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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

The Supreme Court holds that a claimant's receipt of pension benefits is not a presumption of retirement but is, instead, an inference that must be considered in connection with the totality of the circumstances.

City of Pittsburgh and UPMC Benefit Management Services, Inc. v. WCAB (Robinson); 18 WAP 2011; decided 3/25/13; by Chief Justice Castille

The Pennsylvania Supreme Court clarified the employer's burden of proof with respect to a petition to suspend benefits based on a claimant's retirement. In this case, the claimant started receiving a disability pension after her work injury. The employer then petitioned to suspend benefits, asserting the claimant had voluntarily removed herself from the work force and had not looked for a job in the general labor market. The claimant challenged the petition, presenting evidence that she was registered to work with the Pennsylvania Job Center but was not employed due to the unavailability of work and because the employer had eliminated a light-duty position that she had held.

The Workers' Compensation Judge denied the petition, concluding that the claimant was forced into disability retirement when the light-duty position was eliminated. The Appeal Board affirmed, as did the Commonwealth Court. In affirming the decisions below, the court held that, in a petition based on the retirement of a claimant, the employer must show, by the totality of the circumstances, that the claimant has chosen not to return to the work force. In other words, the mere acceptance of a pension by a claimant does not equate with retirement.

The Supreme Court of Pennsylvania agreed with the Commonwealth Court and provided further clarification with respect to the employer's burden of proof in retirement cases. According to the Court, where an employer challenges the entitlement to continuing compensation on the grounds that the claimant has removed himself or herself from the work force by retiring, the employer has the burden of proving that the claimant has voluntarily left the work force. There is no presumption of retirement from the fact that a claimant seeks or accepts a pension. The acceptance of a pension entitles the employer to a permissive inference of retirement, and such an inference, on its own, is not sufficient evidence to establish retirement. The inference that arises from an acceptance of pension benefits must be considered in the context of the totality of the circumstances. II

Side Bar

This is a beneficial decision from the Supreme Court because it gives employers and their counsel guidance on what evidence is needed to obtain a suspension of benefits on the basis of voluntary removal from the workforce. If a workers' compensation claimant seeks a pension, this should raise a red flag of retirement for employers and they should notify their counsel. A claimant's pursuit or receipt of pension benefits may provide the basis for a suspension petition. But this fact alone will not win the day. As the Supreme Court makes clear, there are other factors that will be considered in determining whether there has been voluntary removal from the workforce, such as the claimant's acceptance of a retirement pension or the acceptance of a pension and refusal of suitable work within the claimant's restrictions.

New Jersey Workers' Compensation

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Dario J. Badalamenti

A specific medical connection between a work-related event and an injury is not required to trigger the notice requirement under N.J.S.A. 34:15-17.

Ader v. Lebanon Township, Docket No. A-0383-11T2, 2013 N.J. Super. Unpub. LEXIS 555 (App. Div., decided 3/11/13)

The petitioner was employed by the respondent as a volunteer emergency medical technician. At the time of his work-related accident, the petitioner had been with the respondent for 29 years and had served as its captain for eight years. In his capacity as captain, the petitioner was responsible for the overall operation of the emergency squad as pertains to running squad calls. On November 18, 2008, the petitioner was the captain of an emergency squad that responded to a motor vehicle accident. At one point during his surveillance of the accident scene, the petitioner climbed onto a tow truck to inspect one of the vehicles involved in the accident. The petitioner sustained injury to his low back when he jumped from the tow truck and landed on both feet.

The petitioner filed a claim with the Division of Workers' Compensation in February 2010, alleging injuries sustained as a result of his November 18, 2008, accident. The respondent denied the petitioner's claim, as it was the respondent's first notice of injury, and filed a motion to dismiss based on N.J.S.A. 34:15-17, which requires an employee seeking compensation to notify his employer of injuries sustained in a work-related accident within a maximum period of 90 days.

At trial, the petitioner testified that he felt immediate pain in his low back following his November 18, 2008, incident and sought treatment with his primary care physician soon thereafter. At the time of his January 2009 visit, he told his primary care physician that the November 18, 2008, incident with the tow truck was "the only thing that had enough force to cause an injury" to his low back. "Despite the fact that he related this information to his physician within the 90-day statutory window," the Judge of Compensation noted, "petitioner did not notify the Township [of the incident] until approximately one year later." Accordingly, the Judge of Compensation granted the respondent's motion and dismissed the petitioner's claim.

