

## PENNSYLVANIA WORKERS' COMPENSATION

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**Commonwealth Court holds that the Workers' Compensation Judge erred in finding the claimant was fully recovered from occupationally-induced asthma when the evidence established that the claimant could not return to her pre-injury job because of ongoing sensitivity and increased risk of further asthma symptoms.**

*Nancy Little v. WCAB (Select Specialty Hospital)*; 1401 C.D. 2014; filed March 25, 2015; Judge Simpson

The claimant worked for the employer as a licensed registered nurse. Eventually, she began experiencing breathing difficulties at work that worsened over time. The claimant stopped working, and the employer issued a medical only notice of compensation payable that described the claimant's injury as an inflammation of her lungs resulting from an allergic reaction to floor wax. The claimant later filed a claim petition seeking payment of total disability benefits for the time she missed from work, including the time she missed since she stopped working for the employer. The claimant then obtained a part-time job with a second employer who changed the floor wax they used after hiring the claimant, as it was the same type used by the claimant's first employer. The claimant experienced no breathing problems with the second employer.

The Workers' Compensation Judge granted the claim petition, finding that the claimant sustained a disabling work-related injury as a result of her exposure to a chemical in the floor wax that was used by the first employer. The judge noted that the employer's IME physician agreed with the diagnosis of occupational asthma secondary to the chemical and believed that the condition was directly related to the claimant's workplace exposure. However, the IME physician also opined that the claimant was fully recovered from her work injury and that she had no pulmonary

impairment or disability. Therefore, the judge terminated benefits as of the date of the IME.

The claimant appealed to the Workers' Compensation Appeal Board, arguing that the judge erred in terminating her benefits since she could not return to her pre-injury position with the first employer due to ongoing sensitivity to the chemical in the floor wax. According to the claimant, she still suffered a wage loss from her work injury because she was earning less wages due to her part-time position with the second employer. The Board denied the claimant's appeal.

The Commonwealth Court, however, reversed. In doing so, the court pointed out that the claimant developed allergic asthma and an ongoing sensitivity to the chemical as a direct result of her pre-injury job. She did not suffer from a pre-existing asthmatic condition and did not have any work-related medical restrictions prior to the work injury. Moreover, despite normal pulmonary function, the claimant's asthma and ongoing sensitivity precluded her from returning to her pre-injury job. The court held that the judge's determination that the claimant was fully recovered from her injury was contrary to the evidence of record and erroneous as a matter of law. II

**The employer's future rights to subrogation had not been waived where there was no express waiver or language referencing future subrogation rights contained in a corrected third party settlement agreement.**

*Kristina Fortwangler v. WCAB (Quest Diagnostics and Travelers Property and Casualty Company)*; 1085 C.D. 2014; filed March 31, 2015; Judge McCullough

In this case, the claimant sustained an injury to her neck in a work-related motor vehicle accident. The employer accepted liability for the injury through a notice of compensation payable. Later, the claimant filed a petition to reinstate/review in which she alleged that, based on a Third Party Settlement Agreement, the employer was paying her benefits at

an incorrect rate and taking a credit to which it was not entitled.

The claimant had settled the third party case against the driver involved in the motor vehicle accident. She and the insurer signed an original Third Party Settlement Agreement (Original TPSA) that resulted in a net lien calculation of \$18,969.21 owed to the employer. The Original TPSA also included language in the "Further Matters Agreed Upon" section that said, "[t]he Employer specifically waives its right to subrogation against future benefits payable . . . in exchange for and in consideration of the moneys paid to the Employer in excess of the net lien to which the employer is entitled."

Thereafter, there was a Corrected Third Party Settlement Agreement (Corrected TPSA) that accounted for further indemnity benefits paid by the employer not contained in the Original TPSA, resulting in an accrued lien of \$30,280.37. The Corrected TPSA stated that the employer and its workers' compensation carrier agreed to a payment of \$19,818.14 in full satisfaction of the right to subrogate against the third party settlement. The sentence that expressly waived the employer's future subrogation rights from the Original TPSA was removed. Nevertheless, it was the claimant's understanding that the employer had waived their future rights.

