What's Hot in Workers' Comp
Significant Workers' Compensation Case Summaries
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Pennsylvania Workers' Compensation

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The Commonwealth Court denies a claim for a work-related psychiatric injury sustained by a liquor store clerk who was robbed at gunpoint on the basis that it was the result of normal working conditions.

PA Liquor Control Board v. WCAB (Kochanowicz); 760 C.D., 2010; filed September 20, 2011; by Judge Pellegrini

Recently, the Commonwealth Court issued a decision in this psychic injury case that is causing a stir in the workers' compensation community on a national level. The court held that a liquor store clerk who was robbed at gunpoint, as well as tied to a chair with duct tape, was not entitled to benefits for a psychic injury. The reason? According to the court, given the frequency of liquor store robberies and the proximity of recent incidents, the claimant, a career retail liquor store clerk, was not exposed to abnormal working conditions by virtue of the armed robbery.

In concluding that this particular claimant was not subjected to abnormal working conditions and that he did not meet the burden of proof for his claim, the court was persuaded by evidence presented by the employer that the claimant received considerable training on workplace violence. The claimant was also provided with pamphlets and educational tools on how to handle a robbery. Moreover, the employer presented evidence that since 2002, there were approximately 15 robberies per year of retail liquor stores in southeastern Pennsylvania and that four robberies occurred in close proximity to the claimant's store within weeks of the incident involving the claimant. In light of this evidence, the court concluded that robberies of liquor stores are a normal condition in today's society.

It must be pointed out that a strong dissenting opinion was authored by Judge Cohn Jubelirer. In her view, the majority of the court went too far because they focused on evidence that was largely discredited by the workers' compensation judge and because she felt that the court exceeded their role by making their own factual findings in reaching their conclusion. Judge Cohn Jubelirer pointed out that, although the claimant was provided with training on handling a robbery, one of the employer's own pamphlets specifically stated that robberies occur very infrequently. The dissenting opinion also pointed out that the workers' compensation judge did not credit the statistical evidence presented by the employer regarding the frequency of liquor store robberies. In short, Judge Cohn Jubelirer and the judges that joined in the dissent (Judges McGinley and Butler) countered that the majority of the court appeared to be equating

"forseeability" with "normalcy." In other words, nearly anything is foreseeable, and just because events like robberies occur, that does not make those events "normal."

The court's opinion is one that undoubtedly has the potential to shock the conscience of many in the workers' compensation community. Considering the profile of this case, and considering the disagreement of the judges on the panel, it is anticipated that the Supreme Court of Pennsylvania will be heard from on this groundbreaking and controversial decision. **II**

The court reverses a termination of claimant's benefits since it was based on equivocal testimony given by the employer's medical expert.

Richard Miller v. WCAB (Peoplease Corp., Arch Insurance Company & Gallagher Bassett Services); 204 C.D. 2011; filed October 11, 2011; by Senior Judge Friedman

The employer filed a termination petition following the claimant's work injury. In support of the petition, the employer presented testimony from the claimant's treating orthopedic surgeon, who had released the claimant to unrestricted work because the claimant had fully recovered from his work injury. The only evidence offered by the claimant was his personal opinion that he had chronic nerve damage related to the work injury.

The termination petition was granted by the workers' compensation judge and affirmed on appeal by the Appeal Board. The Commonwealth Court, however, reversed after reviewing the testimony given by the employer's medical expert. In the court's view, the expert failed to provide unequivocal testimony that the claimant was fully recovered from the work injury. As an example, the court noted that as to the claimant's pain, the expert testified, "I think that his pain he was having pre-operatively nearly completely resolved for the most part." The court interpreted the statement as a "peculiar way" of saying that the claimant's pain from his work-related injury was not fully resolved. **II**

An employer who refuses to pay bills for medical treatment causally related to the work injury, without explanation and without requesting utilization review, is subject to penalties to be imposed at the discretion of the workers' compensation judge.

