

PENNSYLVANIA WORKERS' COMPENSATION

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An employer is entitled to subrogation from a recovery made by a claimant from a bad faith action against a manufacturer's insurance carrier.

Clyde Kennedy v. WCAB (Henry Modell & Co., Inc.); 1649 C.D. 2012; filed 8/1/13; by Judge Leavitt

The claimant sustained a crush injury to his right hand while using a conveyor belt at work. The employer paid the claimant total disability benefits and paid his medical bills. Later, the claimant filed a product liability action against the manufacturer of the conveyor belt, and the employer asserted a subrogation lien. The manufacturer's insurance carrier refused to defend the action, claiming it fell within the "product hazard" exclusion in the liability insurance policy.

The trial court approved a consent judgment against the third party. The claimant agreed not to pursue the third party for the judgment. Instead, the claimant pursued the manufacturer's insurance carrier for collection of the judgment and filed a complaint against them for breach of contract and bad faith. The trial court ruled in the claimant's favor. When the claimant failed to pay the employer the amount of their subrogation lien, the employer filed a review offset petition. In his answer, the claimant asserted that the employer was not entitled to subrogation because the money the claimant received was for a breach of contract, not negligence. The employer's petition was granted by the Workers' Compensation Judge and affirmed by the Workers' Compensation Appeal Board.

On appeal to the Commonwealth Court, the claimant argued that, by law, the employer is subrogated only where the recovery comes from the third party that caused the injury for which the employer paid compensation benefits. In this case, the third party tortfeasor that caused the

injury, the manufacturer, paid nothing to the claimant due to its insolvency. The court, however, rejected this argument, pointing out that the only reason the manufacturer's insurance carrier was not involved in the case was because it wrongfully refused to defend and indemnify the tortfeasor. The claimant's lawsuit against the insurance carrier depended on the malfeasance of the original tortfeasor, that is, the manufacturer's negligence. Thus, the court concluded that the employer was entitled to subrogation under §319 of the Act and affirmed the decisions of the Workers' Compensation Judge and the Appeal Board. **II**

A judge's decision granting a claim petition is reversed on the basis that the claimant was not in the course and scope of employment at the time of the work injury.

Trigon Holdings, Inc. v. WCAB (Griffith); 207 C.D. 2013; filed 8/7/13; by Judge Covey

In this case, the claimant filed a claim petition for workers' compensation benefits for a degloving injury that occurred to his left thumb. The claimant worked in a machine shop, and approximately two hours into the midnight shift, after ensuring that the employer's machines were running smoothly, the claimant told co-workers he would be in the tool and die room for a few minutes if they needed him. Within five minutes, while polishing a bolt for his child's go-cart with an emery cloth, the claimant's left thumb was drawn into a lathe. The claimant filed a claim petition, which was granted by the Workers' Compensation Judge. The Appeal Board affirmed the judge's decision.

The Commonwealth Court, however, reversed the decisions below. Noting that the judge concluded that the injury occurred during a temporary departure from work that did not break the course of employment, the Commonwealth Court disagreed and held that the

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claimant abandoned his work responsibilities as he was deliberately engaged in an activity wholly foreign to his employment, *i.e.*, polishing a bolt for his child's go-cart. In the court's view, although the claimant was gone from the machine shop for only five minutes when he sustained the injury, his departure from the course of his employment was not trivial or insignificant. The court further noted that the claimant was not injured attending to personal comfort, such as getting a drink of water or using the restroom. Rather, he was injured while actively disengaged from his work responsibilities. The court held that the evidence supported the legal conclusion that the claimant's injury occurred during a pronounced departure from his job and, therefore, not in the course and scope of employment. ||

Testimony from the claimant's medical expert regarding the cause of the decedent's death was not equivocal simply because the expert offered alternate theories regarding the exact cause of death.

