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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

A claimant who is injured while walking along a United States naval ship that is on the water is not entitled to workers' compensation benefits, the Long Shore and Harbor Workers' Compensation Act has exclusive jurisdiction.

Christopher Savoy v. WCAB (Global Associates); 2613 C.D. 2015; filed August 25, 2016; by President Judge Leavitt

The claimant, an electrician, was assigned to work on United States Navy vessels. While walking along a passageway on the USS Stephen Groves, he tripped and twisted his right knee. The claimant filed a claim petition alleging a torn right lateral meniscus.

Before the Workers' Compensation Judge, the parties litigated the issue of whether there was concurrent compensation under the Pennsylvania Workers' Compensation Act (Act) or whether the Long Shore and Harbor Workers' Compensation Act (Long Shore Act) was exclusive. The claimant testified that, at the time of the injury, the ship was located inside the basin of the Navy Yard, on the water. Consequently, the judge concluded that the Long Shore Act had exclusive jurisdiction. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued there was insufficient evidence to establish that the ship was on the navigable waters of the United States when he was injured. However, the only evidence presented on this issue was the claimant's own testimony, and he unequivocally said that the ship was "on the water." The court held that the Workers' Compensation Judge correctly determined that the Long Shore Act provided the claimant's exclusive remedy. The claimant was injured while performing the traditional maritime function of ship repair while the vessel was on the water. The claimant did not fit with any landward extension of the Long Shore Act since he presented no evidence to suggest that the ship was working on a graven dry-dock at the time of his injury. II

Claim petition was again properly dismissed without prejudice where the claimant's delay in obtaining an expert opinion during litigation was due to circumstances beyond his control.

North-Tech, LLC and American Zurich Insurance Company v. WCAB (Skaria); 2488 C.D. 2015; filed September 14, 2016; by Judge Covey

The claimant filed an initial claim petition and penalty petition seeking total disability benefits for a May 16, 2012, work injury. At the final hearing before the Workers' Compensation Judge, claimant's counsel withdrew both petitions. The judge marked the petitions as withdrawn without prejudice.

The claimant later re-filed the claim petition, seeking benefits again for the same injury. Eventually, claimant's counsel again requested the petition be withdrawn without prejudice since the deposition of the claimant's medical expert had not yet been scheduled. The employer asserted in a letter brief to the judge that they were prepared to present fact witnesses on the issue of notice but that the witnesses had left the employer's employment. The judge determined that the employer would be prejudiced if the claimant was given another opportunity to file a petition. Thus, the judge dismissed the claimant's petition with prejudice. The claimant appealed to the Appeal Board, which reversed, finding that the delay in obtaining an expert opinion was due to circumstances beyond the claimant's control.

On appeal to the Commonwealth Court, the employer argued that the Board was wrong to conclude that the claimant's delay in deposing his expert was due to circumstances beyond his control. The employer further asserted that failure to dismiss the claim petition would actually prejudice

the employer. The court disagreed and affirmed the Board, noting that the record showed a good faith effort to advance the case and obtain the opinions of the claimant's medical expert, but that the claimant's medical expert had advised that the claimant needed to undergo an invasive procedure to further refine his causal opinions. The court noted that case law seems to generally imply that prejudice to the employer was grounds for a dismissal with prejudice. However, in this case, because the delays were not due to the claimant's disregard of deadlines orders, a dismissal was not warranted. ||

News from Marshall Dennehey

Michele Punturi (Philadelphia, PA) obtained a seven-figure reimbursement from the Supersedeas Fund of the Commonwealth of Pennsylvania. This extraordinary recovery of *$1,771,961.74* for medical payments stemmed from a complicated fact pattern. The facts of the case involve a 2005 injury with a self-insured employer who had excess coverage provided by a carrier that was a reimbursement policy. In 2000, the employer lost its self-insurance status and replaced it with a workers' compensation self-insurance replacement policy. The claim then pierced to self-insured retention, and the replacement policy carrier became insolvent (liquidated in 2001), and upon liquidation, the claim came under the ongoing payment policy of the Pennsylvania Workers' Compensation Security Fund administered through its third-party administrator. The TPA administered payment of the ongoing claim benefits and submitted reimbursement requests to the excess carrier under the excess policy originally issued to the employer. A URO request was filed challenging the medical treatment as of April 5, 2000, and a decision was issued finding the treatment reasonable and necessary, which was appealed and remanded back to the judge. The judge ultimately found the treatment to be neither reasonable nor necessary by decision in August 2014. No further appeals were filed. In January 2014, the indemnity aspect of the claim resolved by Compromise and Release. The issue in the case was the right/standing of the excess carrier to secure reimbursement for the medical payments found unreasonable and unnecessary. The analysis for the Supersedeas Fund reimbursement focused on Regulation 127.208(g), which addresses URO decisions and reimbursement from the Fund, and Section 443(A), pertaining to supersedeas requests and denials, and the fact that the excess carrier was ultimately the liable entity. The Supersedeas Fund was in agreement with Michele's arguments and awarded the significant reimbursement.

Workers' compensation attorney **Angela DeMary** (Cherry Hill, NJ) has been recognized by *The New Jersey Law Journal*. The award recognizes outstanding work being done by female attorneys across New Jersey, with notable achievements in recent years. Honorees were selected by the NJLJ's editorial staff.

For the fourth consecutive year, the *Philadelphia Business Journal* has named **Marshall Dennehey** one of the Philadelphia region's "Best Places to Work." The award recognizes the company's achievements in creating a positive work environment that attracts and retains employees through a combination of benefits, working conditions and company culture. Marshall Dennehey is proud to have earned this annual recognition since 2013. Hundreds of companies submitted nominations to the program, which ranks the top employers according to scores given to the companies by their own workers. Marshall Dennehey's Delaware Valley locations, including its Philadelphia headquarters and offices in King of Prussia, Doylestown and Cherry Hill, were included in the survey.