CVA, Inc. and State Workers Insurance Fund v. WCAB (Riley); 2658 C.D. 2010; filed October 14, 2011; by Judge Leavitt

The claimant filed a penalty petition alleging the employer violated the Act by failing to pay for numerous Therapeutic Magnetic Resonance (TMR) treatments, from May 2008 through June 2009. The petition was assigned to a workers' compensation judge, who held one hearing and told the parties they had three months to submit their evidence and briefs. The claimant submitted HCFA billing statements sent to the employer, along with medical reports documenting his condition and response to the treatments. Also offered by the claimant were denial letters from the employer. The employer objected to the documents as hearsay, but the workers' compensation judge overruled the objection. The employer presented no evidence in defense of the penalty petition and did not submit a brief.

The workers' compensation judge granted the penalty petition, finding the employer had refused to pay some bills without explanation. The total outstanding balance of unpaid medical bills was $140,876, and the workers' compensation judge assessed a 50% penalty. The judge's decision was affirmed by the Appeal Board.

On appeal, the Commonwealth Court rejected the employer's argument that the penalty petition should have been denied because the claimant's documentary evidence was legally insufficient to prove a violation of the Act. The court cited numerous cases supporting the submission of medical bills and reports where litigation involves medical expenses, making medical reports admissible regardless of the length of disability. The court also rejected the employer's argument that the claimant failed to prove the TMR treatment was reasonable and necessary, or reasonable in cost, and that the claimant failed to prove that the treatment was related to the injury because the claimant did not present medical evidence that the treatment was "generally accepted in the medical community." The court pointed out that the injury was to the claimant's left knee and that the treatment was for the left knee injury. The court also pointed out that the employer did not submit the bills for utilization review. The court also rejected the employer's argument that they were denied due process rights by the workers' compensation judge and that the 50% penalty was excessive. The employer did not meet the deadline for presenting evidence given by the judge, and the judge was empowered to assess a penalty of up to 50% for violations involving "unreasonable or excessive delays." **II**

The Commonwealth Court holds that the workers' compensation judge cannot suspend the benefits of an undocumented alien solely by taking an adverse inference from the claimant's refusal to answer the question of whether he was a naturalized citizen.

Kennett Square Specialties v. WCAB (Cruz); 636 C.D. 2011; filed October 19, 2011; by Judge Brobson

The claimant sustained a work-related injury to his low back while working as a truck driver for the employer's mushroom growing business. Following the employer's issuance of a notice stopping temporary compensation and a notice of workers' compensation denial, the claimant filed a claim petition. At a hearing before the workers' compensation judge, on cross-examination the employer asked the claimant whether he was a naturalized

citizen. The claimant refused to answer, asserting his privilege under the 5th Amendment of the United States Constitution. The employer then asked the claimant if he was an undocumented worker. Again, the claimant refused to answer, citing his privilege against self-incrimination. The workers' compensation judge granted the claim petition but suspended the claimant's benefits based on a finding that the claimant was an undocumented alien worker. The judge drew an adverse inference from the claimant's refusal to answer the employer's questions regarding his immigration status.

On appeal, the Appeal Board reversed the suspension of the claimant's benefits, and the Commonwealth Court affirmed. The court held that the workers' compensation judge's adverse inference from the claimant's refusal to answer questions about his immigration status did not support his finding that the claimant was an undocumented alien. According to the court, it was not error for the judge to draw the adverse inference, but the adverse inference alone could not support the finding that the claimant was an undocumented alien. **II**

An IRE that finds no objective evidence of an accepted work injury on the date of the examination may validly assign a zero impairment rating for that condition.

Westmoreland Regional Hospital v. WCAB (Pickford); No. 1188 C.D. 2009 (Pa. Cmwlth.); decided September 23, 2011; Judge Leavitt

The claimant sustained a work injury which included judicially determined conditions of reflex sympathetic dystrophy (RSD) and brachial plexus stretch. The employer obtained an IRE to determine the degree of whole body impairment under Section 306(a.2) of the Act. The IRE physician found no objective evidence of either the RSD or the brachial plexus injury, even though he acknowledged these to be work-related conditions. The AMA Guides to the Evaluation of Permanent Impairment require objective evidence of a condition and that the condition exhibit a sensory or motor impairment. The employer petitioned to modify benefits based upon the 22% IRE evaluation, which included 0% for the RSD and brachial plexus stretch. The workers' compensation judge denied the petition because it did not include a rating for the two acknowledged injuries and also because the treating physician found the claimant to exhibit objective evidence of RSD five months after the IRE.

