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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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An actuarial methodology used by the state employees' retirement system is legally sufficient to establish employer's entitlement to an offset/ credit in accordance with Section 204 (a) of the Act.

Harry Marnie v. WCAB (Commonwealth of PA / Dept. of Attorney General); 1583 C.D. 2011; filed June 7, 2012; by Judge Cohn Jubelirer

Following the claimant's work injury, he began receiving workers' compensation benefits. Later, he began receiving a pension from the State Employees Retirement System (SERS). The employer then notified the claimant via a notice of offset that it would reduce his benefits by the amount of SERS benefits attributable to the employer.

The claimant filed a review petition challenging the employer's offset. In support of his petition, the claimant presented testimony from an actuary. The employer presented testimony from a benefits coordinator and their own actuary. The Workers' Compensation Judge (judge) credited the testimony of the employer's witnesses and held that the employer met its burden of establishing its entitlement to an offset. The claimant appealed to the Appeal Board (Board), which agreed that the employer was entitled to an offset, but also concluded that the judge erred in fully accepting the employer's actuarial evidence. The Board remanded the matter to the judge, the actuarial witnesses testified again and the judge again denied the claimant's review petition. The Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the formula used by the employer inaccurately attributed funds to the employer which should have been attributed to the claimant in determining the amount of the offset. According to the claimant, the employer's failure to exclude retained investment returns from its offset calculations impermissibly credited the employer with contributions, a violation of §204 (a) of the Workers' Compensation Act (Act). The claimant maintained that the employer's actuarial evidence was neither competent nor legally sufficient. The Commonwealth Court rejected this argument and dismissed the claimant's appeal. Citing the Supreme Court's decision in *Department of Public Welfare v. WCAB (Harvey)*, 605 PA 636, 993 A.2d 270 (2010), the court held that §204 (a) does not explicitly require an employer to prove the amount of its actual contributions. The court also noted that the judge accepted the testimony of the employer's actuarial witness as more credible than the testimony given by the claimant's actuarial witness. In sum, the court concluded that the employer's actuarial testimony was legally sufficient and provided substantial, competent evidence to support the judge's decision in favor of an offset. II

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In its opinion, the court referenced recent cases it had decided concerning the offset issue. The thrust of those decisions, as well as this one, is that testimony presented by an employer's actuarial witness is not legally insufficient simply because the extent of the employer's contributions cannot be precisely quantified by the actuary. Section 204 (a) does not explicitly require an employer to prove the amount of its actual contributions, and if actuarial testimony is found credible, it is legally competent to establish the extent of an employer's funding for offset purposes.

A claim petition is properly dismissed when the employer met its burden of proving that injuries resulted from the claimant's violation of positive work orders.

Ryan Miller v. WCAB (Millard Refrigerated Services and Sentry Claims Services); 2306 C.D. 2011; filed June 22, 2012; by Senior Judge Friedman

The claimant worked for the employer driving a pallet jack. On the date of injury, the claimant worked the second shift from 4 p.m. to 12:30 a.m. and was told by a supervisor that he needed to stay until 1:30 a.m. The claimant finished working at 12:58 a.m. but didn't leave. Instead, he jumped on a forklift and drove it around before driving it to the punch-out area. While doing so, he crashed into a pole and crushed his foot, which had been sticking out of the forklift. The claimant said that he drove the forklift because it was fun and admitted that he was not authorized, nor certified, to operate it. The claimant also said that it was common practice for employees to drive the forklifts for fun and their supervisors said nothing about it.

However, the employer presented testimony from a supervisor who made it very clear that he hired the claimant to run the pallet jack, not the forklift, and who said that the claimant had been told specifically not to use other equipment unless he was certified to do so. The Workers' Compensation Judge (judge) found this witness's testimony to be credible and dismissed the claim petition, finding that the employer met its burden of proving that the claimant's injury was caused by a violation of several work rules. The Board affirmed.

The Commonwealth Court dismissed the claimant's appeal, agreeing with the judge and the Board that the employer met their burden of proving that the claimant violated a positive work order and that the violation removed the claimant from the course and scope of his employment. The court found the claimant's appeal to be nothing more than an argument that the judge should have believed his version of events instead of the employer's and considered it to be an impermissible attack on the judge's credibility determinations. II

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It is important to remember that violating a positive work order is an affirmative defense, meaning that the burden is on the employer to show that, by virtue of the claimant's violation of the employer's rules, the work injury occurred outside the course and scope of employment. The employer in this case was successful with this defense largely due to the fact that the claimant said he knew he was violating several work rules when he hopped on the forklift at the end of his shift. Clearly, this was a safety rule that the employer rightly emphasized and reinforced with its employees. Moreover, it enabled the employer to present strong evidence of the work order violation, resulting in dismissal of the claim.