Manitowoc Co., Inc. and Sentry Insurance v. WCAB (Cowan); 472 C.D. 2013; filed 8/20/13; by Sr. Judge Friedman

The claimant filed a fatal claim petition, alleging that the death of his decedent was caused by injuries he sustained from a fall from a crane platform at work. The decedent and a co-worker were working, without harnesses, on an elevated crane platform with no handrails approximately six feet from the ground. While in a crouched position, the co-worker saw the decedent's eyes roll back, and the decedent fell off the platform, striking his head on the floor. The co-worker testified that the decedent had gone limp and did not try to catch his fall. Within

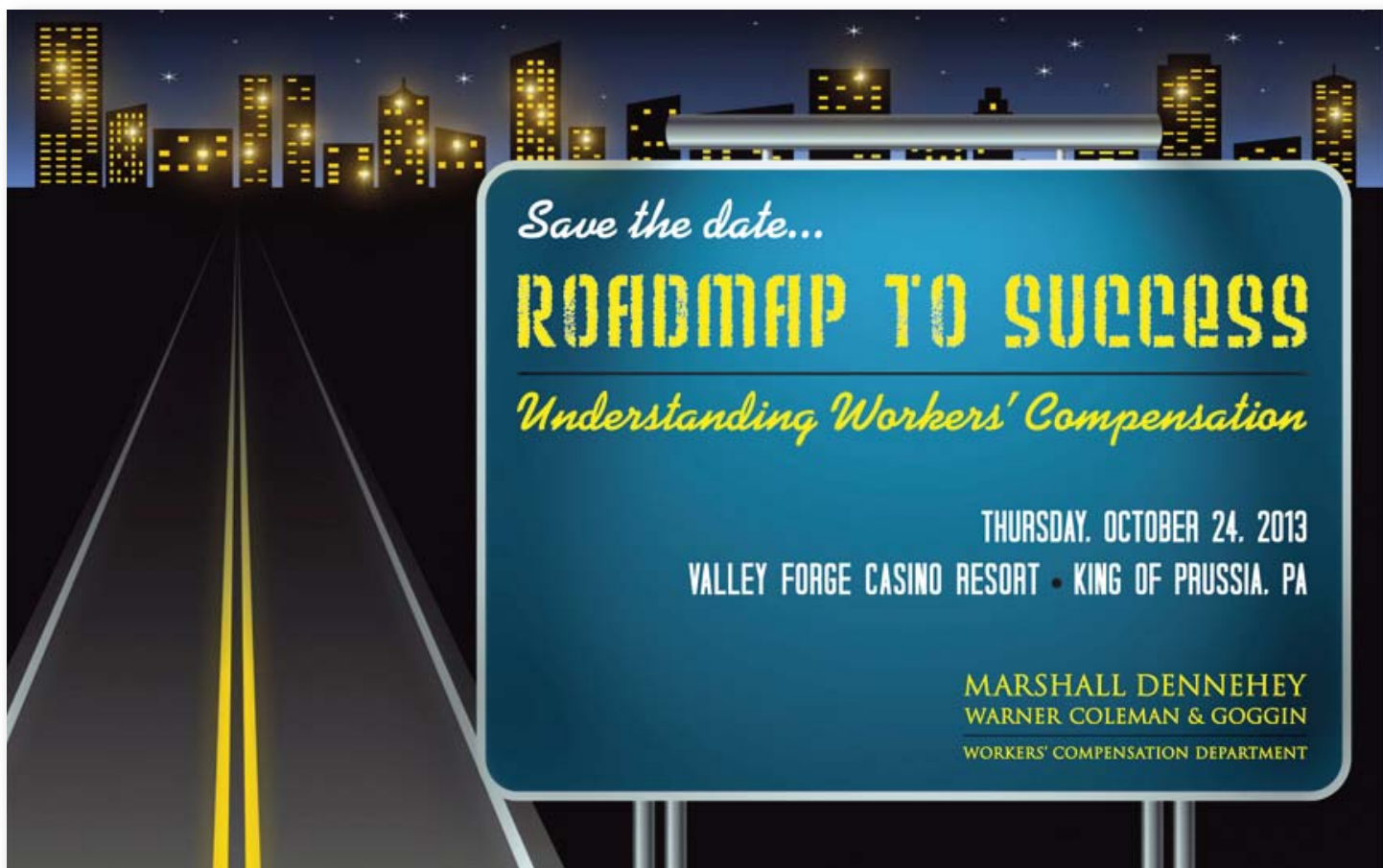
seconds of the fall, the decedent began turning blue and blood was coming from his mouth. The decedent soon stopped breathing, and he was transported to the hospital and placed on life support. Diagnostic tests later revealed that the decedent was brain dead, and life support was disconnected. The autopsy report stated that the cause of death was cardiac dysrhythmia due to mitral valve prolapse.

