MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 17 | NO. 7 | JULY 2013

What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

Since our last edition, neither the Commonwealth Court nor the Supreme Court issued any significant 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.

Denial of unemployment benefits under §402 (e.1) of Unemployment Compensation Law is proper for claimant's termination from employment due to a violation of the employer's substance abuse policy.

Matthew J. Dillon v. Unemployment Compensation Board of Review; 786 C.D. 2012; filed June 18, 2013; by Judge Ledbetter

The claimant worked for the employer as a pipefitter. The claimant's job duties included handling chemicals, using power tools and operating a forklift. The employer prohibited its employees from working with a breath alcohol content in excess of 0.02% and conducted random tests for compliance purposes. In December 2010, the claimant tested positive and signed a "Last-Chance Agreement," which subjected him to additional testing for a year and potential disciplinary action, including discharge, in the event of another positive test. In September 2011, the claimant tested positive again, and he was terminated.

The Commonwealth Court considered the issue of whether the claimant's eligibility for unemployment benefits should be analyzed under §402 (e.1) or §402 (e) of the Unemployment Compensation Law. The court pointed out that, in prior holdings, they found that the proper provision under which to analyze discharges where an employee fails to submit and/or pass a drug test is §402 (e.1), not §402 (e). In this case, the Unemployment Compensation Board of Review (Board), in affirming the referee's denial of benefits, concluded that §402 (e) of the law was applicable. The Commonwealth Court, however, disagreed with that analysis.

According to the court, although the legislature did not include the word alcohol in §402 (e.1), the court felt that a strict interpretation of this exclusion would lead to an unreasonable result and potentially rise to the level of absurdity. Moreover, the court concluded that the legislature intended to include alcohol as a substance that is subject to abuse within the meaning of the provision. Although the Commonwealth Court disagreed with the Board's analysis, nevertheless, it affirmed the denial of the claimant's unemployment benefits. II

The denial of unemployment benefits was proper where the employee violated the employer's "return home" policy.

Dike v. Unemployment Compensation Board of Review; 1993 C.D. 2012; filed June 18, 2013; by Judge McCullough

In this case, the employer had a "Return Home" policy that permitted employees to return home for certain reasons, such as attending a funeral for a family member. The policy stated that, in order for an employee to request "Return Home Leave" to attend a funeral, the employee must submit a completed application, a copy of a plane ticket or travel itinerary and written documentation of the death or funeral, including a doctor's note, document from a funeral home, death certificate or other written record. The claimant in this case requested a five-week leave to attend his grandfather's funeral in Nigeria. The claimant was given the application and asked to submit his travel itinerary or plane ticket along with a written record of the death or funeral. The claimant replied that he did not know how to obtain written documentation of the funeral from Nigeria and asked what would happen if he did not report for his next scheduled shift. The employer's Job Abandonment Policy was then explained to the claimant.