The executive officer of a corporation who executes workers' compensation forms LIBC-509 and 513 is electing to not be an employee and is excluded from coverage under the Act.

Wagner v. WCAB (Anthony Wagner Auto Repairs & Sales); No 1527 C.D. 2011; filed June 4, 2012; by Justice Leavitt

The claimant, operator and sole shareholder of a two-person auto repair and sales business, sought workers' compensation benefits following an automobile accident. The insurer contended that the claimant had waived workers' compensation coverage for himself under § 104 of the Act by executing LIBC-509, "Application for Executive Officer Exemption," and LIBC-513, "Executive Officer's Declaration." These forms provide that an executive of a corporation may elect not to be considered an employee for purposes of the Act and waives all benefits.

The Workers' Compensation Judge (judge) found for the employer on this issue, rejecting the claimant's testimony that he was not informed he was waiving workers' compensation coverage where the evidence showed that he knowingly and voluntarily signed the Bureau forms. The insurer's witnesses testified that they advised the claimant and his girlfriend, who handled the insurance matters, that employees of a corporation can be covered for workers' compensation but that their earnings would be included in the payroll on which the premium is calculated. The claimant declined to provide that information, and his accountant advised that the claimant was to be exempt. The insurer proved that the claimant personally signed the LIBC forms to exclude coverage, and the judge found that he was charged with knowing what he signed. The Board affirmed the judge's decision.

The claimant argued on appeal that the judge and Board erred because his insurance policy did not include an endorsement showing that he was exempt from the policy's coverage, contrary to the *Workers' Compensation Rating Manual* which provides for a specific endorsement when an executive waives workers' compensation coverage. The court rejected this position, noting that the policy included an endorsement, made after the claimant incorporated his business, that the employer had changed from a sole proprietorship to a corporation, that the payroll included only the mechanic's and not the claimant's earnings, and that the policy was based on one employee. Given this endorsement, it could not be argued that the policy clearly covered a second employee, *i.e.* the claimant.

The court further found that the judge is not responsible for enforcing the terms of the *Rating Manual* or the insurance company law. It noted that the only clear mandate of the *Rating Manual* is that the executive officer must personally execute LIBC-509 and 513, which the claimant here did. II

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This case underscores the importance of using all types of Bureau forms in the handling of workers' compensation insurance coverage as well as claims practice. The employer's ability to prove that the correct forms to waive coverage were presented to and signed by the claimant, which resulted in a policy not including coverage for him, was critical to the successful defense of the claim.

The importance of testimony on the practical, everyday use of a body part is subject to a specific loss claim.

Miller v. WCAB (Wal-Mart); No. 1741 C.D. 2011; filed May 25, 2012; by Senior Judge Colins

The claimant was working for Wal-Mart as a claims manager responsible for merchandise returns when she sustained a left arm fracture, left shoulder adhesive capsulitis and weakness, and radial nerve palsy. The injury required two surgeries to insert a rod and 15 bolts into

the upper arm and then removal of the bolts. Following the injury, the claimant continued to work with the employer as a greeter and then a telephone switchboard operator, but she could not work her second job. Nearly three years after the injury, the claimant filed a claim petition alleging specific loss of her left arm.

The litigation on the claim petition involved lay testimony from the claimant and three employees, medical testimony from three physicians and surveillance evidence. In a 32-page, 97-findings decision, the Workers' Compensation Judge (judge) denied the claim petition. The Board affirmed, and the Commonwealth did as well, but on the limited grounds that the claimant's injury was not a specific loss for all practical intents and purposes. In reaching it's decision, the court extensively analyzed the judge's findings and the law on specific loss, and even reviewed the surveillance video in assessing the judge's credibility determination.

The court first noted that the judge found the employer's medical expert credible, who opined that, although the claimant suffered from a partial disability, she did not suffer a specific loss of the arm. After examining the claimant and finding normal range of motion in all planes of her shoulder, along with normal movement of her elbow, hand and fingers, the expert concluded that the claimant was "functional" with partial impairment of the arm. In contrast, the claimant's doctor testified with "absolute medical certainty" that she had a total loss of function of the use of the left upper extremity, which is permanent, including a significant loss of her ability to perform activities of daily living such as grooming, bathing and dressing.

The court further noted that the judge's decision was strongly influenced by the discrepancy between the limitations the claimant demonstrated in court and to her doctors and the use of her arm as shown in surveillance video and testimony by co-workers. The video demonstrated use of the arm to grasp a steering wheel, to lift the arm to enter a restaurant and assist her mother, and to open a car door. The employees testified that they saw the claimant use her left arm in a manner inconsistent with her testimony regarding grasping, holding and range of motion.