The Workers' Compensation Judge found that the employer had waived its future subrogation rights based on the amount received under the Corrected TPSA. According to the judge, the statement in the Corrected TPSA, "In full satisfaction of the defendant Employer's right to subrogate against the third party settlement," constituted a waiver of future subrogation rights. The employer appealed to the Workers' Compensation Appeal, which reversed.

The claimant appealed to the Commonwealth Court, which affirmed the decision of the Board. The court found no explicit waiver or mention of future subrogation rights contained within the Corrected TPSA. According to the court, "full satisfaction" could reasonably be interpreted to mean a waiver of subrogation rights to the extent of the employer's accrued lien. The court also examined the Original TPSA in which the claimant agreed to pay the employer a sum greater than the net lien amount in consideration for the employer's waiver of past and future subrogation rights. In the Corrected TPSA, however, the claimant agreed to pay the employer the exact amount of the net lien with no consideration for waiver of future subrogation rights. In the court's view, in order for the employer to have waived its rights, it must have expressly stated its intention to do so in the Corrected TPSA. II

### **The claimant's original attorney is not entitled to a portion of the counsel fee from a settlement negotiated by the claimant's new attorney.**

*Dolores Bierman v. WCAB (Philadelphia National Bank)*; 1336 C.D. 2014; filed April 1, 2015; Judge Cohn Jubelirer.

The claimant had been represented by Attorney Larry Pitt since the employer's filing of a termination petition following the claimant's 1983 work injury. Attorney Pitt entered into a 20% fee agreement with the claimant at that time. Although the petition was granted, the claimant was later successful on a petition for reinstatement. For 20 years, the claimant received her total disability benefits, with 20% going to Attorney Pitt as his fee.

In April of 2012, settlement negotiations began between Attorney Pitt and the employer's insurance carrier. In June of 2012, those negotiations were abandoned. At the same time, the claimant entered into a 20% fee agreement with a new attorney and sent Attorney Pitt a letter terminating his representation. The claimant's new attorney then filed a petition to review, arguing that he was entitled to a 20% fee as of the date he entered into a fee agreement with the claimant. According to evidence in that

petition, Attorney Pitt did not provide any legal services for the claimant from 1989 through 2010, and since 2010, the claimant spoke to Attorney Pitt on four occasions for 15 minutes each. The claimant said that Attorney Pitt was discharged since she was not satisfied with the settlement that was negotiated with the employer's insurance carrier.

During litigation of the review petition, a C&R Agreement was approved by the Workers' Compensation Judge. The new attorney's 20% counsel fee was placed in escrow pending the judge's decision on the petition to review. The judge concluded that Attorney Pitt was entitled to a 20% fee up until the date the C&R was approved, but he also found that the claimant's new attorney was entitled to the fee from the settlement amount. Attorney Pitt appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal to the Commonwealth Court, Attorney Pitt argued that he was entitled to a portion of the attorney's fee from the settlement based on *quantum meruit*. He asked for at least 20% of the settlement that he negotiated for the claimant that the claimant rejected. The Commonwealth Court dismissed Attorney Pitt's appeal, concluding there was no error or abuse of discretion in awarding the entire 20% of the C&R counsel fee to the claimant's new attorney and awarding a 20% fee to Attorney Pitt up until the date of the C&R Agreement that was approved. II

### **The claimant established by clear and convincing evidence that she was in a common law marriage at the time of the decedent's death and was entitled to death benefits under Section 307 of the Act.**

*Elk Mountain Ski Resort, Inc. v. WCAB (Tietz, deceased and Tietz-Morrison)*; 1017 C.D. 2014; filed April 7, 2014; Judge Leadbetter

The claimant filed a fatal claim petition alleging that the decedent died as a result of multiple traumatic injuries sustained in a utility tractor rollover accident. The claimant listed herself as the decedent's wife and their daughters as his dependents. The employer stipulated that the decedent's death was caused by work-related injuries and that the daughters were entitled to weekly death benefits under §307 of the Pennsylvania Workers' Compensation Act. However, the employer disputed that the claimant was legally married to the decedent at the time of his death. This issue was decided by the Workers' Compensation Judge.