After the Appeal Board affirmed, the Commonwealth Court reversed. The court first found that an IRE physician does not have to assign an impairment rating greater than 0% in the absence of objective evidence of the condition *on the date of the IRE* evaluation. In so holding, the court noted that both the Act and the AMA Guides require that the impairment must be based on the claimant's condition on the date of the IRE and that it is not a survey of the claimant's injuries over a period of time. Unlike a finding of full recovery, which may be challenged on the basis of medical evidence showing the claimant's disability from work over time, an IRE is limited to impairment on the date of the exam. In this case, the claimant's physician had examined the claimant the day before the IRE and confirmed there was no objective evidence of RSD, but stated that the condition waxes and wanes, and found such evidence months later. **II**

Supersedeas Fund reimbursement is not available to an employer who is held not to be the liable employer.

GMS Mine Repair & Maintenance, Inc. v. WCAB (Way); No. 92 C.D. 2011 (Pa. Cmwlth.); decided October 7, 2011; Sr. Judge Friedman

Employer A sought Supersedeas Fund reimbursement for indemnity and medical benefits that it paid to the claimant for an occupational disease based on a workers' compensation judge's determination that, because Employer A never filed an answer to the claim petition, it was the liable employer. After the Appeal Board reversed that decision and held that another defendant was liable to the claimant, Employer A filed an application for Supersedeas Fund reimbursement. The workers' compensation judge denied the request, finding that the payments were not the result of a final determination that benefits were not payable but, rather, that Employer A was not the liable employer. In affirming that determination, the Commonwealth Court noted that supersedeas is available under Section 430 of the Act only where "it is determined that such compensation was not, in fact, payable." Here, Employer A was found not to be responsible for the payments, but they were in fact payable to the claimant. The employer's remedy is to pursue subrogation against the responsible party under Section 319 or for the judge to order reimbursement from the liable employer. **II**

The Commonwealth Court reaffirms that unemployment compensation benefits are not to be included in the calculation of a claimant's average weekly wage.

Lenzi v. WCAB (Victor Paving); No. 741 C.D. 2011; decided October 13, 2011 (Pa. Cmwlth.); Sr. Judge Kelley

The claimant sought to include unemployment compensation benefits received while off work during the 52 weeks prior to a work-related injury by arguing that the inclusion of such compensation would be a truer measure of his actual earnings and would reflect the remedial nature of the Act. The claimant sought support for this position in the concurring opinion of Judge Baer in *Reifsnyder v. WCAB (Dana Corp.)*, 883 A.2d 537 (Pa. 2005), which argued that the court should not have addressed the issue of whether unemployment compensation benefits are excluded from the average weekly wage calculation. In rejecting this position, the Commonwealth Court stated that there is no justification for revisiting the holding in *Reifsnyder* that the inclusion of unemployment compensation benefits is not required in order to ensure an accurate measure of a worker's earnings history. **II**

The claimant, found to have withdrawn from the workforce because he stopped working following his injury, applied for and received both a retirement pension and Social Security Disability, and did not attempt to find work after issuance of a notice of ability to return to work, thus supporting a suspension of benefits.

Dept. of Public Welfare/Norristown State Hospital v. WCAB (Roberts); No. 1677 C.D. 2010 (Pa. Cmwlth.); reported October 14, 2011; Judge Jubelirer

The employer appealed the decision by the workers' compensation judge which denied a suspension petition based on claimant's voluntary withdrawal from the workforce and a modification petition using a labor market survey. The workers' compensation judge found that the claimant chose to accept a retirement pension as an economic decision when the facility he worked at closed and that the employer did not carry its burden of proof on the labor market survey because it was "inconceivable" that somewhere within the Department of Welfare there was no position within the claimant's abilities. After an appeal to the Appeal Board and a remand on the issue of whether positions were available with the employer, the workers' compensation judge rejected the labor market survey since no specific jobs were identified. He further found the claimant was unable to perform the type of jobs described.