On appeal, the petitioner argued that the judge erred by failing to consider that the delay in seeking compensation was due to the fact that the petitioner was unaware of a causal link between the accident and the injuries he sustained until so informed by his physician in February 2010. Despite the petitioner's belief that the tow truck incident could have caused his injuries, he argued that the notice requirement under N.J.S.A. 34:15-17 was not triggered until February 2010, when he was advised of a specific medical connection between the work-related event and his injuries by his primary care physician.

In affirming the Judge of Compensation's dismissal of the petitioner's claim, the Appellate Division relied on *Brunell v. Wildwood Crest Police Department*, 176 N.J. 225 (2003), in which the court held that the employee's reporting requirement is triggered at "[t]he point at which a reasonable person would know he had sustained a compensable injury." As the Appellate Division reasoned, "The record supports the findings of the Judge of Compensation that a reasonable person facing [petitioner's] circumstances would have been aware that he sustained a work-related compensable injury on November 18, 2008."

The Appellate Division found significance in the fact that the petitioner had been an emergency medical technician for 29 years, held the supervisory rank of captain for eight years prior to his November 18, 2008, incident, and had consultations with physicians following his accident wherein which he attributed his injuries to that accident. "His failure to give timely notice to his employer under these circumstances," the Appellate Division concluded, "is legally untenable." II

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This case represents a rare victory on the part of a respondent asserting a "notice defense" to a specific incident claim. As a general rule, the Division of Workers' Compensation will construe the Act's notice provision quite liberally in order to find a claim compensable. Take, for instance, the Supreme Court's holding in *Bollerer v. Elenberger*, 50 N.J. 428 (1967), which remains persuasive law to this date, "Where an employer has knowledge of fact that should have raised in its mind the possibility of a work-connected injury, such knowledge satisfies notice requirements. The test is where a reasonable conscientious employer had grounds to suspect the possibility of a potential compensation claim." Though holdings such as these do marginalize the effectiveness of the Act's notice provision as an affirmative defense, they have not eradicated the notice defense entirely as this Appellate Division decision clearly demonstrates.

Delaware Workers' Compensation

By Jessica L. Julian, Esquire (302.552.4309 or jljulian@mdwcg.com)

Jessica L. Julian

Cephas is still a tough standard for the claimant to satisfy in a Delaware stress claim.

Dan Pelletier v. Delaware Community Investment Corp., (IAB #1380379 – Decided 2/13/13)

Under *Cephas*, in a pure mental stress claim (unlike a physical/mental claim), in order to be successful on a petition, a claimant must offer evidence demonstrating objectively that his work conditions were actually stressful. In addition, the claimant must prove that such conditions were a substantial cause of the claimant's mental disorder. Under this two-prong test, the stress does not have to be "unusual' or "extraordinary."

In this matter, the claimant was an attorney who had practiced law in New Jersey. He took the job with the employer as a portfolio asset manager so that it would be less stressful than practicing law. Two witnesses verified that the claimant had the "boss from hell," who was demanding, tough and picky. The claimant testified that he was forced to comply with fraudulent behavior at his boss's request. One witness testified to physical abuse by the boss. The claimant and these witnesses went before the employer's board of directors. The boss was fired in 2011 for these business activities and for failing to fulfill her job duties. As a result of this testimony, the hearing officer, sitting in lieu of the Board, held that this evidence supported an objectively stressful work environment. The hearing officer held that the claimant had satisfied the first prong of the *Cephas* test.

Under the second prong, the claimant must show that the stressful working conditions were a substantial cause of the claimant's mental disorder. Substantial is not to be equated with "sole" cause, and it differs from a "triggering" event under the "but for" standard. The medical experts both agreed that the claimant had multiple diagnoses and that he had numerous non-work-related stressors in his life. His diagnoses included bipolar disorder, episode mixed, anxiety, alcohol and cannabis dependence, and anxiolytic abuse of benzodiazepines.