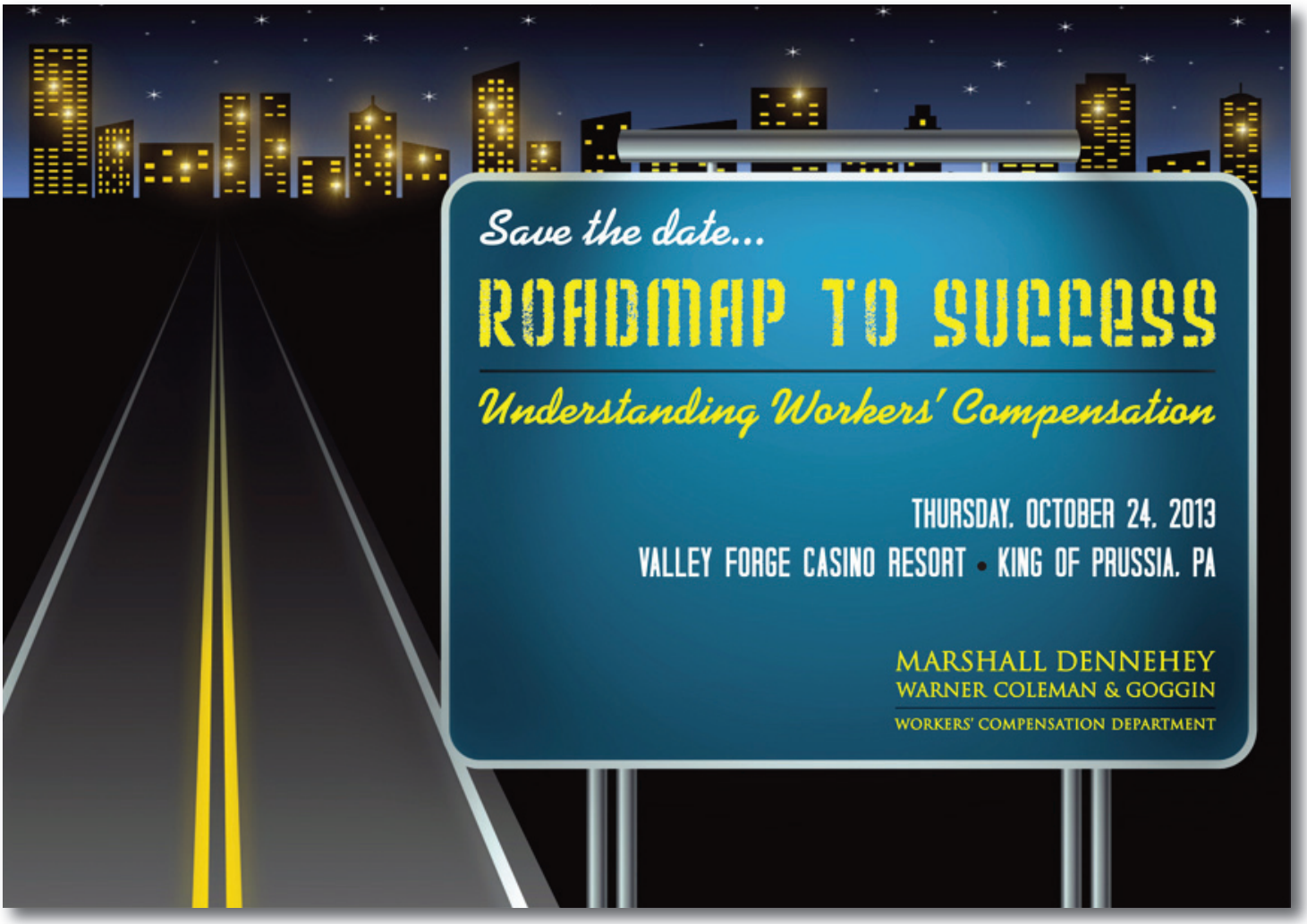
The claimant did not provide the employer with the completed application or other documentation. Also, the claimant failed to appear for a scheduled work shift. The employer then notified the claimant that it deemed his action job abandonment, and the claimant was terminated. The claimant filed for unemployment benefits.

Benefits were denied by the service center, and an evidentiary hearing was then conducted by a referee. The referee found that the claimant was ineligible for benefits under §402 (b) of the Law, holding that he voluntarily left his job for personal reasons and did not attempt to preserve his employment by complying with the employer's "Return Home Leave" policy.

The Unemployment Compensation Board of Review affirmed the referee's denial of benefits, as did the Commonwealth Court. According to the court, the claimant's decision to take leave when he was fully aware that it would result in termination if his request for leave was not approved was tantamount to voluntarily leaving his job. ||

Side Bar

At the hearing conducted by the unemployment compensation referee, three witnesses testified and evidentiary submissions were made. When there is this level of evidence being presented to the court, serious consideration should be given to retaining legal representation.



New Jersey Workers' Compensation

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Dario J. Badalamenti

The statute of limitations defense in the context of occupational exposure claims.

Lattoz v. New Jersey Turnpike Authority, Docket No. A-4335-11T2, 2013 N.J. Super. Unpub. LEXIS 1348 (App. Div., decided 6/5/13)

On November 11, 2008, the petitioner filed a workers' compensation claim against his employer, alleging an injury to both knees as a result of exposure to repetitive motion during the course of his employment from December 1992 through November 11, 2008.

