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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

An insurer is entitled to subrogation under §319 of the Pennsylvania Workers' Compensation Act for injuries sustained by the claimant while driving in Delaware during the course and scope of employment.

Natasha Young v. WCAB (Chubb Corporation and Federal Insurance Company); 1432 C.D. 2013; filed 3/10/14; by Judge Cohn Jubelirer

The claimant sustained injuries in a motor vehicle accident that took place in Delaware, while in the course and scope of her employment, and she received workers' compensation benefits pursuant to the Pennsylvania Workers' Compensation Act. The claimant then reached a settlement of a third party action that had been filed in Delaware. The insurer filed a petition to review to recover their subrogation lien under §319 of the Act.

The claimant took the position that the laws of Delaware, not Pennsylvania, applied with respect to the employer's subrogation rights. Delaware law follows a more equitable approach, whereas under §319 of the Pennsylvania Act, an employer's right to subrogation is absolute.

The Workers' Compensation Judge granted the employer's review petition, and the Workers' Compensation Appeal Board affirmed. The claimant then appealed to the Commonwealth Court.

On appeal, the claimant argued that Delaware law applied since Delaware had more significant contacts to the matter than Pennsylvania. The court, however, rejected this argument and affirmed the decisions below. The court concluded that Pennsylvania had more significant contacts with the underlying controversy than Delaware. Although the litigation from which the lien arose occurred and was governed by the laws of Delaware, the claimant was a resident of Pennsylvania and the employer did business in Pennsylvania while holding a Pennsylvania workers' compensation insurance policy. More importantly, the claimant availed herself of the Pennsylvania Act, the employer paid benefits under the Act, and all of the litigation concerning the claimant's receipt of workers' compensation benefits had been in Pennsylvania pursuant to the Act. For that matter, the claimant had entered into a C&R agreement under the Pennsylvania Act in which she affirmed the employer's subrogation lien. II

Employer's modification petition that is based on the results of an IRE was properly dismissed because the IRE physician failed to satisfy §306 (a.2) of the Act by not being active in clinical practice for at least 20 hours per week.

Verizon Pennsylvania, Inc. v. WCAB (Ketterer); 1188 C.D. 2013; filed 3/12/14; by Senior Judge Colins

The claimant began receiving workers' compensation benefits for injuries he sustained in a work-related motor vehicle accident. The employer filed a request with the Bureau to designate a physician to perform an IRE. The physician selected performed the IRE and concluded that the claimant had an impairment rating of 16 percent. The employer then filed a modification petition based on the results of the IRE.

The IRE physician was Board Certified in occupational medicine and received training on the AMA Guides, 6th Edition. In addition, the physician was approved by the Bureau as a certified IRE physician. At the time of the IRE, however, the physician did not treat or manage the care of any patients. Her practice consisted solely of workers' compensation IMEs, IREs, physical examinations for pilots to determine certification requirements, commercial driver's license examinations, utilization reviews and peer reviews. In fact, at the IRE physician's deposition, she said that her practice at the time the IRE was performed was mostly administrative.

The judge denied the modification petition on the grounds that the IRE physician did not meet the requirement of §306 (a.2) (1) of the Act, which says that physicians performing IMEs must be active in clinical practice at least 20 hours per week. In deciding this issue, the court turned to the Bureau Regulations. In the court's view, the regulations require that a physician's work involve some connection to the care or treatment of patients in order to constitute a "clinical practice." The court rejected the employer's argument that the legislative intent of the "clinical practice" requirement was only to ensure that IRE physicians were up-to-date in their qualifications and medical knowledge. The employer further argued that the clinical practice requirement would exclude competent occupational medicine physicians from performing IREs, who generally do not have private patients. The court rejected this position as well. According to the court, the "clinical practice" requirement was broad and may be satisfied by treatment or management of injuries as a panel physician hired by the employer or workers' compensation insurer. II

Side Bar

The facts of this case paint a scenario that is not that uncommon, especially when occupational medicine physicians perform IREs. It is strongly recommended that the IRE physician satisfy the "clinical practice" requirement at the time of the IRE physician's deposition. This can be accomplished by asking the IRE physician specific questions regarding such matters as the treatment or management of injuries as a panel physician, the evaluation or diagnosis of patients for the purpose of recommending treatment by other physicians, etc. It should also be established for the record that the IRE physician provides these physician services at least 20 hours per week.

