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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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The Supreme Court of Pennsylvania clarifies Section 413 (a) of the Pennsylvania Workers' Compensation Act.

Gina Cozzone, Executrix of the Estate of Andrew Cozzone v. WCAB (Pa. Municipal/East Goshen Township); 51 MAP 2012; decided August 19, 2013; Chief Justice Castille

This case involved a claimant who sought a reinstatement of temporary total disability benefits after the 500-week period of partial disability had long since expired. The claimant was injured in January of 1989. In September of 1989, the claimant returned to work with no loss of earnings, and benefits were suspended without a supplemental agreement or court order. Over 13 years later, in May of 2013, the parties agreed to a reinstatement of benefits from February to March of 2003. Benefits were then voluntarily reinstated again from June through August of 2005. In June of 2007, benefits were again reinstated. In November of 2007, the claimant began working a modified-duty position for a different employer. The claimant was placed on partial disability status by agreement. In January of 2008, the claimant felt he could no longer work and petitioned for a reinstatement of benefits.

The defendant, who had been making partial disability benefits, ceased doing so, and the claimant filed a penalty petition. The Workers' Compensation Judge granted the claimant's reinstatement and penalty petitions. However, the Appeal Board reversed, and the Commonwealth Court affirmed that reversal.

At the appellate level, the Board and the Commonwealth Court held that the reinstatement petition was untimely filed beyond the 500-week period for which compensation was payable under §306 (b) and §413 (a) of the Act. The courts also held that the claimant was not entitled to penalties because his right to compensation was completely extinguished by the expiration of §413 (a)'s 500-week statute of repose, notwithstanding the supplemental agreement signed by the parties in January of 2008 that provided for payment of partial disability benefits. The courts viewed this supplemental agreement as void and unenforceable.

On appeal to the Supreme Court, the claimant argued that the petition was filed within three years of his most recent compensation payment, consistent with §413 (a) of the Act, and argued that his petition was not barred by the 500-week statute of repose since the defendant voluntarily reinstated compensation after the expiration date for his claim, which was sometime in April of 1999. The Supreme Court, however, agreed with the Commonwealth Court's conclusion that the claimant's reinstatement petition was barred by §413 (a) of the Act because the claimant's statutory right to benefits expired prior to the filing of the petition.

The Supreme Court held that under §413 (a), claimants retain the right to petition for any modification that they hold at the time of any workers' compensation payment for a minimum of three years from the date of that payment. Where such payments have been suspended due to a return to work or an attempted return without a loss in earnings,

SIDE BAR

According to the Commonwealth Court's opinion in this case (*Cozzone v. WCAB (Pa. Municipal/East Goshen*), 41 A.3rd 105 (Pa. Cmwlth. 2012), after the claimant returned to work in September of 1989, a supplemental agreement was not executed, nor was there an order from a Workers' Compensation Judge suspending benefits. The claimant made this an issue in his appeal to the Commonwealth Court, but the court negated it by holding that the employer was entitled to a suspension, notwithstanding the lack of a supplemental agreement or an order. This is a pitfall that employers should try very hard to avoid. Appropriate action to reflect a change in a claimant's disability status, such as when a claimant returns to work, must be taken by filing the appropriate forms with the Bureau of Workers' Compensation.

§413 (a) extends the right to petition for the entire 500-week period during which compensation for partial disability is payable. In the event payments are resumed after a suspension of benefits, claimants continue to retain the right to petition for any modification they hold at the time of any workers' compensation received subsequent to suspension for a minimum of three years from the date of payment. Finally, in the event that a period of suspension comes to an end upon the resumption of workers' compensation payments, claimants retain the right to petition for modification as set forth in §413 (a). II

An impairment rating given for a medical condition that is not part of the recognized work injury will not bar the employer from obtaining a termination for the official work injury.

Richard Harrison v. WCAB (Auto Truck Transport Corp.); 769 C.D. 2013; filed 10/2/13; Judge Leavitt

The claimant sustained a work-related injury to his right ankle. The employer issued an notice of compensation payable (NCP) acknowledging the right ankle sprain, and the claimant received temporary total disability benefits. The claimant was later seen for an IRE and was given a 13% impairment, and the employer subsequently filed a modification petition to change the claimant to partial disability status. An IME was then performed, and this physician concluded that the claimant was fully recovered. The employer petitioned to terminate the claimant's benefits. The claimant then filed a petition to review to amend the injury description in the NCP to include additional conditions described by the IRE physician in his report.