In support of the fatal claim petition, the claimant's medical expert concluded that cardiac arrest was not experienced at the time of the fall because, once on the ground, the decedent clearly had a pulse. The expert further opined that the decedent did not die from mitral regurgitation or heart disease but from falling onto his head, which caused a closed head injury with a massive concussion.

The employer's medical expert testified that it was highly possible a cardiac episode caused the decedent to lose consciousness. This expert also opined that the decedent's brain injury stemmed primarily from cardiac arrhythmia and secondarily from the blow to the head when he hit the floor. Both experts agreed that the decedent suffered brain death.

The Workers' Compensation Judge granted the claimant's petition, and the Appeal Board affirmed. The employer appealed to the Commonwealth Court, arguing that the testimony of the claimant's medical expert was equivocal since he offered alternate theories regarding the exact cause of the decedent's death.

The Commonwealth Court disagreed and affirmed the decisions below. It noted that, although the claimant's expert set forth four possible explanations regarding the connection between the decedent's fall and his death, under each scenario, his ultimate conclusion was that the fall and blunt force head trauma was the cause of death. The expert further testified that, absent the head trauma, the decedent would still be alive. ||



NEW JERSEY WORKERS' COMPENSATION

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



Dario J. Badalamenti

Under what circumstances can a respondent recover a faultless overpayment of workers' compensation benefits from a petitioner?

Weiner v. Elizabeth Board of Education, Docket No. A-0627-12T2, 2013 N.J. Super. Unpub. LEXIS 1729 (App. Div., decided 7/15/13)

On October 18, 2000, the petitioner received an award of total disability from his employer, entitling him to permanent total disability (PTD) benefits at a rate of \$480 per week for 450 weeks. On April 1, 2002, the petitioner qualified for and began receiving ordinary disability pension benefits, in addition to his workers' compensation benefits, which he did not disclose to the respondent. On or about April 29, 2010, the respondent became aware that the petitioner was receiving ordinary disability pension benefits and entered into a consent agreement reducing the petitioner's PTD rate to \$222.39, prospectively.

The respondent subsequently moved for reimbursement of the excess PTD benefits the petitioner received from April 1, 2002, through August 10, 2011. Based solely on a review of several years of the petitioner's income taxes returns, the Judge of Compensation found that, given the petitioner's "limited resources and inability to work," it "would be inequitable" to require him to reimburse the respondent for the overpayment. He, accordingly, denied the respondent's motion, and the respondent appealed.

In reversing the Judge of Compensation's ruling and remanding for further proceedings, the Appellate Division relied on its decision in *Hajnas v. Engelhard Mineral & Chemical Co.*, 231 N.J. Super. 353 (App. Div. 1989), in which the court established the criteria for recovering overpayments:

The Workers' Compensation Division is to determine if the petitioner was unjustly enriched under 'settled principles of

unjust enrichment,' an issue for which the respondent employer has the burden of proof. It is considered unjust enrichment to permit the recipient of money paid under mistake of fact to keep it, unless the circumstances are such that it would be inequitable to require its return.

