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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Commonwealth Court rejects the claimant's argument that a C&R agreement should be rescinded due to a mutual or unilateral mistake on behalf of the employer.

Su Hoang v. WCAB (Howmet Aluminum Casting, Inc.); 2277 C.D. 2011; filed August 20, 2012; by Judge McCullough

The claimant sustained a work-related injury in October of 2007 that was acknowledged by a Notice of Compensation Payable (NCP). In 2009, the parties entered into a Compromise and Release Agreement (C&R) and sought approval of the C&R at a hearing conducted by a judge. The claimant testified at the hearing, with the claimant's son acting as a translator. The claimant testified that he understood he was giving up his right to any claim for benefits and that, if the settlement was approved, he could never come back against the employer or the insurance company for any reason. The claimant also told the judge, in response to her questions, that his son translated the C&R for him and that he was satisfied that all of his questions had been answered. The judge approved the C&R agreement.

After the C&R was approved, claimant's counsel discovered that there was an unpaid medical bill totaling $37,674. Claimant's counsel sent employer's counsel a copy of the bill, along with a letter stating that the claimant believed that all medical bills had been paid at the time of settlement. Later, claimant's counsel sent employer's counsel another letter, restating a phone conversation in which employer's counsel admitted to being unaware of the bill at the time of settlement and stating that he had been told that the treatment at issue was not related to the work injury. Ultimately, the claimant filed review and penalty petitions, seeking to rescind the C&R on the basis of mutual mistake of fact, as well as a unilateral mistake on behalf of the employer.

The judge dismissed the claimant's petitions, and the Workers' Compensation Appeal Board (Board) affirmed. Both the judge and the Board pointed out that the approved C&R did not contain language acknowledging that all reasonable and necessary medical bills had been paid.

The Commonwealth Court affirmed the decisions below, concluding that there was a lack of evidence presented by the claimant that the C&R should be rescinded based on a mutual mistake of fact or a unilateral mistake of fact. According to the court, there was simply no evidence that the employer knew or should have known of the claimant's mistake regarding the unpaid medical bill. The court also referenced language contained in paragraph 18 of the C&R specifically stating that the agreement resolved "all indemnity and medical to which claimant may have been entitled for any injuries sustained while working for the employer, and that the C&R represented a full and final settlement of any claim, both past, present and future, that claimant had against the employer." ||

SIDE BAR

The courts are extremely reluctant to rescind C&R Agreements. To do so, strong evidence of fraud, deception, duress or mutual mistake must be presented. Surprises, however, do happen. In order to address them, it is recommended that C&R Agreements include language such as the language that appeared in paragraph 18 of the C&R in this case.

The decedent died in the course of his employment where his injury occurred in the furtherance of his business as a college professor even though precipitating events occurred at lunch off campus.

The Pennsylvania State University v. WCAB (Rabin); No. 224 C.D. 2011; filed August 15 2012; by Senior Judge Friedman

The decedent, who worked as a professor at Penn State, suffered from significant pre-existing medical conditions including lymphedema, uncontrolled diabetes, hypertension, difficulty breathing, cardiac problems and cellulitis of the legs. Under a doctor's care over a period of six years, his health conditions improved to the point where he required only routine quarterly checkups.

The decedent was working with a student who was preparing and defending his doctorial thesis. The decedent and the student worked together on the thesis, including meeting at a local restaurant because of their conflicting work schedules. On December 20, 2006, they were together at a restaurant exhaustively reviewing a draft of the thesis. They stopped to have lunch when the decedent suddenly fell to the floor, complaining of pain in his chest, shoulders and arm. He was taken to the hospital where he suffered a left shoulder fracture/dislocation. Had he not been injured, the decedent and student intended to continue their work on the dissertation.

At the hospital, he underwent a procedure involving a closed reduction of the fracture and dislocation, wherein infection was identified as a risk. During his hospital stay, the decedent began complaining of left shoulder pain and other problems. He later developed intense pain with cardiac and respiratory distress and was moved to the ICU Unit where he subsequently died. The treating physician concluded that he expired from multiple medical problems stemming from his upper extremity fracture.

A Fatal Claim Petition was filed, which the judge granted, finding that the decedent was engaged in the furtherance of the business or affairs of Penn State when he fell and was injured and died as a result of those injuries.