Delaware Workers' Compensation

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

Paul V. Tatlow

The Delaware Supreme Court finds that substantial evidence supported the Board's conclusion that the claimant was not a displaced worker because his job search was not successful for reasons unrelated to his work injury.

Kenneth Howell v. Wilson Masonry, (Supreme Court – C.A. No. S13A-02-003 – decided 3/7/14)

This case was before the Delaware Supreme Court on the claimant's appeal from the Superior Court's decision which had affirmed the Board's decision in favor of the employer. The claimant had sustained a compensable injury to his left ankle in 2009 and was receiving compensation for temporary total disability. Later, the employer filed a petition to terminate benefits, alleging the claimant was no longer disabled. The evidence included testimony from medical experts for each party showing that, while the claimant still had significant injuries and was suffering from pain, he was capable of performing sedentary work, even according to his own treating physician. The Board issued its decision granting the termination petition and finding that the claimant was only partially disabled, and based on the vocational evidence, the Board reduced the claimant's compensation to the partial disability rate of $5.00 per week.

On appeal, the claimant argued that the lower court had erred in finding that he was not a displaced worker who could not obtain employment. The court noted that the concept of displaced worker refers to one who, while not completely incapacitated for work, is so handicapped by the compensable work injury that he or she will no longer be employed regularly in any well known branch of the competitive labor market, essentially requiring a specially created job if he or she is to be steadily employed at all. The court concluded that the claimant was not, in fact, a displaced worker either in the form of being *prima facie* displaced or actually displaced. The reasoning of the court was that the claimant was not so limited by his physical restrictions, age, education or otherwise to be *prima facie* displaced. In addition, the claimant did not produce any evidence that he was unsuccessful in securing employment as a result of his work injury. Rather, the evidence showed that the claimant's limited attempts in obtaining employment were unsuccessful but were not due to his work-related physical injuries. Accordingly, the decision below was affirmed. II

Side Bar

This case shows the need for employers to be ready to litigate the issue of whether a claimant is a displaced worker who has made reasonable efforts to secure suitable employment but which have been unsuccessful. If the employer is utilizing a vocational expert, that person should carefully review any job searches made by the claimant and be prepared to challenge their validity for various reasons, which would include making only a limited job search or applying for jobs which clearly exceed the claimant's work capacities. Such evidence can serve to refute any assertion of displaced worker status.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The New Jersey Supreme Court reverses an appellate division decision employing an overly expansive interpretation of the premises rule.

Hersh v. County of Morris, A-59 September Term 2012, 07143, 2014 N.J. LEXIS 251 (Supreme Court, decided 4/1/14)

As the petitioner's employer, the respondent assigned the petitioner free parking at a private garage located about two blocks from her workplace. The respondent paid for 65 parking spaces for its employees at this private garage, provided each employee with a scan card so that they could gain access to the garage, and instructed all employees to park on the garage's third level. On January 29, 2010, approximately ten minutes before she was due to report to work, the petitioner parked her car on the third level of the parking garage and exited the building. As she was crossing the street, the petitioner 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 petitioner's accident arose out of and in the course of her 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 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 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'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 as her work day 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 employees. "[As] the employer's control extended the workplace premises to the garage," the Appellate Division concluded, "when Petitioner parked her car in the assigned garage, she was not coming to work, she had arrived there."

The Supreme Court granted the respondent's petition for certification. In reversing the Appellate Division's holding, the Supreme Court relied on a series of so-called "ingress and egress" cases. *See Brower v. ICT Group*, 164 N.J. 367 (2000); *Ramos v. M & F Fashions, Inc.*, 154 N.J. 583 (1998); *Ehrlich v. Strawbridge & Clothier*, 260 N.J. Super. 89 (App. Div., 1992), cert. denied, 133 N.J. 435 (1993); and *Novis v. Rosenbluth Travel*, 138 N.J. 92 (1994). These cases support the principle that public places that are not under the control of the employer are not considered part of the employer's premises for purposes of workers' compensation benefits, even if employees use the route for ingress or egress to the place of employment, except in those instances where the employer controls the route. In applying the principles of these cases to the instant case, the Supreme Court reasoned:

> Most importantly, the accident occurred on a public street not under the control of the [employer]. In walking a few blocks from the garage to her workplace, Hersh did not assume any special or additional hazards. Nor did the [employer] control Hersh's ingress or egress route to work. The [employer] provided Hersh with the benefits of off-site but paid-for parking, but did not dictate which path Hersh had to take to arrive at her place of employment.