The Workers' Compensation Judge not only granted the employer's modification petition, based on the results of the IRE, but he also granted the employer's termination petition and denied the claimant's review petition. The claimant appealed to the Board, which affirmed the judge's decision. In his appeal to the Commonwealth Court, the claimant argued that the report from the IRE physician established the "compensable injury" and that the testimony of the IME physician, in his opinion, only addressed the injury that was described on the NCP.

The Commonwealth Court dismissed the claimant's appeal and affirmed the decisions of the judge and the Board. According to the court, although §306 (a.2) states that the impairment rating is to be based on the "compensable injury," it does not state that an impairment rating based on all of the claimant's medical conditions changes the work injury. Secondly, the court noted that the IRE physician did not opine that the work injury was anything more than an ankle sprain. The IRE physician included the claimant's right foot and ankle in his impairment rating out of an abundance of caution. Finally, the court held that the judge's acceptance of the IRE did not alter the employer's burden of proof on the termination petition. II

Side Bar

The Commonwealth Court has consistently treated the IRE and the IME as separate entities. In the court's view, the IRE addresses impairment, and the IME addresses disability. For example, in past cases, the Commonwealth Court has held that an impairment rating given after an opinion of full recovery does not bar an employer from pursuing a termination of benefits.

The claimant's receipt of a pension does not raise a legal presumption of voluntary removal from the workforce.

Nancy Turner v. WCAB (City of Pittsburgh); 347 C.D. 2013; filed 10/16/13; Judge McCullough

The claimant was involved in a work-related motor vehicle accident in February of 1994 in the course and scope of her employment as a police officer. The claimant sustained injuries to her neck, left shoulder, lower back, right wrist and right knee. Those injuries were acknowledged by an notice of compensation payable (NCP) from the employer. Subsequently, the claimant returned to work at a modified-duty job and received Heart and Lung benefits for approximately 10 years. In August of 2003, the Heart and Lung benefits were converted to workers' compensation benefits based on a medical determination that the claimant would not be able to return to her job and based on the claimant's acceptance of a disability retirement.

Following an IME, the employer sent the claimant a notice of ability to return to work (NARW) and filed a petition to suspend benefits, alleging the claimant had voluntarily removed herself from the workforce since she was physically capable of performing light-duty work and had not sought employment. The claimant asserted in her answer that she was involuntarily put out of the workforce and would otherwise continue to work.

When the claimant testified, she admitted that she was capable of performing some level of work, such as the modified-duty job she previously worked. She also agreed that she did not look for work immediately following retirement. However, the claimant said she would not have applied for a disability pension if her job had not been removed. The claimant also said that after receiving the NARW, she enrolled in a skills training program, which she eventually completed. A witness from the employer's third party administrator testified that the employer's transitional duty program was discontinued in 2003 and a new program was instituted in 2005. This new program was only available to active employees, and the claimant was not eligible since she retired with a disability pension in 2003.

The judge granted the employer's petition and rejected the claimant's allegation that she had not voluntarily withdrawn from the workforce because she had work capabilities and admittedly had not looked for work since retiring. The judge also found that, because the claimant was retired and no longer an active employee, the employer was not required to offer the claimant a return to a light-duty position. On appeal, the Board remanded to the judge for further findings regarding whether the claimant was forced into retirement because of her work injuries. On remand, the judge again granted the employer's suspension petition, and the Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the judge and Board improperly reasoned that receipt of an NARW and a disability pension are sufficient to raise a presumption that the claimant intended to withdraw from the general workforce. The court agreed with the claimant and granted the appeal. The court held that the receipt of any type of pension does not raise a presumption that a claimant has retired from the workforce and, in this case, that the claimant's receipt of a disability pension merely showed the claimant's inability to perform her time-of-injury job. The court vacated the Board's order and remanded the case to the judge for further findings. II

In a cumulative trauma case, the claimant's last employer is not automatically liable for payment of benefits where there is evidence that work for a prior employer materially contributed to the injury.

