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What's Hot in Workers' Comp

SPECIAL PENNSYLVANIA WORKERS' COMPENSATION ALERT

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At the end of May, the Pennsylvania Supreme Court released two opinions in Pennsylvania workers' compensation cases, one concerning the issue of statutory employer liability and the other relating to the issue of average weekly wage calculation.

In *Six L's Packing Co. and Its Claims Administrator, Broadspire Services, Inc. v. WCAB (Williamson)*; 46 EAP 2011; decided May 29, 2012; by Mr. Justice Saylor, the Supreme Court addressed a statutory employer's liability for payment of workers' compensation benefits to a claimant who was employed by an independent contractor. The entity that was found to be the statutory employer in the case (Six L's) grew and distributed produce and contracted with a company to perform services, such as the transportation of produce. The claimant worked for this second company as a truck driver and suffered injuries from a motor vehicle accident that occurred while the claimant was transporting tomatoes between a warehouse and a processing facility.

After claim petitions were filed, it was determined that the only entity to have insurance was Six L's. At the Workers' Compensation Judge (WCJ) level, Six L's argued that they were not responsible as the claimant's statutory employer for the payment of benefits since the elements of statutory employment had not been met. In support of their position, Six L's pointed out that the claimant was injured on a public highway and not on premises occupied or controlled by Six L's. Six L's also presented evidence that it used independent contractors, such as the company the claimant worked for, to supply transportation services.

The WCJ rejected Six L's contention and found them liable for payment of the claimant's benefits. The Workers' Compensation Appeal Board (Board) affirmed—despite agreeing that the claimant's injuries were not sustained on premises controlled by Six L's. In the Board's view, under §302 (a) of the Act , Six L's was a contractor and the other company a subcontractor since it performed work of a kind that was a regular part of Six L's business. Consequently, the Board found Six L's to be the claimant's statutory employer. The Commonwealth Court agreed.

The Supreme Court affirmed the decisions below. According to the Court's analysis of the Act, the legislature intended to require persons—including entities like Six L's—who contracted with others to perform work that was a regular or recurrent part of their business to ensure that the employees of those others were covered by workers' compensation insurance on pain of assuming secondary liability for benefits payment upon a default.

In *Lancaster General Hospital v. WCAB (Weber-Brown*); 69 MAP 2010; decided May 29, 2012; by Madame Justice Todd, the Court was confronted with a case concerning the calculation of an average weekly wage with an unusual fact pattern.

The claimant worked as a nurse for Lancaster General Hospital (employer) beginning in 1979. Around that time,

the claimant was cleaning the tracheotomy of a patient who was infected with herpes simplex virus. While the claimant was cleaning, the patient coughed and sprayed sputum in the claimant's left eye. The claimant immediately flushed out her eye, but two weeks later, the eye became swollen and infected. The claimant's symptoms subsided with treatment, and she did not miss any work with the employer. She later left that employment for reasons unrelated to the eye incident.

In the years that followed, the claimant's eye became infected several more times. Each time, the symptoms subsided with treatment. In October of 2006, however, while working for another employer, the claimant's eye again became infected. This time, the eye did not respond to treatment. In February of 2007, the claimant lost the vision in her eye, and, thereafter, she underwent a cornea transplant. The transplant did not work, and due to her blindness, the claimant was not able to return to work. At that time, the claimant was earning $21.00 per hour on a part-time basis.

The claimant filed a claim petition alleging the complete loss of use of her left eye. The WCJ granted the petition and awarded specific loss benefits based on the wages the claimant was earning for the employer she was working for at the time she lost the use of her eye, not the employer she was working for at the time of the original incident back in 1979. The employer appealed, and the Board affirmed, as did the Commonwealth Court. The Board and the court concurred that the Act defines wages in terms of the claimant's weekly pay at the time of the injury. Since the date of injury was the date when the claimant was informed by her doctor of the loss of use of her eye, the WCJ's calculation of the claimant's average weekly wage based on her earnings at the time the loss of use of the eye was identified was proper.

The Supreme Court agreed and held that, under these circumstances, the claimant's average weekly wage could be calculated based on wages earned with an employer different from the one paying benefits. According to the Court, §309 of the Act is concerned with calculating the claimant's average weekly wage at the time of injury. The Court also commented that §309 does not explicitly indicate which employer, the payor or the employer at the time of the injury, is relevant for purposes of the average weekly wage calculation. Because the incident occurred in 1979, but the injury did not develop until May of 2007, the calculation of the claimant's average weekly wage based on the claimant's 2007 earnings was proper.