What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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Pennsylvania Workers' Compensation

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A Certificate of Mailing does not automatically establish the timeliness of an appeal filed with the Appeal Board if the form fails to adequately describe the case and is not enclosed with the appeal or is mailed separately to the Board.

Sherri Mills v. WCAB (School District of Harrisburg); 1958 C.D. 2010; filed June 15, 2011; by Judge Simpson

The claimant mailed an appeal of a workers' compensation judge's decision dated November 5, 2009, to the Workers' Compensation Appeal Board on November 25, 2009. The envelope mailing the appeal had a private postmark, reflecting the date November 25, 2009. The employer filed a Motion to Quash the claimant's appeal as untimely. In her answer to the motion, the claimant averred that she obtained a Certificate of Mailing, showing a postmark of November 25, 2009, and attached a copy of the Certificate of Mailing form to the answer. The Appeal Board, nevertheless, quashed the claimant's appeal and noted that there was nothing on the Certificate of Mailing form to indicate that it pertained to the claimant's appeal.

The Commonwealth Court agreed with the Appeal Board and affirmed the dismissal of the appeal on the basis that it was untimely. The court also addressed this Certificate of Mailing form, pointing out that, while frequently used, it is not determinative of filing dates in agency appeals. The court also noted that the claimant neither included a copy of the form in her appeal document mailed to the Appeal Board nor mailed it separately to the Appeal Board. The claimant also failed to identify the case on the Certificate of Mailing form. The court, thus, held that the Appeal Board was required to consider the document filed on the day it was received, which was five days after the filing deadline of November 25, 2009. ||

An employer can pursue termination, suspension or modification of benefits as of a date prior to the issuance of a Notice of Compensation Payable.

City of Philadelphia v. WCAB (Butler); 1245 C.D. 2009 (July 26, 2011); opinion by Judge Leavitt

The issue on appeal to the Commonwealth Court in this case was whether benefits can be terminated or suspended as of a date **before** a Notice of Compensation Payable is issued. The claimant was injured in a car accident on September 28, 1995, while working as a probation officer. He received treatment from a panel physician who determined that as of October 19, 1995, the claimant was fully recovered and capable of returning to his pre-injury job. However, because the claimant still complained of pain, the physician referred him for a second medical opinion. The second doctor agreed that the claimant was fully recovered. Thereafter, on November 7, 1995,

the employer issued a Notice of Compensation Payable, noting the work injury and compensation rate and stating that the claimant received salary in lieu of workers' compensation.

The employer then filed a petition asserting the claimant was fully recovered as of October 20, 1995, or alternatively, seeking suspension of benefits. The workers' compensation judge granted the termination petition and dismissed the suspension petition as moot. After an appeal to the Appeal Board, a remand to the workers' compensation judge and being affirmed by the Appeal Board, the Commonwealth Court first held that the employer was required to prove that the claimant's work-related disability had resolved sometime **after** the date the Notice of Compensation Payable was issued, based upon the decision in *Beissel v. WCAB (John Wanamaker, Inc.)*, 465 A.2d 969 (Pa. 1983). The case was remanded to the workers' compensation judge to rule on the suspension petition but came back to the Commonwealth Court after the judge suspended the claimant's benefits as of a date after the Notice of Compensation Payable. The court, on its second consideration of the issue, held that the employer's only burden in a termination petition is to prove that the claimant had fully recovered from the work injury described in the Notice of Compensation Payable where the Notice did not state that the claimant remained disabled.

The claimant had argued the statement from the decision in *Beissel* that there must be a change in the claimant's condition "after the date of the ... notice of compensation payable," precluded the termination of benefits on a date before the Notice of Compensation Payable. The court in *City of Philadelphia* found that this statement was taken out of context and that the principle in *Beissel* is only that an employer is bound by the contents of its own Notice of Compensation Payable and cannot seek to repudiate it after accepting liability. In this case, the employer did not seek to disavow the Notice; it sought to prove that the claimant had fully recovered from the injury on the Notice. ||

A heart attack suffered at home after receipt of a letter terminating employment held not to be within the scope of employment.

Little v. WCAB (B&L Ford/Chevrolet); No. 1857 C.D. 2010 (July 28, 2011); opinion by Judge Brobson

The Commonwealth Court upheld the denial of a fatal claim petition, finding that the claimant failed to meet her burden of proving that her husband died in the course and scope of his employment or while furthering the employer's business when he suffered a fatal heart attack two days after receiving a letter terminating his employment.