On appeal, the employer argued that the decedent's injuries did not occur in the course of his employment as he was on a break from work and at a public restaurant. The Board affirmed. On appeal to the Commonwealth Court, the court found that, indeed, the decedent's injuries did arise in the course of his employment as he was involved in a multi-hour meeting, which included a working lunch, in furtherance of his job duties as a college professor. According to the court, the lunch was an inconsequential departure from regular work activities. The court also rejected the employer's challenge to the medical findings, concluding that there was credible, unequivocal medical evidence that the decedent's work contributed to his demise. **II**

Side Bar

The employer first attempted to deny liability on the basis that the decedent's injuries did not occur in the course of his employment because he was off premises and engaged in lunch at the time that he fell. The court's decision emphasizes that, while the general rule that injuries occurring off premises and at lunch are not in the course of employment, here the facts substantiated the work-relatedness of the injury: (1) the decedent and his student were engaged in a protracted discussion of the thesis; (2) the lunch occurred as part of a general meeting, and (3) the location of the lunch was the only place the two parties could meet considering their diverse work schedules. The courts look carefully at claims involving injuries off premises where there is no direct correlation to the claimant's work activities. However, here is an example of the court finding that the unique nature of the decedent's job extended to off-premises activity, even when there was a break to engage in lunch.

New Jersey Workers' Compensation

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Dario J. Badalamenti

"Premises Rule" broadly construed: Appellate Division finds that an employee struck by a car on a public street while walking to her workplace from an employer-controlled parking garage is eligible for benefits.

Hersh v. County of Morris, Docket No. A-1442-10T4, 2012 N.J. Super. Unpub. LEXIS 1774 (App. Div., decided July 24, 2012)

The respondent assigned the petitioner free parking at a private garage located two blocks from her workplace. The respondent paid for parking spaces for its employees at this private garage, provided each employee with a scan card to gain access to the garage and instructed all employees to park on the garage's third level. On January 29, 2010, the petitioner parked her car in the parking garage and, as she was crossing the street, was struck by a car and severely injured.

The petitioner filed a claim with the Division of Workers' Compensation seeking medical and indemnity benefits. The respondent denied that the accident arose out of and in the course of the petitioner's employment and invoked *N.J.S.A. 34:15-36* of the Workers' Compensation Act. This so-called "premises rule" provides that:

> Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer.

The respondent argued that the garage was neither owned nor operated by the respondent and that, even if it was, the petitioner's accident did not occur in the garage, but on a public street over which the respondent exercised no control.

At the conclusion of trial, the Judge of Compensation found that the petitioner's accident was compensable as it happened after she had arrived at the parking garage designated for her use by the respondent. The Judge of Compensation rejected the respondent's contention that the petitioner was no longer in the course of her employment when she entered the public street. "Because the employer chose a parking location that required petitioner to cross a busy thoroughfare," the Judge of Compensation noted, "petitioner consequently lost the ability to decide where she wanted to park and assess the risks herself." The respondent appealed.

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Livingstone v. Abraham and Strauss, Inc.*, 111 N.J. 89 (1988), in which the court found that an employee's parking lot accident was compensable because her workday commenced when she arrived in her car at the section of the mall-owned parking lot adjacent to her employer's premises. The employer, a tenant in a large shopping mall, required its employees to park at the outer edge of the lot so that customers could park closer to the store. The fact that the employer did not own, maintain or have exclusive control of the parking lot did not preclude the accident from being compensable as the *Livingstone* Court reasoned that the term "control," as used in *N.J.S.A. 34:15-36*, must be interpreted as simply "use by the employer in the conduct of his business."

Applying the principle of *Livingstone*, the Appellate Division found that the petitioner's accident was compensable under the Act. Although the garage and the sidewalk en route to the workplace were not part of the workplace in a physical sense, the respondent exercised control over these areas by designating the third floor of the garage for its employees. "[As] the employer's control extended the workplace premises to the Cattano [Avenue] garage," the Appellate Division concluded, "when petitioner parked her car in the assigned garage, she was not coming to work, she had arrived there." II

Side Bar

The "premises rule," an exception to the "going and coming rule," rests on the assumption that an employee's day-to-day travels to and from work neither yields a special benefit to the employer nor exposes the employee to risks that are peculiar to the employment. As such, accidents occurring either before an employee arrives at or after she leaves her employer's premises are generally not compensable. However, as this decision demonstrates, where the employer exercises some element of control over an employee's comings and goings, here through designation of an assigned parking garage, compensability may be found through broad interpretation of the premises rule.