The claimant is a Native American and testified as to a Native American marriage ceremony that she participated in with the decedent. The decedent had previously asked the claimant's parents for her hand in marriage. The decedent and the claimant visited her parents and informed them of their intention to be husband and wife. They then went down to the field by a stream behind the house of the claimant's parents, wrapped a Native American blanket around themselves, and exchanged vows. The decedent also prayed, and the two exchanged symbolic gifts and wedding bands.

After the ceremony, the claimant and decedent continued to live together. Numerous documents were also made part of the record, including the coroner's report listing the claimant as the decedent's wife and a letter from the Department of Labor offering condolences to the claimant on the tragic death of her husband. The Court of Common Pleas of Susquehanna County also issued a final decree stating that the claimant was a surviving spouse of the decedent.

The judge granted the petition and concluded that the claimant and the decedent entered into a common law marriage contract on June 12, 2004. The Workers' Compensation Appeal Board affirmed.

The employer then appealed to the Commonwealth Court, arguing primarily that the judge failed to require the claimant to establish a common law marriage by clear and convincing evidence. The court

rejected this argument and affirmed the decisions below. The court noted that it prospectively abolished common law marriages in Pennsylvania in the case of *PNC Bank Corporation v. WCAB (Stamos)*, 831 A.2d 1269 (Pa. Cmwlth. 2003) and that the legislature subsequently abolished common law marriages by amending §1103 of the Marriage Law, which went into effect on January 24, 2005. The court also noted that a party claiming a common law marriage does bear the burden of producing clear and convincing evidence of the exchange of words creating the marriage contract. The employer maintained that the judge incorrectly required the claimant to establish a common law marriage by substantial evidence. The court, though, found that the employer was incorrectly equating an appellate review standard with the applicable burden of proof. Substantial evidence is the standard for ascertaining

whether the evidence is sufficient to support a fact finder's finding. The court concluded that the judge did not place an incorrect burden of proof on the claimant. Additionally, the court rejected the employer's argument that the claimant's testimony was prohibited by the Dead Man's Act and, therefore, not clear and convincing evidence of common law marriage. The court pointed out that the employer never raised the Dead Man's Act before the judge and did not object to testimony given by the claimant regarding the words exchanged at the ceremony creating the marriage contract. Therefore, the employer waived the issue on appeal. Finally, the court concluded that the documentary evidence postdating the 2005 abolishment of common law marriage was relevant to the issue of constant cohabitation and reputation of marriage following the 2004 exchange of vows. II

## NEW JERSEY WORKERS' COMPENSATION

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Dario J. Badalamenti

### **A PIP carrier may file a claim with the Division of Workers' Compensation as a means of enforcing its statutory right of reimbursement under N.J.S.A. 39:6A-6.**

*High Point Insurance Co. (As Subrogor of Kevin Smith) v. Drexel University*, Docket No. A-2030-13T4, 2015 N.J. Super. Unpub. LEXIS 868 (App. Div., decided April 17, 2015)

The petitioner was a Ph.D. student at Drexel University, the respondent, and was also employed there as a teaching assistant. On September 2, 2011, the petitioner was driving to New Jersey's Pine Barrens to conduct field study for his graduate dissertation when he was involved in a motor vehicle accident in which he sustained bodily injury. The petitioner filed an application for personal injury protection (PIP) benefits through his automobile insurance carrier, but he did not file a workers' compensation claim. After paying PIP benefits, his auto insurance carrier, as subrogor for the petitioner, filed a claim with the Division of Workers' Compensation asserting that the petitioner's personal graduate studies and responsibilities as a teaching assistant were intertwined to such an extent that traveling for his research was a prescribed job duty. As such, the petitioner's auto insurance carrier asserted that his injuries arose out of and in the course of his employment. The respondent filed an answer denying that the claim was compensable.

