MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 16 | NO. 8 | AUGUST 2012

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)
and
G. Jay Habas, Esquire (814.480.7802 or gjhabas@mdwcg.com)

Francis X. Wickersham

G. Jay Habas

At the risk of overstating the obvious, you'll notice that the Pennsylvania section of this newsletter does not contain summaries of Pennsylvania workers' compensation cases. That's because since our last edition, neither the Commonwealth Court nor the Supreme Court issued any decisions on workers' compensation cases. But as you can see, they did not go on vacation, because they did issue decisions in unemployment cases, which we have summarized here. We did so in order to remind our readers that, although the focus of our department is on defending workers' compensation claims, we have attorneys with the skill, ability and experience to represent employers in unemployment cases as well. More and more employers are having counsel represent them at unemployment hearings. Should you determine that you need representation in an unemployment matter, please call us, and we will vigorously represent your interests.

The use of the word "moron" does not rise to the level of willful misconduct and, therefore, the claimant is entitled to unemployment benefits.

Neil D. Brown v. Unemployment Compensation Board of Review; 1618 C.D. 2011; filed August 9, 2012; by Judge Leavitt

The claimant worked for the employer as a battery machine operator in a warehouse with 605 employees. As part of his job, the claimant was required to make sure that batteries needing repair were kept out of circulation and set aside in a designated space. The claimant labeled each out-of-service battery with a sign reading, "Do Not Use." One day, the claimant discovered someone had torn the sign from an out-of-service battery and attempted to charge and use it before it had been repaired. The claimant then placed two handwritten signs on the battery that read, "To the Moron who can't read – do not use this, do not use this battery" and "Not charging you moron." A complaint was made about the signs, and the claimant was terminated.

The claimant then filed for unemployment compensation benefits but was denied benefits by the Unemployment Compensation Service Center and later by an Unemployment Compensation Referee after evidence was presented. The Referee's denial was affirmed by the Unemployment Compensation Board of Review (Board).

However, the Commonwealth Court reversed the Board's decision and granted the claimant's appeal. In doing so, the court held that the claimant's signs were not threatening and not in violation of the employer's *Employment Guide*. The court pointed out that the claimant worked in a 770,000 square foot warehouse with 605 employees, that it was not a "... ladies' club where the servers wear white gloves and speak in hushed tones." There was no evidence that the claimant directed the word "moron" to any specific individual or coworker. The Board concluded that "moron" was not threatening or so outside the bounds of words that may be spoken in a large and busy warehouse and, therefore, the claimant did not commit willful misconduct. ||

Evidence presented by the employer at a hearing conducted by an Unemployment Referee was permissible hearsay. Case remanded to the Board to make findings on whether the claimant committed willful misconduct.

Bell Beverage v. Unemployment Compensation Board of Review; 1856 C.D. 2011; filed July 26, 2012; By Judge McCullough

The claimant was terminated from his job at the employer's warehouse for theft and conspiracy. He applied for unemployment benefits, but his claim was denied by the local service center. The claimant appealed, and a hearing was conducted by an Unemployment Compensation Referee.

The employer's owners appeared at the hearing and testified. In addition, the employer offered into evidence a letter from a private investigator. The private investigator was not present to authenticate the letter. Because the claimant did not appear at the hearing and was not present to object, the letter was received into evidence. The Referee concluded that the claimant was fired for willful misconduct, and his claim for unemployment benefits was denied.

According to the evidence presented at the hearing, the employer noticed that inventory was missing and hired a private investigator to follow its delivery trucks. It was discovered that one of the employer's drivers and the driver's helper were involved in theft. The claimant was placed on the truck with the culprit in order to determine if the claimant was also involved. The private investigator followed the claimant's truck and discovered that inventory from the truck was removed and carried into the driver's residence. Although the claimant remained on the truck, when he was called by the employer, he lied about his location and did not state the actions of the driver.

The Board remanded the case to the Referee so the employer could present a DVD that contained footage taken by the private investigator. But again, the private investigator did not attend the hearing to authenticate the DVD. Ultimately, the Board did grant unemployment benefits to the claimant, concluding that the employer failed to meet its burden of proving that the claimant was fired for willful misconduct. In doing so, the Board dismissed as hearsay testimony given by the employer concerning information from its private investigator. The employer appealed to the Commonwealth Court.

