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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

Commonwealth Court holds that a decedent employee, while attempting to apprehend a thief after a robbery of a convenience store, was in the course and scope of his employment.

Walter Wetzel, deceased, c/o Walter Wetzel, III v. WCAB (Parkway Service Station)

The decedent, a management employee of the employer's convenience store, filed a claim petition alleging that, as a result of being struck by a vehicle, he sustained a severe traumatic brain injury rendering him comatose and permanently disabled. The decedent passed away after filing the claim petition. The employer argued that the decedent violated a positive work order by possessing a gun on the employer's premises, and that the decedent was not in the course of his employment at the time he was struck by a vehicle while trying to stop a fleeing individual who had attempted to rob the employer's store.

The decedent was scheduled to work the nightshift, but he went in early—with his work shirt on—in response to a phone call from a co-worker who needed help correcting a mistake on the cash register. After adjusting the cash register, the decedent remained on the employer's premises to stock and check supplies before beginning his shift. While at the coffee machine with another co-worker, an individual reached over the counter near the cash register and attempted to grab cash out of the drawer. The thief then ran out the door, and the decedent, with others, chased him. The decedent sustained his serious injuries as a result of being run over by the thief's car.

The Workers' Compensation Judge granted the claim petition, finding that the decedent was furthering the business affairs of the employer when he was struck by the thief's car as the thief fled the premises after a robbery attempt.

The Workers' Compensation Appeal Board reversed, concluding that the decedent was not furthering the employer's business affairs when he was injured. The Board did not think that the duties of a convenience store manager included the pursuit and apprehension of criminal suspects and held that the claimant abandoned his employment.

The Commonwealth Court, however, reversed the Board. The court pointed out that evidence was presented before the Judge that many robbery attempts had taken place at the employer's store over the years. In the past, the employer permitted the decedent to carry a firearm and to thwart robbery attempts without consequence. Thus, the court concluded that the decedent's job duties as a night manager included securing the safety of his fellow employees and customers and found the claim to be compensable. II

Commonwealth Court holds that the employer failed to meet its burden of proving that the claimant's removal from the work force was voluntary when there is evidence that the claimant was not receiving a pension, had not applied for retirement, and had been actively seeking employment following her work injury.

Francis Keene v. WCAB (Ogden Corporation); 1421 C.D. 2010; filed 6/4/14; Senior Judge Friedman

The claimant sustained a work-related injury to her right knee in 1989. Following knee replacement surgery, the claimant began looking in the newspaper for suitable work. She did apply for jobs, but was not hired. She worked a light-duty position for the employer for two years, until the position was eliminated. Thereafter, the claimant applied for other employment, but was not hired. She continued searching for other work. The employer filed a suspension petition alleging that the claimant had voluntarily removed herself from the work force. After filing the petition, the claimant applied for more jobs, but was not hired.

The Workers' Compensation Judge dismissed the employer's petition. In doing so, the Judge accepted the claimant's testimony that she had been actively seeking employment. The employer appealed to the Appeal Board, which reversed. The Board pointed out that the claimant admitted that she did not apply for work for about two years because it was very depressing.

The Commonwealth Court reversed the Board and affirmed the Judge's dismissal of the suspension petition. The Pennsylvania Supreme Court later vacated the court's order and remanded the case to the Commonwealth Court in light of its decision in *City of Pittsburgh v. WCAB (Robinson)*, 67 A.3d 1194 (Pa. 2013), in which the Supreme Court held that the employer had the burden of proving that the claimant voluntarily left the work force and that there was no presumption of retirement arising from the fact that a claimant seeks or accepts a pension. Rather, the worker's acceptance of a pension entitles the employer only to a permissive inference that the claimant has retired, which is not, on its own, sufficient to establish retirement and must be considered in the context of the totality of the circumstances.

The Commonwealth Court then held that the employer failed to meet its burden of proving that the claimant voluntarily left the work force. The court pointed out that the claimant testified that she was not receiving a pension from the employer and had not applied for retirement. Although the claimant was receiving Social Security Disability Benefits, this, alone, was not enough to show that the claimant had voluntarily removed herself from the work force. Although the claimant admitted that she did not apply for jobs for two years, nevertheless, the Judge found that the claimant had a desire to work and, in fact, looked for suitable work. Considering the totality of circumstances, the court held that the employer had not shown that the claimant removed herself form the work force. **II**

A claimant who injures himself on ice in the parking lot hours before his shift was to begin was in the course and scope of employment at the time of the injury.

Ace Wire Spring & Form Co. v. WCAB (Walshesky); 1916 C.D. 2013; filed 6/10/14; Judge Covey

The claimant worked full time for the employer as a press operator. After arriving at the employer's premises to begin an 8 AM shift, he slipped and fell on ice in the parking lot and hit his head. He was taken to the hospital and, thereafter, never returned to work for the employer. The claimant filed a claim petition seeking benefits. The employer denied the claim petition on the basis that the claimant was not in the course and scope of his employment when the injury occurred. The Workers' Compensation Judge granted the claim petition, and the Appeal Board affirmed. On appeal to the Commonwealth Court, the employer argued that the claimant was not in the course and scope of his employment while furthering the employer's interests or affairs when he arrived at the employer's facility at an unreasonable time prior to his scheduled work shift.

