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**NEWSFLASH: Workers' Compensation Medicare Set-Aside Arrangements (WCMSAs)**

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On April 25, 2006, CMS (Centers for Medicare & Medicaid Services) issued a Memorandum revising the "low dollar threshold" for Medicare beneficiaries who are settling the medical aspect of their workers' compensation cases. Previously, if the settlement was under \$10,000.00 and Medicare's interests were taken into consideration in the Compromise and Release Agreement a formal set-aside arrangement with Medicare was not needed, even if the claimant was a Medicare beneficiary. Well, good news, as of April 25, 2006, the low dollar WCMSA threshold for Medicare beneficiaries has been increased to \$25,000.00. Therefore, CMS will only review new WCMSA proposals for Medicare beneficiaries where the total settlement amount is greater than \$25,000.00. Keep in mind, however, that, as in the past, Medicare's interests still must be taken into consideration in the Compromise and Release Agreement and all parties must ensure that Medicare is secondary to a claimant's receipt of workers' compensation benefits.

**NOTE:** Even though a Medicare set-aside arrangement is not needed, if the claimant is a Medicare beneficiary, one must still determine if Medicare has a lien as this is an absolute right and is not waived if Medicare does not raise it prior to the Compromise and Release Agreement hearing as would a lien held by Blue Cross/Blue Shield, for example.

**CAN EMPLOYERS REJOICE?  
DOES A SUPERSEDEAS REQUEST FINALLY EQUAL A STAY?**

*Snizaski v. WCAB(Rox Coal Co.)*, 891 A.2d 1267 (Pa. 2006)  
*Gibson v. WCAB(Armco Stainless & Alloy Products)*, 897 A.2d 535 (Pa. Cmwlth. 2006)  
*Varghese v. WCAB(Ridge Crest Nursing Home)*, No. 28 C.D. 2006,  
2006 Pa. Commw. LEXIS 248 (filed May 12, 2006)

When does an employer have to pay on an Order of a Workers' Compensation Judge? This question seems fairly easy to answer, and, in cases where there is no appeal, while the answer is not explicitly set forth in the Workers' Compensation Act (Act), most practitioners would agree that payment should be made within 30 days of the circulation date of the Order by the WCJ. Trickier question: When does an employer have to pay on an Order of a WCJ when an appeal is taken and supersedeas requested?

With its decision in *Snizaski v. WCAB(Rox Coal Company)*, 891 A.2d 1267 (Pa. 2006), it appears that the Supreme Court of Pennsylvania has clarified an employer's duty to pay upon an award by a workers' compensation judge following their appeal and request for supersedeas to the Workers' Compensation Appeal Board (WCAB). While this decision is no doubt a welcome one for employers and their carriers, this opinion

might not have solved the problem. One thing is for certain, all parties would most likely agree that a binding and definitive time frame for payment on appealed awards with a request for supersedeas is necessary.

In Snizaski, the Claimant, Renee Snizaski, filed a fatal claim petition following the death of her husband in a motor vehicle accident. The WCJ denied the petition. On October 21, 1999, the WCAB reversed and remanded for a computation and award of benefits. The WCAB, in its June 13, 2000 Order, denied the petition for reconsideration of its October 21, 1999 Order filed by Rox Coal Company (Rox Coal) and also included its own calculation of compensation benefits ordering Rox Coal to pay Claimant and her four dependent minor children \$527 a week from May 7, 1996 and continuing.

On July 6, 2000, Rox Coal timely filed a request for supersedeas with the WCAB in connection with its appeal to the Commonwealth Court. Under the then applicable Special Rules of Administrative Practice and Procedure before the Workers' Compensation Appeal Board ("the Board's Rules"), the WCAB had to rule on Rox Coal's request within 20 days from Claimant's response, or 30 days after Employer filed its request, whichever was sooner.

After the 30 day time limit for payment of the award passed, but while Employer's supersedeas request was pending, Claimant threatened to execute the award against Rox Coal. In response to Claimant's threat, Rox Coal paid the back compensation due under the award prior to the WCAB's ruling on its request for supersedeas. The WCAB denied Rox Coal's request for supersedeas on July 31, 2000, 15 days after Employer had filed it. On September 8, 2000, the Commonwealth Court denied Employer's subsequent application for supersedeas.

