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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

Fatal motor vehicle accident occurred within the course and scope of employment because the decedent was responding to an operational issue at one of his employer's locations.

Mandeep Rana v. WCAB (Asha Corporation); 1401 C.D. 2016; filed Sep. 29, 2017; Judge Cosgrove

The decedent was employed as a manager-in-training for a franchisee of Dunkin Donuts, which operated three locations. The decedent was assigned primarily to one location, but with the expectation that he would respond to operational issues at the other locations. On November 12, 2010, a message was left for the decedent by the employer at around 10:00 P.M., informing him that a kitchen employee at one of the locations had fallen ill during his shift. The decedent called the employer and said he would investigate the situation. While en route, the decedent and another employee were involved in a motor vehicle accident. Two days later, the decedent passed away due to injuries from the accident.

The claimants, the decedent's parents, filed a fatal claim petition. The Workers' Compensation Judge found that the decedent was furthering the employer's business and was on special assignment at the time of the accident and ordered payment of benefits to the claimants. The judge further found that, due to reciprocity between the United States and India, the claimants were considered dependents of the decedent.

The employer appealed to the Workers' Compensation Appeal Board on the basis the decedent was performing his regular job duties. The Board agreed, and reversed the judge's decision.

On appeal to the Commonwealth Court, the claimants argued that the decedent had no fixed place of employment, an exception to the general rule that an employee may not be compensated for an injury suffered while commuting to and from work. The employer responded by arguing that the decedent had a fixed place of employment since he regularly worked at any one of its three locations. Furthermore, the employer argued the decedent was not on a special mission, returning to stores after hours were a normal part of the decedent's duties.

The Commonwealth Court disagreed with the employer and reversed the Appeal Board's decision. According to the court's analysis, the decedent, as manager for one of the locations, was a stationary employee as to that store. However, the court found that the decedent was not a stationary employee with regard to the other locations but, rather, a traveling employee. Consequently, the court concluded that the decedent's motor vehicle accident was within the scope and course of his employment. The court also said that the accident could also be deemed compensable under the special assignment doctrine. The court noted that the decedent, having already worked his regular shift, was travelling to the other store to investigate a situation on behalf of the employer. **II**

An insurance company is not entitled to Supersedeas Fund reimbursement when the underlying determination identifies the employer as liable for payment of compensation and does not conclude that compensation was not, in fact, payable.

Volpe Tile & Marble, Inc. v. WCAB (Redelheim); 118 C.D. 2017; filed Sep. 29, 2017; Senior Judge Leadbetter

An insurance company's application for Supersedeas Fund Reimbursement was denied by a Workers' Compensation Judge. In denying the application, the judge concluded that, under § 443(a), the company failed to establish that, upon the outcome of the proceedings, it was

determined that compensation was not, in fact, payable.

The claimant sustained a work injury in July 2006 and was paid benefits. Later, his benefits were suspended by Supplemental Agreement. The claimant then filed a reinstatement petition, seeking a resumption of benefits as of December 2007. The employer and the insurance company filed a joinder petition against another insurance company, alleging the claimant suffered a new injury in December 2007. The judge granted the reinstatement petition. The employer and the insurance company filed an appeal and an application for supersedeas, which was denied by the Appeal Board.

While the appeal was pending, the claimant entered into Compromise and Release Agreements with both insurance companies. Both C&Rs were approved by the judge. However, the parties allowed the appeal before the Board to proceed. Ultimately, the Board reversed the judge's decision granting the reinstatement petition and remanded the case to determine the average weekly wage and compensation rate for the new injury in December 2007. On remand, the judge dismissed as moot the claimant's reinstatement petition and the joinder petition filed against the other insurance company due to the C&Rs.

The original insurance company then filed an application for Supersedeas Fund reimbursement. After it was denied by the judge, the Board affirmed. According to the Board, there was no finding that compensation was not payable to the claimant, but rather, it was determined that another company was the responsible insurer.

On appeal to the Commonwealth Court, it was argued that the benefits paid to the claimant as a result of the Board's denial of supersedeas were "not payable" under § 443 (a) of the Act and, therefore, reimbursement should have been granted. The Commonwealth Court, however, rejected the argument. According to the court, the Board did not determine that compensation was not payable to the claimant but, rather, the company was not the liable insurance carrier. In the court's view, the application for Supersedeas Fund reimbursement did not meet the required criterion that compensation was not payable to the claimant. **II**

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division revisits *Laidlow* and the intentional wrong exception to the exclusive remedy provision of the New Jersey Workers' Compensation Act.