The Commonwealth Court reversed the Board's conclusion that the employer presented hearsay evidence. According to the court, the statements made by the private investigator fell under the "present sense impression" exception to the hearsay rule. The court also felt as though the letter from the private investigator was admissible, since the claimant was not present at the hearing to object to it, and because it was corroborated by the employer's testimony. The court vacated the Board's order and remanded the case to the Board for additional findings of fact as to the issue of willful misconduct. The court pointed out that, although "willful misconduct" is not specifically defined by the law, the courts have found the term to include theft from an employer and concluded that the remand was necessary since the Board issued no findings as to whether the claimant was on the truck while the theft was occurring, whether the claimant knew or should have known that the theft was taking place, whether the claimant was involved in the theft, or whether the claimant lied to the employer. **II**

Ask Our Attorneys

Q: If a police officer working for a university comes to the aid of a victim who is being attacked by a street thug and this officer ends up shooting the thug, does his or her resulting anxiety and depression claim regarding the shooting constitute a work injury?

A: Should the officer file a claim petition alleging a mental injury resulting from the mental stimulus (shooting the thug), he or she would have to prove that the incident in question constituted an abnormal working condition for the claim to be held compensable. Based on the plethora of court cases dealing with the issue, the likely outcome of such a fact scenario would be that the claim would not be found compensable since the incident does **not** rise to the degree of "abnormal working condition" for a police officer.

Tony Natale, Esq.
215.575.2745 | apnatale@mdwcg.com

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

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwcg.com)

Dario J. Badalamenti

Failure to disclose prior relevant medical history results in a dismissal with prejudice of petitioner's claim and carrier is reimbursed for previously paid temporary benefits.

Johnnie Jackson v. Township of Montclair; Docket No. A-2212-11T2; 2012 N.J. Super. Unpub. LEXIS 1598 (App. Div., decided July 5, 2012)

On August 4, 2008, the petitioner sustained injury to his right knee while in the course of his employment with the respondent. The petitioner was authorized for treatment with an orthopedist. An August 28, 2008, MRI of the petitioner's right knee showed a tear involving the posterior horn of the medial meniscus, a "sprain" of both the anterior cruciate ligament and the medial collateral ligament, and a "trace" Baker's cyst. The orthopedist's treatment notes indicated that the petitioner denied any prior history of right knee injury. On September 18, 2008, the petitioner underwent an arthroscopic partial medial meniscectomy of the right knee, requiring time out of work. The respondent paid temporary benefits during this period of time. On March 5, 2009, the petitioner was assessed at maximum medical improvement by another doctor, whose report indicated that the petitioner denied any problems with respect to his right knee prior to his August 4, 2008, work-related accident.

On November 5, 2008, the petitioner filed a claim with the Division of Workers' Compensation alleging injury to his right knee as a result of an accident arising out of and in the course of his employment. While conducting its investigation, the respondent determined that the petitioner had been involved in an April 13, 2007, motor vehicle accident in which he sustained injury to his right knee and for which he sought treatment with an orthopedic surgeon. An August 25, 2007, an MRI of the petitioner's right knee revealed a tear of the posterior horn of the medial meniscus, a partial tear of the anterior cruciate ligament and a small Baker's cyst. The orthopedic surgeon's October 10, 2007, treatment notes indicated that the petitioner was subsequently recommended for a surgical arthroscopy of the right knee. That notwithstanding, the petitioner never underwent the recommended procedure for reasons unspecified. However, the petitioner did bring a civil action in connection with his motor vehicle accident and indicated in answers to interrogatories prepared on December 15, 2008, that as a result of this accident he suffered permanent injury to his right knee, which continued "to limit his activities."

At trial, the petitioner testified that he had no problems with his right knee until after his August 4, 2008, work-related accident. When asked to explain the apparent contradiction between his testimony and interrogatory answers, the petitioner simply indicated that his answers to interrogatories were incorrect. As to his prior motor vehicle accident, the petitioner testified that he had no recollection of having been told by the orthopedic surgeon that he had sustained a tear of the medial meniscus. However, later in his testimony, the petitioner contradicted himself when he stated that the orthopedic surgeon had advised him that he would require surgery of the right knee because of a "partial tear of the ACL."

At the conclusion of trial, the respondent moved for dismissal of the petitioner's claim as well as reimbursement of temporary benefits that had been paid to the petitioner. In support of its motion, the respondent invoked the New Jersey Workers' Compensation Fraud Act, *N.J.S.A. 34:15-57.4(c)*, which provides that a person who:

> Purposefully or knowingly makes, when making a claim for benefits pursuant to N.J.S.A 34:15-1 et seq., a false or misleading statement, representation or submission concerning any fact which is material to that claim for the purpose of obtaining benefits, the Division may order the immediate termination or denial of benefits with respect to that claim and a forfeiture of all rights of compensation or payments sought with respect to the claim. *N.J.S.A. 34:15-57.4(c)(1)*.