A&J Builders, Inc. and State Workers' Insurance Fund v. WCAB (Verdi); 479 C.D. 2013; filed 10/16/13; Judge Simpson

This cumulative trauma case involved multiple employers. The claimant filed a claim petition against Employer A alleging a work-related repetitive trauma injury to his right knee on October 6, 2008. The claimant then filed a claim petition against Employer B, alleging that on September 25, 2007 (his last day of work for Employer B), he sustained a repetitive trauma injury to his right knee. Employer B denied the claim petition's allegations and filed joinder petitions against numerous employers.

The evidence revealed that before working for Employer B, the claimant sustained an injury to his right knee in 2004. He had surgery and returned to work without restrictions. The claimant worked for Employer B for three and one-half years and performed his regular duties installing commercial drywall. The claimant said that this caused his right knee pain to return. While working for Employer B, he began treating for his right knee pain. After Employer B, the claimant worked for several other employers; the last employer was Employer A.

The claimant's treating physician, who testified in the case, opined that the claimant's job duties with Employer B and Employer A materially aggravated his underlying right knee condition. Because the claimant worked for Employer B for more than three years, the expert said he sustained more chondral damage to the right knee than during the time he worked for Employer A. Employer A's medical expert also testified, stating that the claimant was experiencing slow, gradual deterioration of his right knee function related to age. However, the expert also said he did not think the three days of work the claimant performed for Employer A substantially contributed to the development of his right knee arthritis.

The Workers' Compensation Judge granted the claim petition that was filed against Employer B. In doing so, he accepted the opinion of the claimant's physician. He also credited the testimony of the employer's physician that the claimant's work duties for Employer A did not materially aggravate the claimant's condition. Employer B appealed to the Board, which affirmed. Employer B then appealed to the Commonwealth Court.

On appeal to the Commonwealth Court, Employer B argued that the judge erred in determining that the claimant provided timely notice. According to Employer B, the claimant did not provide notice within 120 days from his last day of work with them. Employer B further argued that the claimant did not show "reasonable diligence" in providing notice under §311 of the Act. The court, however, dismissed this argument, pointing out that the judge found that the claimant did not know for sure whether there was a relationship between his work duties and his knee pain until first being informed by his physician of the causal connection in July of 2009, approximately 90 days before the claim petition was filed. The court further rejected Employer B's argument that liability should have been assessed against Employer A since they were the claimant's last employer in a cumulative trauma case. The court held that the judge accepted the testimony of the claimant's expert that he materially aggravated his right knee condition when he worked for Employer B for three years and that the decision was, therefore, supported by the evidence. II

Side Bar

This author represented one of the joined employers in this case. The takeaway from the case is that in cumulative trauma claims where there are multiple employers, the employer that is last in time, although a target, is not necessarily the liable employer if the evidence in its entirety does not support such a finding. In this case, the evidence supported the judge's decision that Employer B was responsible for payment of benefits, even though the claimant worked for other employers after he stopped working for Employer B.

Massage therapy provided by an LPN not licensed in massage therapy is nevertheless reasonable and necessary.

Kevin Moran v. WCAB (McCarthy Flowers and Donegal Mutual Insurance); 830 C.D. 2013; filed 10/16/13; Judge McGinley

The claimant was injured at work in July of 1997. Later, the claimant settled the wage loss portion of his claim through a compromise and release agreement. However, medicals remained opened. The employer then requested utilization review concerning the reasonableness and necessity of medical treatment the claimant was receiving from a nurse, which included massage therapy.

The utilization review was performed by a licensed practical nurse. In her determination, she said that massage therapy does not fall within the scope of a licensed practical nurse. The nurse provider was certified in massage therapy but was not licensed for that. Therefore, it was determined that the massage therapy was not reasonable and necessary. The claimant challenged the determination by filing a petition. The Workers' Compensation Judge granted the petition and found that the nurse provider was licensed as a practical nurse and that the massage therapy was being performed under orders from a licensed physician.

The employer appealed, and the Board reversed, concluding that in order for the cost of services to be payable under §306 (f) of the Act, it must be a medical service which the provider (a practical nurse) is licensed to provide. Because the provider was not licensed by the Commonwealth as a massage therapist, her services were not reimbursable under the Act.