After the Appeal Board affirmed the workers' compensation judge, the Commonwealth Court reversed, finding that the totality of the circumstances established that the claimant had voluntarily withdrawn from the workforce so as to support a suspension of benefits. In so holding, the court specifically noted the facts that the claimant (1) had not worked since his injury; (2) had applied for and received both a retirement pension from the employer and a Social Security Disability pension shortly after he stopped working; (3) was ineligible to work and still received Social Security Disability; and (4) never attempted to find work after receiving a notice of ability to return to work. Of note, the claimant did not contend that his work-related injury forced him from the workforce, a position that claimants may use in an attempt to avoid a suspension on the basis of a withdrawal from the workforce. **II**

The Supreme Court holds that a medical opinion based upon unsubstantiated assumptions or a proper factual foundation is insufficient to overcome the presumption of occupational disease causation.

City of Philadelphia v. WCAB (Kriebel); No. 49 EAP 2010 (Pa. Supreme Court); filed October 19, 2011; Madame Justice Orie Melvin

The claimant, a firefighter, died from liver disease caused by Hepatitis C. The decedent's widow filed a fatal claim petition alleging that he died from Hepatitis C contracted in the course of his employment, a result of exposure to the blood of victims whom he attended. The decedent's widow offered supporting medical evidence. The defense countered with a medical opinion that the decedent's hepatitis was acquired from intravenous drug use and relied upon a note in the decedent's military records of more than 30 years ago indicating he had Hepatitis B from drug usage. The employer's medical expert opined that Hepatitis B and C are transmitted commonly through needle-related drug use and concluded that the decedent contracted Hepatitis C in that manner. The workers' compensation judge accepted this evidence and ruled against the widow.

After the Appeal Board reversed and the Commonwealth Court upheld the workers' compensation judge, the Supreme Court addressed the issue of whether the employer's medical evidence was competent to overcome the rebuttable presumption under the Occupational Disease Act that the Hepatitis C was from the decedent's employment. The Court held the medical opinion was not competent because it was based upon a series of assumptions that lacked a factual basis, primarily the lone notation in the decedent's medical record indicating Hepatitis B from drug use, where there was no evidence in the subsequent 30 years of any intravenous drug use or the link to Hepatitis C. **II**

New Jersey Workers' Compensation

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The Appellate Division addresses an insanity-based challenge to the statute of limitations provision of the Workers' Compensation Act.

Zito v. AIC, Docket No. A-1070-10T2, 2011 N.J. Super. Unpub. LEXIS 2451 (App. Div., decided September 26, 2011)

The petitioner was employed as a mechanic by the respondent. On June 18, 2004, the petitioner injured his back at work while lifting a manhole cover. He received a period of authorized medical treatment and was assessed at maximum medical improvement on September 14, 2004. He subsequently underwent an IME to assess his permanent disability. On February 22, 2005, the respondent sent a letter to the petitioner notifying him of its intent to make a voluntary offer and tender of workers' compensation permanency benefits based on its IME findings. The respondent issued payments to the petitioner with the last payment of benefits dated April 20, 2005.

In 2007, the petitioner consulted an attorney for his injuries. On March 5, 2008, the petitioner filed a claim with the Division of Workers' Compensation for injuries arising out of his June 18, 2004, work-related accident. The respondent raised a statute-of-limitations defense in its answer and then moved for dismissal based on this defense. The respondent relied on N.J.S.A. 34:15-51, which provides that an initial claim for workers' compensation benefits must be filed "within two years after the date on which the accident occurred, or in case a part of the compensation has been paid by the employer, within two years after the last payment of compensation."

In opposition to the respondent's motion, the petitioner argued that the statute of limitations should be tolled under the "insanity clause" of N.J.S.A. 34:15-27. The petitioner submitted an affidavit in which he certified that he had severe dyslexia since childhood and appended school records to his affidavit indicating that he had been classified as having a neurologic and perceptual impairment. The petitioner claimed that his dyslexia prevented him from pursuing any remedies he may have been able to exercise had he been able to read or comprehend the respondent's letter notifying him of the voluntary offer and tender, or had someone been able to explain to him its significance or the effect that a delay in action would have on his recovery of benefits. Without oral argument, the Judge of Compensation entered an order on October 13, 2010, granting the respondent's motion and dismissing the petitioner's claim. The petitioner appealed.

