, the Court stated, provides that "[p]ayments of temporary compensation shall commence and the [NTCP] shall be sent" within the twenty-one day period set forth in Section 406.1(a). Employer further asserted that Section 407 of the Act provides that "[w]here payment of compensation is commenced without an agreement, the employer or insurer shall simultaneously give notice of compensation payable to the employee . . ., on a form prescribed by the department, identifying such payments as compensation" under the Act.

The Court stated that the Act does not specifically allow for or disallow the filing of a subsequent NTCP, and that Employer neither violated the Act nor is estopped from denying liability for Claimant's left labrum and bicep tear conditions. The Court agreed with the Board's explanation:

> Pursuant to Section 406.1 of the Act, once the initial medical only NTCP converted to an NCP, [Employer] had *accepted liability* for medical costs incurred for a left knee, left shoulder and left hand contusion injury. After [Employer] received information that Claimant was suffering disability as a result of that injury, it issued another NTCP indicating that it would make payments for both medical and wage loss liability for an injury described as a left labrum and bicep tear. However, pursuant to Section 406.1(d)(1) of the Act, by issuing this second NTCP, [Employer] was *not* admitting liability for this injury. Furthermore, since it did file a NCD and Notice Stopping Compensation within 90 days of issuing that *second* NTCP, [Employer] was not admitting liability for those additional injuries or for wage loss as a result of those injuries. Notably, since Claimant had not lost any time from work until after July 19, 2011 and did not have a diagnosis for her shoulder which required the surgery until around that time period, we don't see any violation of the Act in[Employer's] issuance of a second NTCP in August of 2011. Nor do we see a violation of the Act in the issuance of the NCP and Notice Stopping Compensation within the time frames required by the Act as[Employer] had subsequently determined that those additional injuries and Claimant's disability were not

> related to the work injury. We note that the Act does not specifically allow for or disallow the filing of subsequent temporary acceptance documents. Thus, contrary to Claimant's allegations, there was no clear-cut violation of the Act nor was [Employer] estopped from denying liability for payment of wage loss benefits for a left labrum and bicep tear merely because if had issued that second NTCP.

Claimant further argued that because the NCD identified the injuries set forth in the May 2011 NTCP and not the additional injuries set forth in the August 2011 NTCP, Employer accepted liability for all of the described injuries. Claimant reasoned that Employer was time-barred from challenging the injuries identified in the May 2011 NTCP because it had converted to an NCP by operation of law, thereby rendering Employer's NCD (which identified the injuries set forth in the May 2011 NTCP) untimely and ineffective. Claimant further argued that because the NCD identified the injuries that were set forth in the May 2011 NTCP and not the August 2011 NTCP, Employer never denied liability for the injuries set forth in the August 2011 NTCP. As a result, Claimant took the position that the August 2011 NTCP should have converted to an NCP for the additional injuries. Citing the humanitarian purposes of the Act, Claimant maintained that under the Act it is impermissible for an employer who has accepted liability for work injuries and related disability to stop paying benefits, and that, in this case, Employer did just that when it failed to issue an NCD pertaining to the injuries identified in the August 2011 NTCP and stopped paying compensation benefits.

The Court stated, however, that when the May 2011 NTCP converted into an NCP, it became clear that Employer would be liable for the *medical-only* claims related to the injuries identified as contusions. When Employer issued the August 2011 NTCP for the newly alleged disability from labrum and bicep tear injuries, it was clear that that August 2011 NTCP was unrelated to the contusion injuries for which Employer remained liable, the Court said. The distinction was based upon the fact that the August 2011 NTCP provided for *wage loss* as well as medical benefits, unlike the initial contusion injuries, the Court stated.

The Court further pointed out that because Employer never started paying wage loss benefits for the contusion injuries, it is perfectly clear that the NSTC, despite language to the contrary, related to Employer's initiation and discontinuation/dispute of wage loss benefits for labrum and bicep tear injuries. The NCD, by implication, the Court added, pertained specifically to the purpose for which Employer issued the second NTCP—the payment of temporary wage loss benefits for the potentially work-related left labrum and bicep tear injuries for which Employer had not accepted liability. Thus, the Court said, common sense supports its conclusion that Employer never accepted liability for the alleged labrum and left bicep tear injuries for which Claimant sought wage loss benefits, which is consistent with the positions taken by the WCJ and Board.

The Court further stated that Employer did not engage in any conduct that violates the Act, because it had no burden to initiate payment; it apparently anticipated that the injuries might be work-related, and Employer accepted liability only for the injuries in the converted NCP. By issuing the August 2011 NTCP regarding potential work-related injuries, Employer in this case did not accept liability for the additional injuries.