On the day of the injury, the claimant said he parked in the employer's parking lot at approximately 6:30 AM. He then went into the employer's building to pick up his clean uniforms and take them back out to his car. As he returned to the building, he slipped on ice and struck the right side of his head, causing it to bleed. He then went into the employer's building and reported the incident to the general manager. The next thing the claimant remembered was waking up in a nursing home, paralyzed on his left side. The claimant's shift did not begin until 8 AM, but he testified that he typically arrived at work early because of traffic. He said he planned to return to the employer's building and have coffee in the break room until his shift began. The employer testified, however, that the claimant would not have been able to do this because the claimant did not have a key or pass code in order to access the building.

The claimant testified again, this time he said he arrived at approximately 7:30 AM, rather than 6:30 AM. He also said that the door to the employer's building was unlocked when he arrived, which enabled him to retrieve his uniforms and return to his car. After the fall, he went back into the building through the same unlocked door. Additional testimony from the employer revealed that the claimant's time card for the day before the incident showed that the claimant worked from 6:56 AM until 4:31 PM. The claimant did not clock in on the day of the incident. However, the time card of the co-worker who found the claimant on that day showed that he had punched in at 6:37 AM.

The Commonwealth Court held that there was substantial evidence to support the Judge's finding that the claimant's arrival at work on the day of his injury was somewhere between 6:30 and 7:30 AM.

Although not an exact or precise time, the court concluded that the evidence did not establish that the claimant arrived at the employer's premises an unreasonable amount of time before his shift began. In the court's view, there was no credible evidence to show the claimant abandoned his employment. The claimant collected uniforms, which were provided and cleaned as an employer-provided benefit, and then put them in his car. The court agreed that the evidence supported a finding that the claimant was in furtherance of the employer's interests and, therefore, was in the course and scope of employment. **II**

A claimant who sustained injuries in a multi-level parking garage that was part of a subsidized parking program the employer provided was not in the course and scope of employment and was not entitled to an award of benefits.

PPL v. WCAB (Kloss); 1634 C.D. 2013; filed 6/11/14; Judge McCullough

The claimant was a 30-year employee of the employer. The employer maintained a parking program for its employees with the owner of a parking lot and a municipal parking authority. A parking garage was located less than a block to the east of the building where the claimant worked. The owner of the parking lot was responsible for its maintenance, and the lot was used exclusively by the employer's employees and the employees of a nearby bank. The employer's parking program was subsidized, allowing its employees to pay a reduced monthly fee for parking. Employees could only gain access to the lot through the use of a magnetic swipe card that was issued by the owner of the parking lot.

On the day of the incident, the claimant used her swipe card and drove into the lot. The claimant parked on the second floor, walked to a glass-enclosed area and took an elevator to the next level. The claimant then proceeded across a skywalk into the employer's building. After her shift ended, the claimant exited the building onto a sidewalk, crossed over a street and used her swipe card to gain access to the lower level

of the parking lot. As the claimant was approaching the elevator inside the lot, she tripped and fell to the ground, injuring her right arm and shoulder. The claimant filed a claim petition for benefits.

By interlocutory decision, the Workers' Compensation Judge concluded that the claimant was within the course and scope of her employment. Later, the Judge granted the claim petition. With respect to the course and scope issue, the Judge found that the restricted-use lot was physically connected to the employer's premises, was subsidized by the employer for the benefit of the employees, and the location where the claimant fell was integral to the employer's premises and a reasonable means of access. The Appeal Board affirmed.

The Commonwealth Court reversed the Board, however. The court held that the employer-provided parking program was a benefit of employment and immaterial to a determination of whether the parking lot constituted the employer's premises. The employer did not require employees to rent a space in that particular lot and offered subsidized parking in other lots. The court also concluded that the claimant's injuries did not occur on the employer's premises, nor were they caused by a condition of the premises. The claimant admitted that she tripped over her feet and fell while walking to the elevator in the parking garage adjacent to the employer's premises. As for the premises issue, the court found that the lot was not integral to the employer's business and rejected the emphasis the claimant, the Board and the Judge placed on the employer's construction of a skywalk connecting the lot to the building. The skywalk was nothing more than an added convenience for employees who chose to rent a space at the parking lot. II

Delaware Workers' Compensation

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Paul V. Tatlow

Board's award of ongoing temporary total disability is affirmed when the evidence shows that the claimant is limited to light-duty work which the employer cannot accommodate.

Johnson Controls, Inc. v. Patricia Andries, (Superior Court-C.A. No. N13A-06-010 FSS) – Decided 4/29/14

This case was before the Superior Court on the employer's appeal from the Board's decision which granted the claimant's petition to determine compensation due. The Board's decision found that the claimant sustained a work-related low back injury on April 4, 2012, and was entitled to ongoing compensation for total disability as of April 23, 2012. The employer argued on appeal that the Board had abused its discretion by accepting as more credible the testimony of the claimant's medical expert; had abused its discretion by substituting its opinion for that of the employer's medical expert; and had erred as a matter of law in finding that the claimant was a displaced worker.