The petitioner testified that he began working for the respondent in 1992 as a landscaper and that he had no problems with his knees at that time. In or about 2000, the petitioner began work as a toll technician with the respondent, which is when he began reporting complaints of pain and discomfort of the knees which caused difficulties walking and standing. The petitioner further testified that the pain in his knees progressively worsened in the years he worked as a toll technician. In 2004, the petitioner began working with the respondent as a communication technician, which required periods of extended kneeling, causing a worsening of his complaints. Despite neither seeking medical treatment nor reporting any complaints to the respondent, the petitioner did testify that he attributed the pain in his knees to his employment as early as 2000.

On May 23, 2005, the petitioner consulted an orthopedist, John A. Hurley, complaining of pain in both knees dating back a number of years. Dr. Hurley diagnosed the petitioner with osteoarthritis of both knees. Although surgical and non-surgical interventions were discussed, it was decided that, because of his relatively young age, the petitioner would undergo an aggressive course of physical therapy rather than knee replacement surgery. However, Dr. Hurley did indicate that the petitioner would likely require knee replacement surgery at some point in the future. In April of 2008, the petitioner presented to Dr. Robert Golman, an orthopedist, with reported complaints of constant bilateral knee pain. A series of x-rays demonstrated the petitioner's candidacy for surgery. On July 23, 2008, the petitioner underwent bilateral knee replacement.

At the conclusion of trial, the respondent moved for dismissal based on N.J.S.A. 34:15-34, which provides in relevant part:

> [W]here a claimant knew the nature of the disability and its relation to the employment, all claims for compensation or compensable occupational disease . . . shall be barred unless a petition is filed . . . within two years after the date on which the claimant first knew the nature of the disability and its relation to the employment[.]

The Judge of Compensation dismissed the petitioner's claim with prejudice on statute of limitations grounds. The judge explained:

> [H]ere, Petitioner concedes that he believed that his knee pains were caused by the job as early as the year 2000. [O]n May 23, 2005, in the course of his examination with Dr. Hurley . . . [Petitioner] was told that his knees were sufficiently damaged to require knee replacement, but that his age combined with the expected utility of the prosthetics made delay advisable. It is inescapable that at that point the Petitioner knew that he was suffering from a serious disability which, by his own admission, he knew to be related to his employment. N.J.S.A. 34:15-34 bars his claim unless he filed a claim petition before May 23, 2007. Since he failed to file a petition until November 11, 2008, his claim is barred[.]

On appeal, the petitioner argued that, although he and Dr. Hurley discussed the benefits of knee replacement in 2005, Dr. Hurley did not impress upon him the necessity or inevitability of surgery. As such, the petitioner claimed that he lacked the requisite knowledge of the severity of his injury which, according to the petitioner, did not fully manifest itself until July 23, 2008, the date of his surgery.

In affirming the Judge of Compensation's dismissal, the Appellate Division found that the record was clear that, when the petitioner consulted with Dr. Hurley on May 23, 2005, he was made aware of the severity of his diagnosis and the inevitability of knee replacement surgery. "Following Dr. Hurley's diagnosis," the Appellate Division concluded, "Petitioner knew he suffered from osteoarthritis, needed bilateral knee replacement, [and] believed that his knee pain was the result of his employment with [Respondent]. Accordingly, Petitioner had the requisite amount of knowledge of the nature of his disability and its relation to his employment on May 23, 2005, sufficient to begin the running of the statute of limitations." II

Side Bar

Unlike an accident, the precise onset of an occupational disease may be difficult to ascertain. As result, the statute of limitations in an occupational exposure claim does not begin to run until such time as the petitioner has knowledge of: [a] the nature and extent of his disability; and [b] its relation to his employment. In *Earl v. Johnson & Johnson*, 158 N.J. 155 (1991), the Court noted that knowledge of the nature and extent of a disability "connotes knowledge of the most notable characteristics of the disease, sufficient to bring home substantial realization of its extent and seriousness." Based on this definition, a showing that the petitioner's condition has fully manifested itself may be necessary in order to establish the petitioner's knowledge of the nature and extent of his disability.