Soto v. ICO Polymers, Docket No. A-3858-14T4, 2017 N.J. Super. Unpub. LEXIS 2551 (App. Div., decided Oct. 11, 2017)

The defendant in this matter grinds plastic pellets into powder, and this pulverization process creates a fine powdered dust that can be highly explosive. As a result, OSHA classified the defendant's Asbury Park facility as a Class II, Division 2 "hazardous location." On July 2, 2007, approximately one year before the plaintiff's accident, accumulations of combustible dust ignited at this facility, resulting in a fire that injured one employee and caused significant damage to the facility. Following the incident, an OSHA compliance officer cited the defendant for multiple safety violations, including significant dust accumulation of up to two inches on the facility's floors, walls and ceiling beams. The defendant entered into a stipulation of settlement with OSHA, a condition of which included the defendant's assurance that it would adhere to OSHA's standard of keeping dust accumulations below one-sixteenth of an inch. On July 26, 2008, the petitioner was severely injured when a powerful dust explosion occurred in the Asbury Park facility.

From the 2007 fire to the 2008 accident, the evidence showed that no changes or upgrades actually occurred in the defendant's Asbury Park facility, despite the assurances and commitment to safety protocols set forth in the settlement with OSHA. The defendant produced no records documenting housekeeping measures, employee training sessions or any records that its employees were apprised of the importance of avoiding dust accumulation. OSHA's post-accident site investigation found that significant amounts of dust were allowed to accumulate on the sprinkler heads, floors, walls, locker room and office, resulting in the explosion that injured the plaintiff. OSHA cited the defendant for repeat violations of the safety protocols for which the defendant was previously cited in 2007.

The plaintiff filed a civil action in the Law Division against the defendant to recover compensatory and punitive damages. He alleged intentional wrongdoing due to the defendant's failure to abate the OSHA safety violations for which it was fined. Section 8 of the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., normally bars a civil action by an employee against an employer for a workplace injury, unless the employee can demonstrate that the injury is the result of intentional wrongdoing by the employer. This is known as the "exclusivity provision" of the Act. Finding that the plaintiff failed to demonstrate that his workplace accident met the intentional wrong standard to allow him to seek damages from his employer, the court granted summary judgment in favor of the defendant. The plaintiff appealed.

In reversing and remanding the Superior Court's ruling, the Appellate Division relied on the seminal case of *Laidlow v. Hariton Machinery Co.*, 170 N.J. 602 (2002) and its progeny. In *Laidlow*, the court delineated a two-prong test to be utilized as an analytical guide for judges when considering and deciding summary judgment motions based on the workers' compensation exclusivity provision. This test requires not only that the conduct of the employer be examined, but also the context of the event in question:

> [T]he trial court must make two separate inquiries. The first is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that

> the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar.

The Appellate Division determined that the motion judge erred because he failed to give the plaintiff the benefit of all legitimate inferences that can be drawn from the evidence amassed by the parties. As the Appellate Division opined:

> Defendant affirmatively promised to abate any OSHA violations outstanding at the time of the July 2, 2007, explosion. However, the evidence shows defendant continued to allow combustible dust to accumulate in hazardous amounts on various surfaces of the Asbury Park facility. Defendant repeatedly asserted that it would improve housekeeping by implementing a hazard communication system and increasing the frequency of its employee safety training sessions.

The Appellate Division concluded that the plaintiff submitted sufficient evidence from which a jury could infer that, at the time of the accident, the defendant was aware that conditions at the Asbury Park facility were exposing its employees to a high risk of serious injury or death. **II**

Delaware Workers' Compensation

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Paul V. Tatlow

The Board issues an important ruling on how frequently an employer can file a petition to terminate total disability benefits.

Michael Sweeny v. Rocla Concrete Tie, Inc., (IAB Hearing No. 1444476 – Decided Jul. 10, 2017)

This case involved a legal motion filed by the claimant seeking to dismiss the employer's termination petition as having been filed in violation of § 2347 of the Act. That section provides in pertinent part:

> …the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in six months, review any agreement or award.

On July 12, 2016, the claimant had filed a petition to determine compensation due, and a hearing took place on that petition on November 29, 2016. The Board issued its decision on January 25, 2017, finding the claimant had sustained a compensable work injury and awarding a period of ongoing total disability benefits. The employer then filed a review petition on May 15, 2017, seeking to terminate the claimant's total disability benefits. A hearing was scheduled on that petition for September 15, 2017.

Shortly after the employer's petition was filed, claimant's counsel filed a motion to dismiss the review petition, asserting that it violated the six-month prohibition contained in § 2347. Specifically, the claimant argued that the prior decision and the award occurred on January 25, 2017. Therefore, the employer's review petition—filed on May 15, 2017—was less than six months later.

The Board disagreed and dismissed the claimant's motion. In so doing, the Board cited the Supreme Court's decision in *Stikeleather v. Zappacosta*, 293 A.2d 572 (Del. 1972), for the proposition that the original making of an award on a petition is not a "review" as that term is used in § 2347. As applied to this case, the Board reasoned that the claimant had achieved an award on the initial DCD Petition but there had been no "review" of that award. Accordingly, the § 2347 limitation on how frequently the Board may review an award was not implicated.