Further, *N.J.S.A. 34:15-57.4(c)(2)* provides, "[i]f that person has received benefits pursuant to [the Act], to which the person is not entitled, he is liable to repay that sum . . . to the employer or the carrier."

The Judge of Compensation found that the petitioner's failure to disclose his prior right knee injury was a deliberate and material omission designed to enhance his prospective award of benefits. Accordingly, the Judge dismissed the petitioner's claim with prejudice, ordered the forfeiture of rights to future compensation with respect to the claim and granted the respondent's request for reimbursement of previously issued temporary benefits. The petitioner appealed.

In affirming, the Appellate Division concluded that there was competent credible evidence to support the Judge of Compensation's determination that the petitioner's conduct violated *N.J.S.A. 34:15-57.4(c)*. That evidence included: (1) the similar MRIs, which were performed before and after the work-related accident; (2) the petitioner's interrogatory answers describing as permanent and limiting the injuries he sustained as a result of his April 13, 2007, motor vehicle accident; and (3) the reports of the orthopedist and the orthopedic surgeon, both of which explicitly stated that the petitioner denied suffering any injury to his right knee prior to his August 4, 2008, workplace accident. II

Side Bar

As this decision demonstrates, the New Jersey Workers' Compensation Fraud Act empowers the Judge of Compensation to address instances of fraudulent conduct on the part of petitioners. Although not frequently invoked, the court has demonstrated a clear willingness to utilize its sanction powers under the Fraud Act when necessary. Where a petitioner's conduct is particularly egregious, those sanctions can be proportionately severe. Here, the Judge of Compensation not only dismissed the petitioner's claim with prejudice, but he also granted the respondent's request for reimbursement of temporary benefits in an otherwise compensable claim. As the Judge of Compensation reasoned, the petitioner's failure to disclose his prior injury "was calculated and manipulative" and should, therefore, serve to deprive him of his right to benefits.

Delaware Workers' Compensation

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

Paul V. Tatlow

Finding that the employer had shown no change in the claimant's medical condition, the Board dismisses the employer's termination petition by granting the claimant's motion to dismiss the petition pursuant to the doctrine of collateral estoppel.

Richard A. Smith, Jr. v. Bayhealth Medical Center; (IAB No. 971350; decided May 15, 2012)

The claimant suffered a compensable work injury on May 28, 1992, and was receiving ongoing compensation for total disability. The employer had filed a review petition in October 2004, which was denied by the Board. It is June 20, 2005, decision, the Board found that the claimant's medical expert was credible in establishing that the claimant could not work on a regular basis.

The petition which gave rise to this litigation was filed in August 2011 and, again, was a review petition alleging that the claimant was capable of working with restrictions. Following the close of the employer's case-in-chief, claimant's counsel made a somewhat unusual motion for dismissal pursuant to the doctrine of collateral estoppel, arguing that the employer failed to show a change in the claimant's condition since the time of the prior decision.

The Board found that the employer had, in fact, failed to show a change in the claimant's medical condition sufficient to warrant a termination of total disability benefits. The Board found that all four elements of collateral estoppel were present, specifically: (1) the issue of the claimant's inability to work had been decided in the 2005 decision; (2) the prior action was fully adjudicated on the merits; (3) the parties were the same in the prior and present proceedings; and (4) the employer had a full and fair opportunity to litigate the termination of total disability benefits. Therefore, the Board granted the claimant's motion to dismiss the termination petition, allowing the claimant to receive ongoing total disability, and also awarded counsel fees and medical witness fees. ||

Side Bar

In finding as it did, the Board commented that the employer's medical expert agreed at his deposition that the claimant's medical condition had not changed over the past several years. This case illustrates the need to have a defense medical expert who is able to show that a claimant's condition has changed from what it was at the time of any prior litigation to the point where the claimant is now capable of performing some type of modified work.

News from Marshall Dennehey

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 in this case 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 the job. This decision will save the insurance carrier from an enormous amount of medical and disability liability.

Congratulations to **Angela DeMary** and **Bob Fitzgerald** (Cherry Hill, NJ) for defeating the petitioner's motion for medical treatment in a heavily litigated case in which 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.

Mary Kohnke Wagner and **Tony Natale** (Philadelphia, PA) presented at the *Workers' Compensation 101 Roundtable* hosted by the Pennsylvania Chamber of Business and Industry. They addressed topics including changes to current workers' compensation laws and regulations, Medicare as it relates to workers' compensation claims, understanding workers' compensation benefits, and things companies do wrong before going to workers' compensation litigation. ||