Because Rox Coal had paid after 30 days from the award of the WCJ, Claimant filed a penalty petition. Claimant alleged that, pursuant to Hoover v. WCAB(ABF Freight Systems), 820 A.2d 843 (Pa.Cmwlth. 2003), Rox Coal's obligation to pay was not vitiated merely because a supersedeas request had been filed. Rox Coal defended the penalty petition on the grounds that its request for supersedeas, which complied with the time restraints set forth in the Board's Rules, acted as a stay until such time as the request was properly ruled upon. In so arguing, Rox Coal essentially requested that Hoover be overruled, especially considering the Commonwealth Court's earlier ruling in Candito v. WCAB(City of Philadelphia), 785 A.2d 1106 (Pa.Cmwlth. 2001), alloc. dn., 572 Pa. 726, 814 A.2d 678 (2002) (holding that it was not an abuse of discretion for a WCJ to deny a penalty petition because an employer did not pay during the pendency of an appeal). The WCJ granted Claimant's penalty petition; however, the WCAB reversed.

Following Claimant's appeal to the Commonwealth Court, the majority held that Rox Coal's request did, in fact, act as a stay on its obligation to pay the award. In so holding, the Court expanded its previous decision in Candito and overruled its decision in Hoover. The Court agreed that allowing a penalty petition to stand while a proper request for supersedeas was pending effectively invalidated the obvious intent behind the Board's regulations providing for such requests in the first place. Judge Rochelle S. Friedman dissented from the majority opinion on the grounds that the majority's decision elevated an employer's compliance with the Board's Rules above an employer's duties to pay under the Workers' Compensation Act.

After closely examining both the (Act) and the Board's Rules, the Supreme Court affirmed the decision of the Commonwealth Court holding that an employer can be "deemed in default only if it fails to seek supersedeas while pursuing additional review or refuses to make a compensation payment after its supersedeas request is denied. To hold otherwise would render the Board's supersedeas regulations and authority a nullity." 891 A.2d 1267, 1278. Therefore, the Supreme Court held that an employer who fails to pay a compensation award during the pendency of a timely filed supersedeas petition authorized under the Board's regulations is not subject to a penalty assessment. Further, the Supreme Court held that "it is absurd and unreasonable to construe the Act as if it intended that the prospect of a penalty assessment should depend upon the unpredictable fortuity of the outcome of the supersedeas request. Penalties should be tied to some discernible and avoidable wrongful conduct". *Id.*

Madam Justice Newman dissented from the majority opinion on the grounds that the mere filing of a supersedeas request is not enough to suspend an employer's obligation to remit benefits payments pursuant to the Act and, therefore, an employer can only stop payment pursuant to an award once their supersedeas request is decided upon in their favor.

Utilizing the Court's decision in Snizaski, an employer can now wait up to 20 days to appeal an award, file a timely request for supersedeas with the Board, and wait the 30 days for the Board's ruling on its supersedeas request before it is obligated to pay the original award. The Court did not address whether payment following a denial of supersedeas was due immediately or if a new 30 day period begins, which I argue it does. If a new 30 day period does begin, an employer then actually has a total of 80 days within which to pay the original award.

While claimants, and their counsel, will most likely bemoan the fact that their "quick on the draw" penalty petitions must now be denied and employers and their counsel will just as fervently celebrate the Court's decision in Snizaski, workers' compensation practitioners at least have a clearer picture of an employer's duty to pay on an award of benefits that is the subject of a proper and timely request for supersedeas. Or do they?

In Gibson v. WCAB(Armco Stainless & Alloy Products), 897 A.2d 535 (Pa. Cmwlth. 2006), decided by the Commonwealth Court in April 2006, the Court fervently applied the Supreme Court's decision in Snizaski to reverse an award of penalties made while a timely supersedeas request filed by Armco Stainless was pending before the Supreme Court of Pennsylvania.

On October 2, 1997, Claimant filed a fatal claim petition following the death of her husband from lung cancer, which she alleged came from his long-term exposure to harmful dust, gas and fumes during his employment with Armco Stainless. The WCJ, on June 29, 2001, granted Claimant's petition. Armco Stainless appealed this decision and the WCAB reversed on July 8, 2002; on May 8, 2003, the Commonwealth Court reversed the Board's decision and reinstated the WCJ's award. Subsequently, Armco Stainless filed a petition for allowance of appeal with the Supreme Court and also filed an application for stay with the Commonwealth Court. The Commonwealth Court denied Armco Stainless' request for supersedeas on June 20, 2003. The Supreme Court, by order dated October 9, 2003, granted Armco Stainless' request for supersedeas.