The employer's expert testified that the job-related stress was only one of many stressors in the claimant's life leading to his panic attack in January 2012 and breakdown in July 2012. This expert opined that there was no casual relationship between the claimant's bipolar diagnosis, which is biological, and his conflicts at work. He further noted that stressors or work place settings did not lead to the bipolar disorder, but left untreated, it can result in lack of focus and concentration. He also noted that the panic attack occurred nine months after the work place stressors occurred. Ultimately, the hearing officer listed the factors which led to his mental breakdown in January and July of 2012 to include: bipolar disorder, longstanding alcohol and substance abuse, testicular cancer, a Delaware Supreme Court Office of Disciplinary Counsel investigation, bankruptcy of his wife's business, and marital issues leading to separation and divorce.

The claimant's petition to determine compensation due was denied. ||

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This case is another perfect example of how difficult it is to overcome the standard set forth in *Cephas* for a pure stress claim. Almost always, after a full investigation, there are other notable stressors existing that impact the claimant's mental health. Discovery should be performed immediately and thoroughly in advance of a medical expert examination and review. Furthermore, the employer's witnesses are typically key to discredit any testimony of the claimant.

News from Marshall Dennehey

Tony Natale (Philadelphia, PA) successfully defended the interests of the a very prestigious Philadelphia admiralty law firm and its insurance carrier in a complex workers' compensation claim. The claimant, a trial attorney, alleged multiple injuries, including an embolism and stroke secondary to work-related stress. Interestingly, Tony was able to ferret out on cross examination that most of the claimant's stress at work was related to normal work duties, including conducting depositions and billable hours. Tony presented an elaborate medical defense to the claim and an insightful, factual defense to the stress allegations. The judge dismissed the claim petition, accepting Tony's argument that the claimant's medical conditions were not caused, aggravated or accelerated by the claimant's work duties. The judge further held that the claimant's work duties as a trial attorney did not result in the stress the claimant alleged to have suffered. Tony structured the defense evidence so that a comparison could be made between the claimant's work duties (a standard trial attorney) and that of the standard workers' compensation attorney. After reviewing the comparison, including the standard weekend work of most workers' compensation attorneys, the judge could find no evidence to support a stress claim evolving from the claimant's trial practice.

Tony Natale (Philadelphia, PA) successfully defended a workers' compensation claim involving a serious disc herniation, subsequent surgery and ongoing disability. The claimant alleged that he injured his low back during the course and scope of employment while engaging in lifting and bending activities. All medical evidence in the case supported a large disc herniation stemming from the work incident. Nonetheless, Tony was able to have the claim dismissed in its entirety through the invocation of Section 311 and 312 of the Workers' Compensation Act pertaining to the notice requirements during a claim petition. Although the claimant testified that during a company bowling outing he may have discussed the allegation of a work injury, the judge held that the claimant's testimony did not meet the stringent notice requirements of the Act. Therefore, even though all experts agreed to a work-related disc herniation, the claim against both the carrier and employer was dismissed.

Tony Natale (Philadelphia, PA) successfully defeated five separate UR Review Petitions filed by a claimant who was being treated by a well-known coordinated care organization. The petitions involved approximately $500,000 worth of varied work injury-related medical expenses generated by a myriad of providers with the CCO. Through the use of both expert testimony and factual evidence generated by the FBI pertaining to the CCO, Tony was able to twist seemingly plausible allegations made by the claimant as to medical treatment into a finding by the judge that said treatment was unreasonable and unnecessary. All five UR Review Petitions were summarily dismissed.

Frank Wickersham and **Audrey Copeland** (King of Prussia, PA) obtained a favorable opinion from the Commonwealth Court affirming a workers' compensation judge's decision terminating claimant's benefits. The court heard the case once before and, in a published opinion (*J. Paz Y Mino v. WCAB (Crime Prevention Assoc.)* 41 C.D. 2009), vacated the decision and remanded it to the judge so findings could be made as to whether the defense medical expert's opinion of full recovery addressed all of the claimant's work injuries. On remand, the judge found that all work injuries were covered by the expert when he testified that the claimant was fully recovered, and the Commonwealth Court agreed.

Frank Wickersham (King of Prussia, PA) obtained a favorable decision from a workers' compensation judge that resulted in an adjustment of the claimant to partial disability status based on the results of an Impairment Rating Evaluation (IRE) that was performed on the claimant in November 2010. The claimant was seen for a prior IRE in 2007 that was above 50 percent, which meant the claimant was presumed to be totally disabled. In litigating the case, Frank presented evidence that the calculations made by the physician who did the IRE in 2007 were inaccurate and not in compliance with the AMA Guides to the Evaluation of Permanent Impairment. II