What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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Pennsylvania Workers' Compensation

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The testimony of the employer's medical expert was competent and legally sufficient to support a termination of benefits, even though the expert was skeptical of the acknowledged injury.

Jacqueline O'Neal v. WCAB (News Corp. Ltd.); 2203 C.D. 2010; filed June 15, 2011; by Senior Judge Kelley

The claimant sustained a work injury to her left wrist in November 1993 that was acknowledged by a Notice of Compensation Payable (NCP). The employer filed a termination petition based on the opinion of a medical expert that the claimant was fully recovered from the injury. The termination petition was granted by the Workers' Compensation Judge. The judge concluded that the employer's expert accepted previous findings made regarding the claimant's work injuries, including a finding (in a decision dismissing a previous termination petition) that the claimant suffered from Thoracic Outlet Syndrome. The claimant appealed to the Workers' Compensation Appeal Board (Appeal Board), which affirmed the judge's decision.

At the Commonwealth Court level, the claimant argued that the testimony given by the employer's expert was incompetent since he disbelieved the claimant's recognized work injury, which had been determined in the previous judge's decision. In support of this contention, the claimant cited two portions of the expert's testimony wherein the expert expressed skepticism about the work injury. The court, in dismissing the claimant's appeal, pointed out that the employer's expert, throughout his testimony, was accepting of the claimant's work injury and said that the claimant was fully recovered from the injuries as of the date of the IME. Thus, the court concluded that the testimony given by the employer's expert was sufficient to support a termination of benefits and affirmed the decision by the judge. **II**

An employer that is not a "successor in interest" to a prior company is not responsible for payment of an award for hearing loss benefits.

James McClure, Sr. v. WCAB (Cero Fabricated Fabrics); 388 C.D. 2011; filed September 15, 2011; by Judge Pellegrini

The claimant worked for Company A as a press operator beginning in 1972. Company A's assets were later acquired by Company B in July of 2000. The claimant continued to work at the same job, in the same plant, and was laid off by Company B in 2003. Audiometric testing performed on the claimant in 1997 indicated that he had a binaural hearing loss

of 18.1%. Testing performed subsequently in July of 2004 showed a loss of 24.69%. The claimant later filed a claim petition for hearing loss benefits against both employers.

The Workers' Compensation Judge issued an Interlocutory Order dismissing Company A on the basis that Company B was the successor-in-interest and bore all responsibility for payment of benefits if the claimant prevailed. This was followed by a decision awarding benefits to the claimant for a 24.69% binaural hearing loss as the result of exposure to noise while working for both employers. Company B appealed, and on the successor-in-interest issue, the Appeal Board vacated and remanded the matter to the judge to include Company A as a party. On remand, the judge dismissed the claim petition against Company A on the basis that it was time-barred. The claimant's employment with Company A ended in July of 2000, and the claim petition was not filed until August of 2004, more than three years after the claimant could have had occupational noise exposure while working for Company A. The judge further found that Company B was responsible for a 6.57% binaural hearing impairment due to noise exposure on July 22, 2004.

On appeal, the Commonwealth Court rejected the claimant's argument that Company B was a successor-in-interest to Company A and, therefore, responsible for payment of a 24.69% cumulative hearing loss. The court, applying a test for determining successor liability, concluded that the asset purchase agreement provided that there was a sale of assets between both employers and was not intended to be a sale of any liabilities. Because there was no merger or consolidation, the transaction expressly excluded workers' compensation claims, and there was no allegation that the transaction was fraud to escape liability to pay compensation or defraud creditors, and there was no indication the sale was not for fair value. The court held that the Appeal Board properly determined that Company B was not a successor-in-interest and not responsible for 100% of the claimant's binaural hearing loss benefits. **II**

Unreasonable contest attorney's fees are not available where disputed issues remain during the litigation.

Thomas Grady v. WCAB (Lutz t/a Top of the Line Roofing), 16 C.D. 2011 (August 5, 2011), opinion by President Judge Leadbetter

The claimant sustained a fracture to a thoracic vertebrae resulting in paraplegia of both lower extremities and depression as a result of a fall from a roof top. The claim was denied on the basis that the claimant was an independent contractor and not an employee. The claimant filed a claim petition alleging his injuries occurred in the course and scope of his employment. He also asserted a claim against the Uninsured Employer's Guarantee Fund. The Workers' Compensation Judge bifurcated the issue of the employment relationship and issued an interlocutory decision concluding the claimant was an employee at the time of injury. The parties then stipulated that the claimant's medical condition was not an issue in the litigation and no medical evidence would be submitted. The case went to a final decision to address disputed issues regarding the calculation of the claimant's average weekly wage and corresponding compensation rate. Since the employer did not offer any evidence as to claimant's injuries and/or disability, the judge found that the employer's contest was unreasonable after the preliminary determination was made that the claimant was an employee. The Appeal Board reversed the judge's decision as to the finding of an unreasonable contest, indicating that the employer did not actually contest the claimant's medical condition and, thus, attorney's fees should not have been awarded.