Unlike the limited routes to the places of employment in *Brower*, *Ramos* or *Ehrlich*, here, Hersh's route to work was used by the public, similar to the route to the building in *Novis*.

The Supreme Court found that the Appellate Division misapplied the holding in *Livingstone* to the instant case. Of chief concern in *Livingstone*, the Supreme Court reasoned, was not the employer's control of the parking lot, per se, but rather the added hazard employees were forced to endure by the employer while they walked through the parking lot. In *Livingstone*, the employer's control over the parking lot required each employee to follow a specific ingress and egress route from the parking lot to the building, even though the parking lot was not owned by the employer, which made the injuries compensable. Here, the respondent exercised no such control over the petitioner's ingress and egress route. **II**

Side Bar

Of significance, the Supreme Court found that the respondent did not exercise control over the garage. As the Supreme Court reasoned, the respondent neither owned nor maintained the lot, but rather, only rented a small number of its parking spaces. Nor did the respondent derive any direct benefit from paying for its employees to park in the garage. That notwithstanding, as its holding was based primarily on an "ingress and egress" analysis, a finding that the respondent did exercise control over the garage would likely have had little impact on the Supreme Court's holding.

News from Marshall Dennehey

Oral arguments presented before the Pennsylvania Supreme Court by **John J. Hare**, shareholder and chair of Marshall Dennehey's Appellate Advocacy and Post-Trial Practice Group, have led to a unanimous decision by the Court to reinstate a long-standing statutory employer defense for general contractors and others who are sued in tort for injuries to subcontractors' employees. Representing Worthington in *Patton v. Worthington Associates*, Hare successfully argued that the statutory employer issue is a matter of law and not one to be decided by a jury. The Court's decision is significant because it negates a large verdict and reverses two lower court decisions that had essentially nullified Pennsylvania's long-standing statutory employer doctrine, which creates an employment relationship between a contractor and the employees of subcontractors, such that the employees are entitled to workers' compensation benefits from the contractor but, in exchange, the contractor receives the same workers' compensation immunity from tort liability that an actual employer receives. The doctrine operates primarily to immunize contractors on construction projects from tort lawsuits by the injured employees of subcontractors. The Supreme Court's decision ensures that protection remains in place.

To read more about this decision, click **here**.

Tony Natale (Philadelphia) successfully defended a large transportation company in a tortuously litigated workers' compensation claim petition. The claimant was a bus driver whose uncontrolled demeanor lead him to fisticuffs with an equally belligerent passenger. The fight started inside the bus before a mob of jeering passengers and ultimately spilled outside the bus doors onto the streets. Most of the battle was captured by the in-house bus video recorder. The litigation involved very sensitive issues, thus provoking claimant's attorney to make over five recusal motions attempting to replace the judge of record. The judge found that Tony's cross examination of the claimant established clear and convincing evidence that the claimant was not in the course and scope of employment at the time of the melee. The claim petition was denied and dismissed.

Tony also successfully defended a large local, A+ rated workers' compensation insurance carrier in a complex claim in which the carrier was wrongfully determined to be liable for injuries sustained by a claimant who was employed by a large communications distributions and technical company. This carrier had insured the employer for its clerical staff only. A Professional Employment Organization (PEO) had an arrangement with the employer by which it "employed" the installation arm of the company of which the claimant was a part. The PEO and its carrier liquidated, leaving the employer with no insurance for the injury. Claimant's attorney filed a claim and penalty petition in an attempt to wile the judge into assigning liability to Tony's client. After substantial litigation, the judge dismissed Tony's client, as the evidence proved the claimant's argument to be nothing more than a wild-goose chase.

Recently Published Articles:

- "Merely Dictum or Controlling Decision? Recent Appellate Decision Addresses Right to Section 40 Recovery Against UIM Policy," *Defense Digest*, March 1, 2014, by Nancy Musser, Esquire.
- "That 70s Show: Obamacare Takes Federal Black Lung Claims Back in Time," *Defense Digest*, March 1, 2014 by A. Judd Woytek, Esquire.