The Commonwealth Court reversed the decision of the Board and granted the claimant's appeal. The court pointed out that the nurse is a licensed health care provider under the Act, her services were prescribed by a physician, and the nurse asserted that she was trained in massage therapy. The nurse further stated that the massage therapy was something she utilized in providing therapeutic care to patients. The court held that the employer failed to establish that massage therapy did not come under the duties of an LPN. II

Side Bar

The Commonwealth Court concluded their opinion by pointing out that the employer also failed to address the merits of whether the treatment being provided by the nurse was reasonable and necessary. This was another reason the court affirmed the decision of the judge. The court reached the conclusion they did because the massage therapy was being provided by a licensed provider and was being prescribed by a licensed physician. This is distinguishable from health care services being provided by an unlicensed massage therapist, even if those services are prescribed by a health care provider.

Delaware Workers' Compensation

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

Paul V. Tatlow

An employee injured in a motor vehicle accident that occurs when he is returning to the workplace from a lunch break was not within the course and scope of his employment.

Matthew Chapman v. Dentsply Caulk, (IAB #1397867 - Decided September 30, 2013)

This case involved a petition to determine compensation due filed on behalf of the claimant alleging that his motor vehicle accident on July 2, 2012, occurred during the course and scope of his employment and, therefore, was compensable.

The facts show that the claimant was returning to work after his lunch break at a Wawa when he was injured in a car accident. At the time of the accident, the claimant was driving his own vehicle and it occurred approximately two miles from the employer's work location. The claimant was an hourly employee who clocked in each morning and who clocked out at the end of the work day, although he did not clock out for lunch time. He thought that he was paid for his lunch break. The employer presented evidence through its director of human resources indicating that the claimant was not paid for his lunch breaks and that the electronic time system automatically deducted the 30-minute lunch break time from each employee's timecard. As such, the employees were not required to clock out at lunch time. The witness further testified that this information was provided to the employees when they had their orientation at the time of being hired.

The Board analyzed this case under the well-known legal proposition that in order to be compensable, the injury must occur within the course and scope of the claimant's employment. The Board concluded that the claimant failed to meet his burden of proof since the injury here happened during his lunch break, when he was not even on the employer's premises nor in a place where he was required to be in order to perform his job.

The claimant made the further argument that he was a "traveling employee" because he occasionally drove the employer's delivery truck between two plants and, therefore, his auto accident should be found to be a compensable work injury. The Board rejected that argument by reasoning that the mere fact that the claimant drove the delivery truck on occasion did not thereby make him a traveling employee since his primary job was to work at a fixed place of employment; therefore, he was not a true traveling employee. The court further noted that the claimant was in his own, personal vehicle at the time of the accident on a lunch break from his regular job at the fixed work location. Therefore, the Board concluded that the claimant was not within the course and scope of his employment, and the petition was denied outright. II

Side Bar

The "going and coming rule" stands for the proposition that when commuting to and from work, an employee with a fixed work location is not within the course and scope of their employment. This case illustrates that, even during a work day where an employee goes out for lunch off of the employer's premises and is injured, there is a viable course of employment defense. The key facts here in establishing that defense were that the claimant was using his own vehicle at the time of the accident, that he was not paid for the lunch break and that he was in no way furthering the employer's business by taking his lunch break off of the premises.

News from Marshall Dennehey

Firm News:

- Our Harrisburg, Pennsylvania office has moved to: Suite 201, 100 Corporate Center Drive, Camp Hill, PA 17011

Recently Published Articles:

- "PEOs: A New Potential for Workers' Comp Fraud?" by **Tony Natale** (Philadelphia, PA).
- "National Trends in Workers Compensation" by **Niki Ingram** (Philadelphia, PA).

Upcoming events:

- **Paul Tatlow** (Wilmington, DE) will present *The Medicare "Super Lien" and Other Liens Simplified* on November 22, 2013, on behalf of the National Business Institute.
- December 3, 2013, **Niki Ingram** and **Tony Natale** (Philadelphia, PA) will give a presentation at the Annual Human Resources Conference for the Pennsylvania Chamber of Business and Industry. Their presentation will be *The Most Common Mistakes Made in Workers' Compensation Cases*.
- **Tony Natale** (Philadelphia, PA) will be presenting a teleconference, *Job Abandonment and Disability Benefits*, on behalf of the National Business Institute on December 10, 2013.
- On December 12, 2013, the National Business Institute will present "Your Top Workers' Compensation Questions – Answered." As part of this day-long seminar, workers' compensation attorneys **Ross Carrozza** (Scranton, PA) and **Angela DeMary** (Cherry Hill, NJ) will speak on *WCMSAs and Ethical Considerations*.