On appeal, the court found that the judge used a wrong legal standard for establishing specific loss of the arm, stating that the loss must include loss of use of the hand and forearm. This position is incorrect, as a claimant may prove a specific loss even where some use of the injured body part is retained. That error, however, did not infect the judge's factual and credibility determinations, which were supported by substantial evidence.

The judge's finding that the injury was not permanent was not supported by the record as the only doctor to address this issue explained that the claimant was at maximum medical improvement and that any future surgery would be to reduce her pain, not function. Nonetheless, the court upheld the decision based on the finding of no specific loss. II

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This case is a good example of the type of evidence and analysis that goes into the determination of a specific loss. The judge's exhaustive analysis identified the evidence supporting the findings on the credibility of the medical experts and the claimant, which the court cannot overturn. In particular, the surveillance evidence was a substantial factor in both the judge's and court's decisions. Although it did not appear to show any dramatic use of the injured arm, it was enough to contradict the claimant's professed inability to use the hand. The opinion in this case demonstrates the importance of testimony on the practical, everyday use of a body part subject to a specific loss claim.

News from Marshall Dennehey

Mary Kohnke Wagner (Philadelphia, PA) was a presenter at the recent Pennsylvania Workers' Compensation Judges' Conference in Harrisburg, Pennsylvania. In collaboration with Rosemary Harris, MD, Mary led a detailed discussion on "Understanding Pain and the Use of Narcotic Analgesia." More than 100 people were in attendance, and Mary's presentation marked the first time that an attorney was asked to speak at this conference.

John Swartz (Harrisburg, PA) successfully defended a review petition that sought to add a herniated disc to the claimant's accepted low back work injury. He also prevailed on a termination petition. Despite the fact that the claimant's diagnostic studies showed a herniated disc in the low back, the judge denied the claimant's review petition to add that condition as part of the work injury and granted the employer a termination of benefits. The claimant failed to disclose the identity of his previous family physician during persistent cross-examination. The judge relied on this fact and accepted the defendant's medical evidence over that of the claimant in denying the review petition and granting a termination of benefits. The success of this petition will allow the employer to save money for any further medical treatment to the claimant's low back and any future award of indemnity benefits.

Tony Natale (Philadelphia, PA) successfully defended a case involving a highly publicized motor vehicle accident. Tony was able to convince a very claimant-oriented judge that the claimant was not in the course and scope of employment at the time of the injury and, more specifically, was engaged in an unauthorized and scandalous detour from the normal duties of his job. This decision will save the insurance carrier an enormous amount of medical and disability liability.

Angela DeMary and **Bob Fitzgerald** (Cherry Hill, NJ) defeated the petitioner's motion for medical treatment in a heavily litigated case. The petitioner asserted that, through decades of laborious work at the employer, he developed right shoulder injuries that required additional medical treatment and diagnostic testing. After a four-day trial, the judge accepted extensive oral argument from Angela on the merits of the case. She was successful in proving that the petitioner's testimony, and that of his medical experts, was not credible. In a rare occurrence, the judge issued an eight-page written decision that culminated in the dismissal of the petitioner's motion. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

Employer immunity from common law suit: The "exclusive remedy" provision of the Act withstands another "intentional wrong" challenge.

Justin Fitzpatrick v. Vreeland Brothers Landscaping, Docket No. A-4726-10T4, 2012 N.J. Super. Unpub. LEXIS 1236 (App. Div., decided June 4, 2012)

The plaintiff was employed as a foreman by the defendant, a landscaping and lawn maintenance service for residential, commercial and industrial premises. The plaintiff had been trained to operate a riding mower and to clear debris that accumulated in the discharge chute that funneled leaves and grass clippings via a small fan blade into a "grass catcher" mounted on the back of the mower. The mower was equipped with a safety interlocking device that automatically shut off the fan blade if the operator were to get off the seat while the mower was running. On November 26, 2006, the plaintiff was operating the mower when he noticed that the grass catcher was full. He placed the mower in neutral, disembarked from the mower seat and placed his hand inside the discharge chute. As he did so, his hand sustained serious injury from the spinning fan blade. A professional engineer hired to examine the mower found that insulation had been removed from two of the wires that served the safety interlocking device and a jumper wire had been installed to bypass the seat safety interlocking switch.

The plaintiff filed an action in tort against the defendant alleging that it had knowingly permitted, and/or compelled the plaintiff to utilize equipment with a disabled safety mechanism. At the conclusion of discovery, the defendant filed a motion for summary judgment based on the Workers' Compensation Act's so-called "exclusivity provision," which provides, in relevant part, that "[i]f any injury... is compensable under the Act ... , a person shall not be liable to anyone at common law or otherwise on account of such injury ... except for an intentional wrong." The defendant's motion was granted, and the matter was dismissed. The plaintiff appealed.