In affirming the Judge of Compensation's ruling, the Appellate Division relied on the plain language of N.J.S.A. 34:15-27. That section, which addresses not the initial filing of a workers' compensation claim, but the reopening of a previously filed claim, provides that: "[A]n order approving settlement may be reviewed within 2 years from the date when the injured person last received a payment[.] If any party entitled to review under this section shall become insane within the aforesaid 2-year period, his insanity shall constitute grounds for tolling the unexpired balance of the 2-year period, which shall only begin to run again after his coming to or being of sane mind." The Appellate Division found that the plain language of N.J.S.A. 34:15-27 did not provide the petitioner with a safe harbor from the consequences of his failure to file a timely claim. The Appellate Division pointed to the fact that the petitioner's claim was an initial petition, not a petition to reopen a previously filed claim and, as such, the provisions of the statute did not apply.

The Appellate Division refrained from considering whether the petitioner's learning disability fell within the scope of the term "insane" found in N.J.S.A. 34:15-27. However, in quoting the Judge of Compensation, the Appellate Division did allude to its possible position: "[Dyslexia] has no bearing on one's intelligence or ability to understand one's legal rights. It is a learning disability. Petitioner's situation is no different from that of a person who does not speak English and who does not read English. Such a person would still be bound by the statutory time frame for filing a claim petition. If we carve out an exception to the statute of limitations for someone with a learning disability of dyslexia, it would open the door for an onslaught of other exceptions being carved out." **II**

Delaware Workers' Compensation

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Paul V. Tatlow

The Board's decision denying the claimant's petition to determine compensation due is affirmed where there is substantial evidence to support the conclusion that the claimant's low back condition was not the result of his employment. The court noted that the Board need not pinpoint the exact cause of the claimant's condition.

Kenny Hoffecker v. Lexus of Wilmington, (Superior Court for New Castle County – C.A. No. N10A-08-010) Decided September 14, 2011

This case involved an appeal by the claimant to the Superior Court from the Board's decision which denied the claimant's petition to determine compensation due by finding that the claimant had not established by a preponderance of the evidence that his low back injury was caused by his employment as a car mechanic. The facts showed the claimant had worked for the employer for 16 years as a mechanic and for 11 years prior to that he had worked as a mechanic for a different car dealer. The claimant worked 10-12 hours per day, four days a week, and his job duties required bending and lifting between 30-70 pounds. The claimant also spent some of his time off the job working on cars. The evidence showed that the claimant first missed work due to back pain on April 27, 2009, but he did not report this to the employer as a work injury. Shortly thereafter, the claimant received medical treatment but did not inform the physician of a specific trauma or that his low back pain was generally related to his employment. The claimant stopped working in July 2009, and the employer presented a fact witness who testified that the claimant gave as his reason that he hated working for the employer.

At the hearing before the Board, the claimant presented medical testimony from his medical expert, who testified that the claimant's low back condition was the result of his employment and was likely caused by the years of bending over and performing heavy lifting. However, in other portions of this expert's testimony, he indicated the possibility that the claimant's condition was chronic and was unrelated to his employment. The employer presented testimony from their own medical expert, who frequently testifies as a treating physician on behalf of claimants. The employer's expert testified that the claimant had a degenerative condition in his lumbar spine typical of a person of his age who has been performing labor for over 20 years.

The Board's decision, issued on July 26, 2010, denied the petition and rejected as not persuasive the testimony of both the claimant and his medical expert. The claimant's appeal to the Superior Court argued that the Board defied common sense by finding that the claimant's non-work-related activities could have caused his lumbar condition but that his employment did not do so. The court, in affirming the Board's decision, rejected that argument and stated that this is not what the Board found. To the contrary, the Board found based on the testimony of the employer's expert that the claimant's condition was simply not related to his employment. The court emphasized that the Board need not ascertain the precise cause of the claimant's lumbar condition since that is the claimant's burden of proof. It is sufficient that the Board determine whether the claimant has met his burden of proof, and in this case, they had substantial evidence and committed no errors of law in finding that the claimant had not done so. In short, the Board properly concluded that the evidence was not sufficient to show a causal relation between the claimant's low back condition and his employment, even under a cumulative detrimental effect theory. **II**