The Commonwealth Court affirmed the denial of attorney's fees for an unreasonable contest under §440 (a) of the Act. In so holding, the court noted that the judge did not direct the employer to begin paying compensation benefits in her interlocutory decision on the employment relationship because disputed issues remained as to the claimant's wage rate and compensation rate. Further, the fact that the employer did not contest the medical issues could not give rise to a claim for unreasonable contest thereof. As a result, this case is distinguished from prior court holdings finding unreasonable contest where there is no dispute as to an issue, but the insurer fails to acknowledge the fact or continues to contest it in litigation. **II**

The Workers' Compensation Judge errs in rejecting unrefuted credible medical evidence found credible but unpersuasive as to continuing disability based upon the doctor's characterization of the claimant's injuries as "degenerative" where, as a matter of law, a degenerative condition may be attributable to a claimant's work injury.

Susan Green v. WCAB (U.S. Airways), 2539 C.D. 2010 (August 20, 2011), opinion by Judge Butler

The claimant appealed the denial of a reinstatement petition where the Workers' Compensation Judge found that the unrefuted testimony of the claimant's medical expert was credible but unpersuasive as to the claimant's continuing disability and the causal relationship between her injuries and work, based solely on the characterization that the doctor described the injuries as "degenerative in nature." The Appeal Board affirmed the judge's decision, falsely finding the judge found the medical evidence not credible. Before the Commonwealth Court, the claimant argued that the judge's decision was not well reasoned and contrary to the law because the judge erroneously presumed that the description of the claimant's condition as degenerative ruled out a finding of a causal relationship to the original work injury.

The Commonwealth Court reaffirmed the principle that merely describing a condition as degenerative does not preclude a finding that it may be activated or accelerated by the work-related trauma. The court cited numerous prior decisions which have upheld findings that a claimant who suffers an acceleration or aggravation of a condition due to a work injury is entitled to compensation benefits. The court indicated that the judge and Appeal Board missed the point of the law in failing to distinguish between degenerative disability produced by work-related trauma and degenerative disability not related to the claimant's work. The court held that the medical evidence offered by the claimant clearly established the nature and progression of the original work injury into subsequent degenerative disability. In so finding, the court determined that the judge capriciously disregarded the medical evidence by not explaining why it was rejected other than the misapplication of the law. **II**

The claimant failed to prove that the decedent died in the course and scope of his employment - he was found dead in his home office - since there was insufficient evidence as to how, when and what the decedent was doing at the time he sustained the injury that led to his death.

Donald Warner v. WCAB (Greenleaf Service Corp.), 25 C.D. 2011 (September 1, 2011), opinion by Judge Brobson

The decedent, an international sales manager who worked out of his house or at the employer's facility when not traveling, was found dead in his home office by his wife. The evidence established that the decedent had communicated work-related e-mails and phone calls that morning while working from home due to a non-work injury that prevented him from making a sales trip. The employer provided the decedent with a computer, phone and other home office equipment and reimbursed him for home office-related expenses. The evidence indicated that the decedent died from blunt force head trauma, and blood was found on the stairs outside the front door of the house and in a bathroom, but there was no evidence as to how, when and where the decedent was injured and, more particularly, what he was doing at the time.

The Commonwealth Court affirmed the decisions of the Workers' Compensation Judge and the Appeal Board denying the fatal claim petition on the basis that the claimant failed to establish through competent evidence that the decedent died in the course and scope of his employment. The claimant tried to establish a claim under the "personal comfort" doctrine, which provides that when an employee sustains an injury during an inconsequential or innocent departure from work during regular work hours, it is nonetheless considered to have been sustained in furtherance of the employer's business. The court rejected this argument because the record was unclear as to the circumstances of the decedent's death. While the claimant contended that the circumstances suggested the decedent slipped and hit his head while outside smoking a cigarette, the court held that this was speculative at best. **II**

New Jersey Workers' Compensation

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Goyden v. State Judiciary and the standard for compensable workplace stress.