Delaware Workers' Compensation

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Paul V. Tatlow

Board grants the employer's termination petition based on accepting the opinion of the employer's medical expert that the claimant has sufficiently recovered from the work injury to the point where she can perform sedentary work on a full-time basis.

Virginia Vassallo v. Eden Rock Assisted Living, (IAB No. 1363820 – Decided 5/23/13)

This case involved a claimant who sustained a compensable work injury on December 7, 2010, to her neck and right shoulder while working as a certified nursing assistant. By agreement, the claimant was put on total disability and was compensated for a 20 percent permanency to the cervical spine. Thereafter, the employer filed a termination petition, alleging that the claimant was physically able to return to work.

The evidence presented before the Board included the testimony of the employer's medical expert, who, based on his most recent evaluation of the claimant in March 2013, was of the opinion that the claimant had recovered to the point where she could do sedentary duty work with a five-pound lifting restriction and with no repetitive use of the upper extremities. The medical expert did acknowledge that the claimant continued to have chronic neck and a bilateral shoulder condition, although only the right shoulder problem was related to the work incident. The employer also presented the testimony of a vocational consultant, who identified 12 sedentary jobs as being appropriate for the claimant, of which five continued to be available as of the hearing date.

The claimant testified that she did not believe she was able to do full-time sedentary work, although she said that she did want to return to work. She also indicated that her pain was at a level 9 on a scale of 0 to 10. The claimant's medical expert was a neurosurgeon who had performed several surgeries to the claimant. Specifically, he had done surgery to the cervical spine prior to the work injury, and subsequent to the incident, he had done two surgeries in March 2011 and again in May 2011. The latter surgery was a decompression and revision to the cervical spine. The medical expert testified that the claimant did not do well after surgery and continued to be in severe pain. He maintained her on total disability status and expressed the opinion that, based on the claimant's severe pain, as well as muscle spasms and the taking of narcotic medications, she was not employable.

The Board reviewed the evidence, including the conflicting medical opinions, and concluded that the employer had met its burden of proof and that the claimant was capable of returning to full-time sedentary work with upper extremity restrictions. In so doing, the Board commented that, at the time of the hearing, it had been nearly two years since the claimant's last neck surgery and more than 18 months since her right shoulder surgery. The Board agreed with the employer's medical expert that under the circumstances, a return to work for the claimant would be rehabilitative under the *Healthcare Practice Guidelines*. In addition, the Board found that the claimant was not entitled to any partial disability benefits since the average weekly wage, as documented by the Labor Market Survey, of $405.00 per week was in excess of the claimant's pre-injury average weekly wage of $315.00. Accordingly, the termination petition was granted as of the date of the Board's decision. II

Side Bar

This case is interesting in that the Board rejected the testimony of the treating physician, which generally is given more weight than that of an evaluating physician. The Board's decision suggests that they did so, in part, since the claimant's medical expert had not seen the claimant since December 2012, which was four months prior to the hearing. He had also conceded that his opinion that the claimant remained totally disabled was based primarily on her complaints of subjective pain and that he had not ordered a functional capacity evaluation (FCE). While generally an FCE can be useful to an employer in showing the claimant has work capabilities, the failure for one to be ordered here by the treating physician was actually used against the claimant.

News from Marshall Dennehey

On August 27, 2013, **Jay Habas** (Erie, PA) will take part in a Lorman Education Services' seminar *Best Practices in ADA, FMLA and Workers' Compensation* in Erie, PA. For details and to register, visit Lorman at http://www.lorman.com/seminars/390801?discount_code=B5962492&p=13389.

Shareholder **Niki Ingram** (Philadelphia, PA) has been named to the 2013 "Top 50 Women Pennsylvania Super Lawyers" list by *Pennsylvania Super Lawyers* magazine. This is the third time Niki has been named to the exclusive list. Niki, Assistant Director of the firm's Workers' Compensation Department and a member of its Board of Directors, has devoted her career to workers' compensation defense. II