Delaware Workers' Compensation

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Paul V. Tatlow

Superior Court affirms the right of the employer to require a claimant to fill her prescriptions through a provider of its choosing.

Patricia Boone v. Syab Services/Capitol Nursing, (Superior Court C.A. No. K11A-10-003 WLW-Decided August 23, 2012)

The issue on appeal in this case is whether the claimant had the right to obtain her prescriptions from a provider of her choosing rather than utilizing the company with which the employer had contracted.

The claimant had sustained a work-related back injury, and there was no dispute as to the medical treatment being provided to the claimant, including the prescriptions her doctor was writing. However, the employer requested a hearing before the Board where it sought an order that the claimant's prescriptions for the work injury should be filled by the preferred provider with which it had a contract, Express Scripts. Under that program, the claimant could obtain the prescriptions at any pharmacy, or even have them mailed to her, and the program would save costs to the employer. The claimant argued to the contrary that she should have the right to obtain her prescriptions from a provider of her own choosing. The Board concluded that the employer's request was reasonable and issued an order directing the claimant to obtain all further prescription medications through Express Scripts.

On appeal, the claimant argued that the Board did not have authority to require her to use Express Scripts and that there was a legislative policy that prohibited the employer from contracting with a preferred provider as it was doing here. The court disagreed and concluded that § 2322 and § 2323 of the Act deal with a claimant's right to select medical providers of her own choosing in treating the work injury, but they do not say anything about the right of the

employee to select a specific pharmacy for getting medications prescribed by her treating physician. The court concluded that a pharmacy is not a medical provider under the statute, therefore, affirming the holding of the Board. The court reasoned that it would be unreasonable to conclude that, whereas here the employer was giving the claimant the ability to obtain the prescriptions as needed, the claimant could, nevertheless, refuse to do so and instead procure them from another pharmacy at a higher rate, which would then be more expensive to the employer. ||

Side Bar

This case again illustrates the distinction made in Delaware that an employer has the right to select a prescription provider as distinguished from physicians or other medical providers for a work injury. This case also shows that it can generally be to the advantage of the employer to select such a preferred provider since it will be more cost effective. This case does point out that the preferred provider should provide the prescription medications to the claimant at any number of pharmacies or even by mail and that failure to do so could jeopardize the right to use the provider.

News from Marshall Dennehey

Tony Natale (Philadelphia) successfully defended a university in a hotly contested penalty petition. The claimant alleged a shoulder injury that was accepted as compensable with no lost time from employment. One month later, the claimant then attempted to argue that, as a result of the injury, he developed high blood pressure that caused various episodes of syncope. He claimed that he was unable to work, drive an automobile, walk without assistance or perform any activities of daily living. He left work and feverishly began to treat for this alleged condition. Tony advised the carrier not to pay any benefits after securing a clandestine surveillance video demonstrating the claimant driving an automobile, walking without assistance and diligently hand making pizzas in a local establishment along the Jersey shore. The judge found the claimant to be not credible and dismissed his penalty petition outright.

Tony also successfully defended a Longshore and Harbor Workers' Compensation death claim. The claimant was a two-pack-a-day smoker for nearly 50 years of his life. He sustained a work injury in the form of an aggravation of pre-existing chronic obstructive pulmonary disease due to asbestos exposure at work. After retiring from employment, the claimant was diagnosed with lung cancer and died. The claimant's widow filed a death claim alleging that the claimant's lung cancer was somehow aggravated or accelerated by the work injury. Tony formulated a Section 8(f) motion which was designed to shift liability to the Longshore Special Fund instead of his insurance company client. After briefs and argument, the Special Fund and the district director concurred and granted Tony's Section 8(f) relief. As a result, Tony's client was discharged from paying death benefits for the remainder of the widow's and/or dependents' lives.

Raphael Duran (Philadelphia) successfully defended a termination petition. During the trial, the claimant testified as to the activities of daily living she could not do because of her work injury. After the closing of the record, online social media revealed the claimant had a Facebook page. A motion to reopen the record and compel the production of the claimant's social networking information was granted. Based on the social media evidence, the judge found the claimant not credible. In rendering his decision, he noted the claimant portrayed herself in court as someone of only minimal activity level. However, the social network information contradicted her testimony and showed she was able to attend concerts, beach bars, football games and a vacation in Jamaica, all of which she denied in court.

John Swartz (Harrisburg) successfully defended a review petition, which sought to add a herniated disc to the claimant's accepted low back work injury, and 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 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. ||