The claimant worked as a forklift driver for the employer. While working an overnight shift on April 4, 2012, the claimant was lifting a small bin of batteries weighing approximately 25 pounds when she experienced a twinge in her back. The medical evidence presented on behalf of the claimant showed that, as a result of the work incident, the claimant suffered low back pain with radicular symptoms and must remain on light duty. In contrast, the employer's medical evidence indicated that the claimant only suffered a minor sprain superimposed on a significant and chronic low back condition and that the claimant could return to work without restrictions. Importantly, the claimant remained employed with the employer and, subsequent to going out of work on April 24, 2012, she had provided medical notes. The claimant was also never instructed that she should look for work outside of the company but was told that the employer could not accommodate her light-duty restrictions. The Board found in favor of the claimant and awarded compensation for ongoing temporary total disability.

The Superior Court rejected all three of the arguments made by the employer on appeal. They found that the Board had properly performed its role and did not abuse its discretion in accepting as more credible the medical testimony of the claimant's expert. On the displaced worker issue, the court cited the *Hoey v. Chrysler Motors Corp*. case for the proposition that a displaced employee is one who can work only in a limited capacity or who has been unable to find work within his or her restrictions. The outcome of this issue often turns on whether the claimant has been terminated by the employer or at least notified that no modified work is available. In this case, the court found that the record supported the contention that the claimant could not return to work at her pre-injury job but had a reasonable expectation of employment with the employer since she remained employed with them and had never been told to look for work elsewhere. Therefore, the Board concluded that the claimant was a displaced worker entitled to ongoing compensation. II

Side Bar

This case illustrates the importance that a finding of a claimant being a displaced worker can have. If the claimant has in fact been terminated from his employment with the employer, it is critical that information be communicated to the claimant, preferably in writing. On the other hand, if the claimant remains employed with the employer but is limited to modified-duty work which the employer cannot accommodate, that fact also needs to be communicated to the claimant, again preferably in writing. The claimant in the *Andries* case provided credible testimony that she remained employed with the employer and had never been told to look for work elsewhere. In order to avoid this problem, it is essential that an employer's representative be actively involved in the case in order to make certain that clear communication is given as to the employment status of the claimant with the employer and whether or not any modified work is available within the claimant's restrictions.

News from Marshall Dennehey

Pete Miller, longtime Director of the Workers' Compensation Department, retired on June 30th. Effective July 1st, **Niki Ingram** (Philadelphia, PA) assumed the position of Director of the Workers' Compensation Department, and **Kacey Wiedt** (Harrisburg, PA) took over as Assistant Director.

Ross Carrozza (Scranton, PA) obtained a favorable decision defending against a claim petition for benefits for an alleged rotator cuff tear. The Workers' Compensation Judge denied and dismissed the petition, stating that he found the claimant not to be credible. He also found the testimony of the defendant's doctor to be more credible than that of the claimant's doctor. The judge found that the claimant did not sustain a rotator cuff tear with his current employer, but rather, two years prior when he was working for a different company which had no insurance.

Tony Natale (Philadelphia, PA) successfully defended a large university. The claimant originally injured his right shoulder at work and suffered a right rotator cuff tear. He refused repair surgery and maintained his right to ongoing benefits, including medical payments. Tony presented evidence that, despite the ongoing tear, the claimant had full range of motion of his shoulder (as depicted in surveillance videos) and that, from an orthopedic standpoint, no ongoing functional limitations. The judge found that the claimant "fully recovered" from the work injury, even though the tear still existed, and that all disability related to the injury had ceased.

Niki Ingram (Philadelphia, PA) was a featured speaker at a diversity luncheon hosted by the Claims & Litigation Management Alliance. The luncheon, hosted by CLM's Diversity and Inclusion Committee, provided an opportunity for attendees to network and hear three dynamic leaders provide insight into "Winning by Inclusion."

Robin Romano (Philadelphia, PA) was a panelist at the Philadelphia Bar Association CLE program, "From *Kachinski* to *Phoenixville Hospital*: Proving Earning Capacity in the Modern Era." This program reviewed the evolution of job development and earning capacity evaluations from *Kachinski*, through the passage of Act 57 and the run up to *Phoenixville Hospital*.

Angela DeMary and **Jammie Jackson** (Cherry Hill, NJ) were presenters at the Annual Career Day for Cramer College Preparatory Lab School in Camden, New Jersey. The event provides the school's third-, fourth-, fifth- and sixth-grade students with an opportunity to learn about various careers and identify potential areas of interest, as well as learn from each presenters' experiences.

On June 30th, Marshall Dennehey announced the official integration of 25 attorneys from Jones Hirsch Connors Miller & Bull, P.C. and the opening of a 20th office located in Westchester County, NY. Of the 25 attorneys, five will staff the new Westchester location; 15 will join the firm's existing Manhattan office; and the remaining five will join the firm in Melville, Long Island. II