The Court said that while it was unclear why Employer issued the August 2011 NTCP, Employer was not required to take such action and by taking the action Employer did not admit liability by issuing the August 2011 NTCP and paying wage loss benefits. Further, the Court added, the fact Claimant had not filed a Review or Claim Petition at that time did not in any way prejudice Claimant from doing so when Employer ultimately issued the NCD in response to its earlier issuance of the August 2011 NTCP regarding the additional injuries. Consequently, the Court concluded, that the WCJ did not err in concluding that Employer was not stopped from discontinuing the wage loss benefits it had begun to pay Claimant based upon the August 2011 NTCP for Claimant's allegedly work-related left labrum and bicep tear conditions.

Finally, the Court said, with regard to the WCJ's determination granting Employer's termination petition, Claimant argued that Employer's testimony is not competent to support the WCJ's factual findings. Claimant asserted that Dr. Donahue's testimony

failed to recognize all of Claimant's work-related injuries. Claimant based this argument on the fact that Dr. Donahue only accepted the injuries identified in the May 2011 NTCP, and does not accept the injuries identified in the August 2011 NTCP. The Court said Claimant is correct in asserting that the testimony of a medical expert that fails to acknowledge or accept injuries an employer has accepted as work-related is incompetent to support an employer's termination petition, citing Elberson v. Worker's Comp. Appeal Bd. (Elwyn, Inc.), 936 A.2d 1195 (Pa. Cmwlth. 2007), appeal denied, 944 A.2d 752 (Pa. 2008). In this case, however, the Court rejected Claimant's argument because Employer never accepted liability for the additional injuries Claimant alleged she incurred. Dr. Donahue, therefore, did not have to testify regarding those injuries as if they existed, the Court stated. Claimant did not carry her burden of proof in her Review Petition, through which she sought to establish the existence of additional work-related injuries. As a result, the Court added, Dr. Donahue was not required to accept the labrum and bicep tear as part of Claimant's work-related injuries for the purpose of Employer's Termination Petition.

The Court thus affirmed the decisions below. Sherry Aldrige v. Workers' Compensation Appeal Board (K Mart Corporation); Cmwlth. Ct. of PA;No. 494 C.D. 2014; Opinion by Judge Brobson; Filed January 26, 2015 and designated an Opinion April 16, 2015.

DEFENSE PERSPECTIVE

Claimant also relied on Mosgo v. Workmen's Compensation Appeal Board (Tri-Area Beverage, Inc.),. 480 A. 2d 1285 (Pa. Cmwlth. 1984), where insurer did not file Bureau documents but made payments for less than two months while it continued its investigation.

The Mosgo, supra., court, the Court here said, concluded that the insurer's failure to comply with the Act, specifically the failure to comply with Section 406.1 of the Act, stopped the insurer from disavowing its acceptance of liability for Mosgo's injury.

Here, the Court agreed with Employer that Mosgo, supra. was not applicable with Claimant's case as Employer here did not make payments in lieu of worker's compensation without the issuance of Bureau documents. Also, the Court here noted, Mosgo pre-dates the 1993 amendments to Section 406.1 of the Act, which added subsection (d) thereby including within the Act for the first time a provision for the issuance of the NTCP where liability is uncertain. Thus, at the time Mosgo was decided an NTCP was not a tool available for use by employers, the Court said.

What is abundantly clear from this case is that the parties have to look closely at all Bureau documents and employers should be careful before they issue such documents that they state what they want to admit.

It is one thing to issue documents in good faith and it is another thing to be bound by careless filings.

CLAIMANT PERSPECTIVE

This is certainly a win for Employers. Employers can issue a Medical only NTCP which describes a particular body part, but limit their potential liability by inadequately describing the injury to that body part. Here, Claimant's left shoulder was noted as one of the injured body parts, but only a "contusion." Since Claimant ultimately had surgery on the shoulder for a left labrum tear, the Court here concluded, essentially, that absent a Review Petition or successful Claim Petition, Employer was not responsible for a left shoulder labral tear. We now know, as well, that an Employer can issue subsequent NTCPs to prolong any final decision regarding acceptance of a particular injury. In other words, inadequately describe the full nature of the injury with the first NTCP, medical only or otherwise, issue a Denial, and then issue a subsequent NTCP more fully describing a work injury.

The Court here attributes nothing but good intentions to the Employer's actions, noting that it can only speculate as to how the Employer became aware of Claimant's need for surgery and issued a second NTCP "either out of concern for Claimant's lost wages or out of some abundance of caution regarding its potential liability." Nothing in the Employer's approach here would seem to support the possibility that the second NTCP was issued out of concern for Claimant.

Ultimately, with medical doctors testifying for both parties, and a credibility assessment made by the WCJ regarding Claimant and the physicians, this was not going to be overturned absent a conclusion that the issuance of the subsequent

NTCP and payment of some compensation obligated the Employer to continue payments. There is no description of how Claimant was injured, so we can provide no assessment of whether or not the Employer's initial description of the injury as involving a contusion was consistent with how Claimant was injured, but it is certainly this Claimants' attorney's experience that insurers regularly "understate" the body parts injured, and the extent of injury, when issuing NTCPs or NCPs.