The decedent in *Little* had sustained a work-related shoulder injury and was assigned to light-duty work for a time before being directed to return to his regular job. The decedent was later sent home from work after the employer received a letter from his attorney indicating that he could not perform any manual labor. The letter requested that the decedent provide a doctor's report advising what type of work he was capable of performing. The decedent obtained a note from his doctor, but before he could provide it to the employer, he was told he did not need to bring it. The employer then issued a letter of termination. Upon receipt of the letter, the decedent became distraught and was unable to eat or sleep. With the letter of termination in his hand, he collapsed and died.

On appeal, the court identified that this case presented the question of whether the law intended employers to bear the risk of a compensable injury that may follow the termination of employment and is a consequence of that decision, even when it bears no relationship to employment responsibilities and occurs after the employment relationship ends. In finding that the claim was not compensable, the court in *Little* noted that when an injury occurs off-premises, the relationship to the employment must be clear. This case is distinguished from those where the claimant's on-the-job stress and exertion caused injury while still employed is compensable. In *Little*, there was an absence of any evidence that stress at the work place was a contributing factor in the decedent's heart attack. ||

New Jersey Workers' Compensation

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Dario J. Badalamenti

A judge of compensation may exercise jurisdiction over an insurance coverage dispute if ancillary to a claim currently before the Division of Workers' Compensation.

Sentinel Insurance Co. v. Earthworks Landscape Construction, Docket No. A-0748-10T1, 2011 N.J. Super. LEXIS 161 (App. Div., Decided August 16, 2011)

The petitioner was a proprietor and employee of the defendant, a limited liability company. In early 2008, the petitioner, acting as a representative of the employer, submitted an application for workers' compensation coverage to the plaintiff insurance carrier. Contained in the employer's original application to the insurance carrier were express representations by the petitioner that all of the employer's employees performed their work "at ground level" and that all "tree work" was subcontracted out to other companies. Based on these representations, the insurance carrier issued a workers' compensation policy to the employer for the period from March 10, 2008, through March 10, 2009.

On June 27, 2008, the petitioner was injured when he fell while pruning tree branches for a client. At the time of the accident, the petitioner was situated approximately 35 feet above the ground in a bucket-truck. This fall resulted in significant bodily injury. On August 27, 2008, the petitioner filed a claim with the Division of Workers' Compensation seeking medical treatment and temporary disability benefits. In response, the insurance carrier informed the employer in writing that it disclaimed coverage "due to a material misrepresentation made by the claimant himself as a member of the insured entity."

On September 8, 2008, the insurance carrier filed a complaint in the Law Division for a declaratory judgment against the employer and the petitioner seeking rescission of its policy and a declaration that the policy was null and void as to the petitioner's claim. On June 12, 2009, the Law Division dismissed the insurance carrier's complaint without prejudice and transferred it to the Division of Workers' Compensation for findings as to the policy's validity.

On September 16, 2010, the judge of compensation declined jurisdiction to void the policy as sought by the insurance carrier but, instead, recommended that the parties seek appellate review in order to resolve the jurisdictional issue. The insurance carrier appealed.

The Appellate Division reversed the judge of compensation's order declining jurisdiction and remanded for a determination as to the rescission issue. In doing so, the Appellate Division relied on its prior holding in *Frappier v. Eastern Logistics, Inc.*, 400 N.J. Super. 410 (App. Div. 2008) in which the court held that the Division of Workers' Compensation can resolve coverage disputes related to an underlying claim which is appropriately before the Division. The Appellate Division reasoned that, as the New Jersey Workers' Compensation Act bestows upon the Division of Workers' Compensation exclusive jurisdiction of all claims for workers' compensation benefits, it stands to reason that it also grants the authority necessary to decide issues of coverage as pertains to those claims. In quoting *Larson's Workers' Compensation Law*, the Appellate Division concluded, "[W]hen ancillary to the determination of the employee's rights, the [Division of Workers' Compensation] has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, existence or validity of an insurance contract, coverage of the policy at the time of injury, and construction of extent of coverage." **II**

Robert J. Fitzgerald

Robert J. Fitzgerald, Esq. has been asked by the Insurance Society of Philadelphia to be a co-presenter at the October 28, 2011, "Workers' Compensation Law Update." This seminar will cover current developments in workers' compensation law in Pennsylvania and New Jersey. Topics will include emerging judicial interpretations of reform measures; case handling strategies and recommendations stemming from statutory changes; developments in subrogation law; and significant statute of limitation cases. This seminar offers continuing legal education and insurance credits. For more information or to register, visit the Insurance Society's web site at http://www.insurancesociety.org/course_workshop.asp.