On August 8, 2003, Claimant filed a penalty petition alleging that Armco Stainless violated the Act by not paying benefits after the Commonwealth Court denied its request for supersedeas. The WCJ, on December 4, 2003, granted Claimant's penalty petition finding that Armco Stainless violated the Act. Armco Stainless appealed this decision to the WCAB which reversed.

Applying the Supreme Court's very recent decision in Snizaski, the Commonwealth Court in Gibson rejected Claimant's argument that Armco Stainless violated the Act and, therefore, affirmed the opinion of the WCAB. The Gibson Court also reiterated that the assessment of penalties should not be dependent upon the grant or denial of an employer's supersedeas request.

So, as of Gibson, it appears to be very clear that the request for supersedeas in any forum acts as a stay and employer is not obligated to make payment of an award to a claimant during this time period and can do so without the assessment of penalties. Not so fast.

On May 12, 2006, the Commonwealth Court decided Varghese v. WCAB(Ridge Crest Nursing Home), No. 28 C.D. 2006, 2006 Pa. Commw. LEXIS 248 (filed May 12, 2006) reversing the decision of the WCJ denying an award of penalties to Claimant, Pascaria Varghese, based upon Ridge Crest's alleged failure to pay a workers' compensation award within 30 days of a denial of its application for supersedeas by the WCAB.

Claimant was injured on January 2, 1999 while employed by Ridge Crest. Subsequently, Ridge Crest filed a termination petition, which was granted by the WCJ. The WCAB granted Claimant's appeal of this decision of the WCJ and reversed the termination of her benefits. Ridge Crest timely filed an application for supersedeas, which was denied by the WCAB on February 18, 2004. Thus, Ridge Crest filed an application for supersedeas with the Commonwealth Court, which was denied on March 26, 2004. On April 23, 2004, 28 days after the denial of its application for supersedeas by the Commonwealth Court, Ridge Crest made payment to Claimant pursuant to the opinion of the WCAB.

Claimant filed a penalty petition alleging, in part, that Ridge Crest failed to pay benefits within 30 days after the WCAB reversed the termination of her benefits in violation of Section 428 of the Act. The WCJ denied Claimant's penalty petition finding that Ridge Crest's obligation to pay the back compensation was stayed while its supersedeas requests were pending before the WCAB and the Commonwealth Court, as well as the fact that Ridge Crest issued payment to Claimant within 30 days of the denial of supersedeas by the Commonwealth Court. The WCAB affirmed this decision of the WCJ.

Claimant argued in her appeal to the Commonwealth Court in Varghese that Snizaski, as well as Candito, only provided a "safe-harbor" from penalties while a supersedeas request is before the WCAB not while it is pending before the Commonwealth Court. The Commonwealth Court agreed with this argument and reversed the decision of the WCJ.

In coming to this conclusion, the Commonwealth Court examined the outcome of the supersedeas requests i.e. whether the requests were granted or denied and stated that Snizaski only applied to those supersedeas requests pending before the WCAB. As this case involved a denial of supersedeas by both the WCAB and Commonwealth Court, the Court held that an employer is not sheltered by a "safe harbor" from the imposition of penalties while a supersedeas request is pending before this Court or the Supreme Court and if an employer has not paid an award of workers' compensation by the WCAB will have placed itself in a "position of peril, betting that if the supersedeas request is granted, it will not have to pay benefits ordered and penalties will not be assessed". Varghese, 2006 Pa. Commw. LEXIS 248, 9. In explaining their holding, the Varghese Court stated that if employers did not face the risk of penalties, then it would become commonplace for employer to file supersedeas requests with no chance of success just to delay payment. *Id.*

So, what does this all mean for employers? Right now, any request for supersedeas to the WCAB tolls the employer's obligation to make payment on an award of workers' compensation by the WCJ until the WCAB issues an

order denying the employer's supersedeas request and, therefore, no penalties can be assessed because an employer did not make payment within 30 days of the WCJ's order. Supersedeas requests filed with either the Supreme or Commonwealth Court, while still acting as a stay, do not guarantee that penalties will not be imposed if payment is not made until the supersedeas request is acted upon by the Court. As the Commonwealth Court's recent decisions in Gibson and Varghese are conflicting and Varghese is contrary to the Supreme Court's decision in Snizaski, I expect the Supreme Court or, maybe even, the General Assembly to further address this issue.

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## MARGOLIS EDELSTEIN NEWS

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*This is a publication of the Workers' Compensation Department of the law office of Margolis Edelstein. Our department welcomes your comments or questions regarding the above or other matters of concern involving workers' compensation issues.*

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