Wildstein v. Middlesex County Department of Weights and Measures, Docket No. A-3389-09T1, 2011 N.J. Super. Unpub. LEXIS 1570 (App. Div., decided June 17, 2011)

The petitioner was employed as an inspector by the respondent. From 2003 through 2007, he was supervised by John Doe ("Doe") who, the record clearly established, managed the department in which the claimant worked in a very lax manner. Employees were not held to requirements of strict time reporting, were allowed to come and go without significant accountability, and their whereabouts were not closely monitored during the work day. The petitioner, like other employees, often left work early without accounting for his time. There was also testimony from a co-employee that the petitioner occasionally conducted his own side business, manufacturing signs, while he was on the clock with the employer.

Doe retired in February 2007 and was replaced by John Smith ("Smith"). Smith immediately informed his staff that he intended to strictly enforce the rules. He required strict timekeeping enforcement, requiring employees in the field to sign in and out during the day. Under Doe's administration, the petitioner was soon written up for a number of time-related infractions involving unexplained periods of absence from work. The petitioner did not deny the infractions but claimed he was being singled out for reprimand while other employees engaged in similar behavior. Additional infractions involved the petitioner's filing of incomplete or falsified inspection reports resulting from complaints originating outside the department. A final disciplinary charge involved the petitioner's violation of the Middlesex County residence policy. Although the petitioner did admit that he resided outside of Middlesex County

during the entire period of his employ with the department, he claimed this information was at all times well known by his supervisors. Following a disciplinary hearing where the petitioner was found guilty of all infractions, his employment with the department was terminated.

The petitioner soon filed a claim with the Division of Workers' Compensation alleging that he suffered anxiety, depression and insomnia as a result of workplace stress due to unfair treatment, retaliation and harassment by his supervisor. Following trial, the Judge of Compensation held that any stress the petitioner suffered resulted from nothing more than merited criticism by his supervisor and did not satisfy the criteria for a compensable occupational disease within the meaning of N.J.S.A. 34:15-31 and N.J.S.A. 34:15-36, as interpreted by *Goyden v. State Judiciary*, 256 N.J. Super. 438 (App. Div. 1991). In *Goyden*, the Appellate Division held that the petitioner must demonstrate the existence of objective evidence of job stress peculiar to the particular workplace which, when viewed realistically, establishes working conditions sufficiently stressful to contribute to the development of psychiatric disability. As the *Goyden* Court stated, "Merited criticism cannot be considered to be a condition characteristic of or peculiar to a particular trade, occupation, or place of employment, as it is common to all employment."

In affirming the Judge of Compensation's dismissal of the petitioner's claim, the Appellate Division reasoned that "[t]he gist of the *Goyden* decision is that the exercise of managerial prerogative in cases where an employee refuses to conform to work rules" is not a compensable condition. As the Appellate Division concluded, "[t]he fact that Petitioner may have been criticized for the way he did his job by his boss and the fact that he wasn't happy with the tougher rules and tighter discipline under Mr. Smith is not sufficient to constitute grounds under *Goyden* that would qualify him to receive Workers' Compensation benefits." **II**

Delaware Workers' Compensation

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Paul V. Tatlow

The Board holds that the employer is not liable to pay travel expenses for the claimant's spouse to accompany him to medical appointments absent medical evidence that the claimant requires the assistance of a travel companion.

Jason Bristor v. Dover Downs, Inc., (IAB #: 1353147) Decided August 25, 2011

In Delaware, pursuant to §2322(g) of the Act, a claimant is entitled to mileage reimbursement for travel to and from medical appointments for a work-related injury. In this case, the claimant had originally moved to Nebraska following his work injury and sought payment for not only his own travel expenses but also those of his wife in returning to Delaware for medical treatment.

In a prior ruling, the Board had found that the employer was only required to pay for the claimant's travel expenses and not for those of a spouse since there was no evidence of the medical necessity of the claimant having a travel companion.

Following this ruling, the claimant then moved to Puerto Rico and filed a motion seeking to have travel expenses paid from Puerto Rico to Delaware for an upcoming defense medical examination.

The facts show that the claimant and his wife were willing to use airline travel vouchers in order to fly from Puerto Rico to Delaware. However, the claimant was seeking an order directing the employer to pay for a rental car, in lieu of a car service, and to pay for the gas and tolls, with the intention that the claimant's wife would drive the car from the airport to the medical appointment. The employer refused the request to pay for the rental car in part based on increased liability issues that would result if the claimant's wife were driving the rental car as opposed to the employer providing a car service for the claimant.

The Board commented that the claimant's request was not unreasonable under the totality of the circumstances. However, the Board held consistent with its prior ruling that the employer was not required to pay any additional costs associated with the claimant's wife accompanying him on this trip. Specifically, the Board stated that it would not order the employer to rent a car for the claimant's wife to drive since there was no medical evidence showing that the claimant required a travel companion. Therefore, the claimant's wife was permitted to accompany him on this trip, but she would need to pay her own expenses for doing so. **II**