In affirming the lower court's dismissal, the Appellate Division relied on *Millison v. E.I. du Pont de Nemours & Co., Inc.*, 101 N.J. 161 (1985), in which the court adopted the "substantial certainty" test to measure whether an employer's conduct rose to the level of an "intentional wrong" under the Act:

> [T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

The Appellate Division found nothing in the record to suggest that the defendant's alleged disabling of the seat safety interlocking switch evidenced a deliberate intention to injure the plaintiff or a substantial certainty that such injury would occur. "[T]he mere act of an employer in exposing a worker to the risk of injury or death," the Appellate Division concluded, "does not establish a per se intentional wrong." ||

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As this headline suggests, this is not the first unsuccessful "intentional wrong" challenge to the Act's "exclusivity provision" brought before the Appellate Division this year. These repeated challenges are a function of the inherent tension which exists between New Jersey's workers' compensation strict liability scheme and the tort liability system. At its core are the competing interests of employers and employees. As the court in *Millison* observed, "[T]he system of workers' compensation confronts head on the unpleasant, even harsh, reality—but a reality nevertheless—that industry knowingly exposes workers to the risks of injury and disease." The goal of the Act is to provide compensation to injured workers for as many of these work-related incidents as possible while reducing the costs of workplace safety through employer immunity from common law suit. As this case demonstrates, the Appellate Division has repeatedly refused to give broad application to the Act's "intentional wrong" exception for fear of potentially frustrating the very purpose of the workers' compensation scheme.

Ask Our Attorneys

Send your questions about Pennsylvania, New Jersey or Delaware workers' compensation to tamontemuro@mdwcg.com.

Delaware Workers' Compensation

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

Paul V. Tatlow

Board grants employer's termination petition seeking to stop total disability benefits based on its acceptance of opinion of employer's medical expert, as supported by the FCE, that claimant capable of part-time, sedentary work.

Dean Baslenkoff-Elder v. EZ Loan, Inc., (IAB No. 1375757 - Decided May 9, 2012)

The claimant suffered a low back injury on November 14, 2008, and was receiving ongoing total disability benefits. In November 2011, the employer filed a termination petition alleging the claimant was able to return to work in some capacity and should receive only partial disability benefits. The claimant opposed the petition and alleged there was ongoing total disability.

The employer's medical expert stated that, based on his DME of the claimant on September 15, 2011, he was of the opinion that the claimant had a diagnosis of failed back syndrome but could, nevertheless, do sedentary-type work and agreed that beginning on a part-time basis was appropriate. Importantly, the evidence included the fact that the claimant had undergone an functional capacity evaluation (FCE) in April 2011 which indicated he could do part-time, sedentary work with limits on lifting, carrying, pushing and pulling. The employer also presented testimony from a vocational consultant who did a labor market survey showing 13 jobs for the claimant, nine of them being either full-time or part-time and four of them being full-time only. The jobs located in the labor market survey were based on the restrictions of the employer's expert, as well as the FCE results.

Testifying as his medical expert, the claimant's treating physician had performed three surgeries to the claimant's lumbar spine following the work injury. The claimant's expert testified that he has maintained the claimant on total disability status throughout his treatment and did not change his opinion when shown the results of the FCE. The claimant's testimony showed that he had undergone three surgeries to the low back and believed his condition had deteriorated significantly since the performance of the FCE in April 2011. The claimant also used a cane at all times both inside and outside of his home.

In granting the termination petition, the Board accepted the opinion of the employer's expert as supported by the results of the FCE, which indicated the claimant was medically capable of working up to four hours per day at a sedentary capacity. The Board commented that it rejected the claimant's expert's testimony as to the ongoing total disability, in part because the claimant's expert had testified that, while he believed strongly in FCEs, he was apparently unaware in this case that one had even been performed. The evidence also showed that an assistant to the claimant's expert had actually reviewed the FCE shortly after it was performed and had indicated the claimant could do part-time, sedentary work within those restrictions. The Board concluded that, despite the fact that the claimant had a significant low back condition that severely limited his work capabilities, he was, nevertheless, able to do very limited work in a part-time, sedentary capacity, entitling him to partial disability benefits. II

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This case illustrates that in Delaware, FCEs are becoming increasingly important in litigating termination petitions. It is probably accurate to state that the Board views them as the "gold standard" in assessing a claimant's work capabilities. The evidence in this case showed that the claimant had significant disability and had a reputable treating physician who maintained him on total disability status, but the Board, nonetheless, was willing to terminate the total disability based on the FCE results coupled with the opinion of the employer's medical expert. Suffice it to say, without the FCE study, the employer would not have prevailed in this case.