The Appellate Division characterized the Judge of Compensation's finding that the petitioner had "limited resources" as "manifestly unsupported by competent credible evidence." The court cited the fact that the Judge of Compensation conducted no evidentiary hearing, required no statement of assets and liabilities evidencing the petitioner's net worth, and did not consider any statement of the petitioner's income and expenses. "Given the paucity of evidence," the Appellate Division concluded, "there was no reasonable basis for the Judge of Compensation's factual finding . . . that it would be inequitable to require him to repay [Respondent.]" Accordingly, the Appellate Division remanded the matter for further determination by the Judge of Compensation following an evidentiary hearing and establishment of a more complete record. II

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In a subsequent decision, *Montgomery v. Abex Corp.*, 253 N.J. Super. 480 (App. Div. 1992), the Appellate Division characterized *Hajnas*, referenced above, as outlining a method whereby a respondent can recover in a faultless overpayment situation. The respondent must first establish unjust enrichment and an absence of circumstances making it inequitable to require the petitioner's reimbursement of the overpayment. If successful in doing so, the respondent may then institute enforcement proceedings in Superior Court. "This process is beneficial," the *Montgomery* court commented, "since an underlying theme of workers' compensation law is that there should not be duplicative payments for the same disability."

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DELAWARE WORKERS' COMPENSATION

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



Paul V. Tatlow

The employer's making of medical payments over an 18-month period was done under a feeling of compulsion and thereby tolled the statute of limitations.

United Dominion Industries v. Joseph Uniatowski, (Superior Court – C.A. No. N12A-08-010 ALR - Decided 8/19/13)

This case was tried before the Superior Court regarding the employer's appeal from a Board decision that granted the claimant's petition to determine additional compensation due by awarding payment of medical expenses as well as a counsel fee. The Board had concluded that the claimant's petition was not barred by the five-year statute of limitations.

The claimant had sustained a compensable injury to his lungs and respiratory system on August 1, 1999. Thereafter, he received compensation for total disability from February 22, 2000, until March 6, 2001. In addition, the claimant received payments for medical expenses. The last payment made for medical treatment was on April 26, 2002. In 2002, the parties resolved the claim by way of commutation, except for medical treatment, which was left open. However, there was then a seven-year hiatus during which no medical expenses were paid.

Beginning on August 13, 2009, and continuing to February 12, 2011, the employer paid medical expenses without objection, but then denied coverage for a medical bill submitted on October 18, 2011, and refused to pay any further medicals. This led to the claimant filing the petition seeking payment for the medicals, and the evidence consisted of the testimony of the claimant as well as the claim adjuster. The evidence showed that between August 2009 and February 2011, the employer paid over \$12,000 in medical expenses without objection, but that they were now contending this was done by mistake. The claimant's evidence indicated that, in his discussions with the claim adjuster, there was no mention of any statute of limitations issue or problems with the medical bills.

The Board found in favor of the claimant, reasoning it was difficult to accept the employer's position that the resumption of medical payments in August 2009, after the seven-year gap, was merely an error given the length of the payment period as well as the amount of medical expenses. The Board concluded that the payments were not made in error but, rather, were made under a feeling of compulsion and, thereby, tolled the statute of limitations.

The Superior Court affirmed the Board, finding that there was substantial evidence to support the Board's determination that the medical expenses were made under a feeling of compulsion and, thereby, created an implied agreement to make those payments. Therefore, the court concluded that the employer remained liable for the claimant's medical expenses. ■

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The facts in this case strongly suggest that the employer had an iron-clad defense to the payment of the medical expenses in August 2009 based on the five-year statute of limitations. It points out the critical importance of carefully checking a file that has been dormant for a period of time to see where there is a viable statute of limitations to any further compensation payments being made. So long as the claimant has been given proper notice of the statute of limitations, the running of five years without any further payments effectively closes the claim. The facts here do strongly suggest that the outcome may have been different if the employer had only made one or two payments over a short period of time, as opposed to a large amount of payments over a substantial period of time.