The Board further clarified that the prohibition contained in § 2347 refers to Board actions, not the actions of a party in filing a petition. In other words, a party filing a petition is not in and of itself a "review" as used in § 2347. The Board also addressed the issue of whether the six-month period should be measured from the date of the Board's hearing or the date of the Board's award. They cited a prior decision they had rendered which clarified that the hearing itself is the actual "review" and, therefore, the six months must be measured between hearings. The implication of this is that the Board cannot hold a hearing to "review" an award more than twice a year, or once every six months. The Board commented that this is a reasonable timeframe since, by not forcing a party to go through the time and expense of a hearing to review an award more than twice a year, they provide some breathing room for the litigants. **II**

News from Marshall Dennehey

Marshall Dennehey's Harrisburg office has been named a "Top Law Firm for Women" by the *Central Penn Business Journal*, ranking #8 out of the region's top 25 law firms. The recognition is based on the number and percentage of women lawyers in the office. Out of 23 total attorneys, eight are women: three shareholders and five associates. "We are extremely pleased to be recognized," said Harrisburg office managing attorney, Timothy J. McMahon. "Many years ago the firm made a commitment to the advancement and retention of our female attorneys, and it continues to be a priority today. We work hard to promote and cultivate a culture where women are welcomed, supported and recognized in equal measure to their male colleagues." Earlier this year, Marshall Dennehey was nationally recognized by *Law360* as one of the "Best Law Firms for Female Attorneys," and in 2014, the firm was named to the 2014 *Honor Roll of Legal Organizations Welcoming Women Professionals* by the Pennsylvania Bar Association's Commission on Women in the Profession.

Nearly 12 years after the claimant's injury, **Andrea Rock** (Philadelphia, PA) successfully prosecuted a modification/suspension petition on behalf of a large financial institution. The claimant sustained injuries to her left shoulder and cervical spine in October 2005. Since that time, she has had two cervical spine surgeries and two shoulder surgeries. Andrea was able to establish that the claimant was able to return to work in a sedentary duty capacity, working from home in a telemarketing position, thus modifying her total disability benefits to a partial. The Workers' Compensation Judge was particularly persuaded by the factual testimony that demonstrated that the actual job duties were no more than what she had to do in her normal activities of daily living.

Michele Punturi (Philadelphia, PA) defeated a claimant's appeal of the Workers' Compensation Judge's remanded decision involving claim and penalty petitions. The initial decision found that: (1) the claimant was not credible; (2) his testimony was not supported by the medical evidence; and (3) he failed to prove a work injury. The judge also accepted the opinions of the IME examiner, who testified that there was no evidence of an aggravation or worsening of a meniscal tear. The judge dismissed both petitions. The claimant appealed, and the matter was remanded by the Appeal Board to address the credibility determinations the judge made of the claimant's testimony and the medical evidence. The parties presented their positions before the judge and subsequent briefs were filed. The judge ultimately found, based upon the evidence presented, that the IME physician's testimony provided substantial, competent and credible testimony, which was contrary to the claimant's medical evidence. The judge again found the claimant not credible based upon his testimony.

Kacey Wiedt (Harrisburg, PA) successfully prosecuted a termination petition and defeated reinstatement and review petitions on behalf of a school district. The claimant tripped on a hockey stick left by a student in the classroom, resulting in a trapezius muscle strain. The claimant alleged she injured her low back as a result of undergoing physical therapy for treatment for her work injury. This resulted in a disc herniation that required surgery. Kacey was able to establish that the claimant was fully recovered from the trapezius muscle strain and that her disc herniation and surgery were not related to the original injury. The Workers' Compensation Judge found that the claimant did not suffer a low back injury as a result of any activity with physical therapy, was suffering from multi-level degenerative disc disease, and did not suffer any sort of herniation or tear during physical therapy.

Judd Woytek (Allentown, PA) successfully defended against claim and penalty petitions. The claimant alleged a lower back injury and had MRI findings of disc bulges or protrusions. Judd argued that the claim should be denied because the claimant failed to report the injury on the day it happened, was terminated from his employment for cause several days later, and failed to seek medical treatment for the alleged injury for almost three months, when he was referred to a doctor by his attorneys. The Workers' Compensation Judge agreed with Judd's arguments. He found the claimant's testimony to be replete with inconsistencies and not credible. The judge also discredited the claimant's medical expert based, in part, upon Judd's cross-examination, during which the doctor admitted that his diagnosis of an aggravation of pre-existing lumbar degenerative disc disease never once appeared in his medical records. The claim and penalty petitions were denied and dismissed. II

We'd like to thank everyone who attended our "What's Cooking in Workers' Comp" seminar on October 19. Close to 100 guests gathered to hear members of the department and esteemed guest speakers discuss emerging issues and how they are affecting the practice of workers' compensation litigation management.

To those who were unable to attend, we hope to see you at a future event!