Jammie Jackson and **Ashley Toth** (Cherry Hill, NJ) will be featured speakers at the October 20th meeting of the Human Resource Association of Southern New Jersey. In their presentation, "Navigating OSHA's New Rule on Injury and Illness Reporting & Anti-Retaliation," Jammie and Ashley will discuss key concerns for employers, including new electronic reporting requirements and electronic submission of OSHA forms; public posting of data in the OSHA Employee Injury and Illness Database; new anti-retaliation provisions; and post-incident drug testing and safety programs. For more information, click here.

John Swartz (Harrisburg, PA) and **Audrey Copeland** (King of Prussia, PA) convinced the Commonwealth Court to affirm a termination of benefits. The court rejected the claimant's argument that the employer's medical expert did not acknowledge the accepted injury, finding the testimony to be sufficient to support a termination when viewed as a whole. The court found that the expert's skepticism alone did not render his testimony incompetent, nor did snippets of his testimony examined outside of the context of his whole opinion affect its sufficiency.

Kacey Wiedt (Harrisburg, PA) and **Audrey Copeland** (King of Prussia, PA) convinced the Commonwealth Court to reverse the decisions of the Workers' Compensation Appeal Board and the Workers' Compensation Judge granting a claim petition in a "special mission" case. We represented the employer, a landscaping company, in this workers' compensation matter. The claimant borrowed the employer's truck to drive home for his own convenience, and he offered to drop off his co-employee in Hagerstown, Maryland on his way home to Chambersburg, Pennsylvania. After leaving the co-employee's home, the truck ran out of gas, and the claimant was struck by another vehicle while he was on the side of the road. The court held that the Appeal Board and judge erred in finding that the claimant was in the course and scope of his employment. The court reasoned that, even assuming the claimant was on a special mission for his employer—as the judge found—that mission ended when the claimant left his co-worker in Hagerstown; therefore, the claimant was not on a special mission at the time of his injury. The court also found that the evidence did not support application of other exceptions to the "coming and going rule" and that the claimant failed to develop arguments in his brief that he was a traveling employee. Therefore, the claimant could not successfully assert a workers' compensation claim against our client. ||

Delaware Workers' Compensation

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwcg.com)

Paul V. Tatlow

In assessing a claim for temporary partial disability benefits, the Board determined that the average of the claimant's post-injury earnings rather than a week-by-week comparison should be used since this method accounted for the weeks where the claimant earned more than the pre-injury average weekly wage.

Mary Friswell v. New Castle County, (IAB No. 1340275)

The claimant was employed as a police officer for New Castle County when she sustained a work injury on October 13, 2008, to her neck and low back while apprehending a prisoner. An agreement accepting the claim as compensable was issued, and the claimant received total disability benefits at the maximum rate of $605.15 per week. Litigation later took place on the claimant's DACD Petition seeking partial disability benefits for various periods after October 2008. The claimant had gone back on total disability status as of May 12, 2011, following surgery for the 2008 work injury. The sole issue before the Board was the proper method for calculating the claimant's entitlement to partial disability benefits.

The parties stipulated that the claimant's average weekly wage was $1,559.07. The employer presented testimony from an administrative aide in the Risk Management Office for New Castle County, and based on this testimony, exhibits of various payroll records for the claimant's earnings for the relevant time periods after the work injury were submitted. The parties agreed that the claimant was entitled to partial disability benefits, but they disagreed as to the method for calculating them.

The claimant utilized a week-by-week comparison of the pre-injury and post-injury earnings and estimated that the partial disability benefits amount to $6,008.88. On the other hand, the employer averaged the claimant's earnings for the post-injury periods for which she was seeking benefits and calculated the partial disability benefits to be a much lower figure of only $2,700.50. Importantly, the payroll evidence for the post-injury earnings showed that, for a number of bi-weekly pay periods, the claimant earned more than her pre-injury average weekly wage multiplied by two.

The Board noted that the term "partial disability" is not defined in the Act. However, they stated that the purpose of partial disability benefits is to assure that a claimant who suffers a loss of earning power caused by a compensable injury can recover the difference between his or her pre-injury wages and his or her earning power after the injury. The Board stated that "actual earnings" and "earning power" are not synonymous.

The Board concluded that the week-by-week comparison of the post-injury earnings to the pre-injury average weekly wage, as the claimant argued for, did not properly reflect the weeks for which the claimant had received more than her pre-injury average weekly wage. Instead, the Board agreed with the employer that an average of the claimant's earnings for the extended periods of post-injury earnings when she could not perform full duty gave a more accurate estimate of her loss of earning power. Therefore, the Board granted the claimant's petition but awarded only the lower amount of $2,700.50 for partial disability benefits for the periods between October 14, 2008, and May 11, 2011. ||

Side Bar

This case makes an important point regarding a claim for partial disability benefits. By attempting to use the week-by-week comparison of the post-injury earnings to the pre-injury average weekly wage with the focus being only on the weeks where the claimant earned less than that figure, the claimant was proposing a method negating any weeks where the claimant earned in excess of the pre-injury average weekly wage. However, as the Board points out, the focus should be on the claimant's "earning power," which entails looking at weeks where the claimant earned in excess of the pre-injury average weekly wage, and that by including those earnings, the claim for partial disability benefits can be substantially diminished. This gives a more equitable result than the method suggested by the claimant, which would have resulted in a windfall.