At the conclusion of trial, where the petitioner was the only witness, the Judge of Compensation determined that the petitioner's injuries were not compensable as he was conducting research solely for the purposes of his education at the time of his motor vehicle accident. The claimant's auto insurance carrier appealed.

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Jumpp v. City of Ventnor*, 177 N.J. 470 (2003), in which the Supreme Court concluded that an off-premises employee was not eligible for workers' compensation benefits for an injury he sustained while returning from checking a personal post office box. Despite the fact that the employee had been checking his personal post office box on a daily basis with his employer's acquiescence, the court determined that

N.J.S.A. 34:15-36, the pertinent statutory provision defining a worker's scope of employment, only allowed coverage for off-premises employees engaged in authorized services for their employers.

The Appellate Division found that the Judge of Compensation's disposition of the petitioner's claim was wholly consistent with *Jumpp*. As the Appellate Division reasoned:

Smith's Ph.D. program did not require that he work as a teaching assistant. He chose to accept that position in an attempt to offset the cost of the Ph.D. program. Smith [traveled to the Pine Barrens] for his personal research, not to engage in work as a teaching assistant. Moreover, Smith had no teaching responsibilities the week of the accident because classes were not in session.

Accordingly, the Appellate Division concluded that there was sufficient credible evidence in the record to support the Judge of Compensation's findings that the petitioner's injuries did not arise out of or in the course of his employment. II

### SIDE BAR

Here, the PIP carrier filed a workers' compensation claim for reimbursement as subrogor of its insured. This right of reimbursement exists under N.J.S.A. 39:6A-6, the so-called "collateral sources" provision of New Jersey's PIP statute, which was interpreted by the Appellate Division in *Aetna Casualty & Surety Co. v. Para Manufacturing Co.*, 176 N.J. Super. 532 (App. Div. 1980). The court in *Aetna Casualty & Surety Co.* held that, where a PIP insured is entitled to, but never files, a workers' compensation claim, the PIP carrier, as subrogor for its insured, may file a claim for reimbursement in the Division of Workers' Compensation to prove that the motor vehicle accident in which its insured was injured is compensable under the Workers' Compensation Act. Although effectively exercising this right, High Point ultimately received no reimbursement as it failed to sustain its burden of proof as to the compensability of its insured's injuries.

## DELAWARE WORKERS' COMPENSATION

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



Paul V. Tatlow

**Even though the parties stipulated that the claimant sustained an injury during the course of his employment, the Board denied the petition based on its finding that the work injury was the result of the claimant's intoxication.**

*Roger Johnson v. R.C. Fabricators, Inc.,*  
(IAB No. 1404987 – Decided April 9, 2015)

This case involved the claimant's Petition to Determine Compensation Due in which the claimant alleged that he sustained a work injury on October 30, 2013, when he fell while working for the employer as a steel worker. The parties stipulated that the claimant did in fact fall from a roof during the course of his employment, sustaining injuries to his right shoulder, right hip and ribs. However, the employer defended on the basis that the claimant's injuries were the result of his intoxication and/or his willful failure or refusal to use a reasonable safety appliance and, therefore, any compensation should be forfeited.

The evidence before the Board described the process called "tying off" in which the worker wears a harness or a lanyard that prevents him from falling. The evidence showed that the employer had a policy requiring workers use the tying off procedure for any work done six feet or higher. Additionally, the employer had a drug policy providing that employees who use drugs would be terminated.

The claimant was not tied off at the time of his fall. His testimony indicated that he did not do so because the other workers were likewise not doing it that day, and also because there was an open hole on the roof, which made him believe it would be unsafe to use the tie as the retractable device would pull him towards it.

The evidence on the intoxication issue included the claimant's own testimony that he did not believe he had used any alcohol the night prior to the work injury, but he did admit that he had smoked marijuana and had used cocaine with other co-workers. Further evidence showed that, following his fall, the rescue squad personnel found a bag of clear liquid wrapped around the claimant's ankle with an ace bandage. The claimant acknowledged that this was a bag of urine he wore on his leg when he smoked marijuana so that he would pass the employer's random drug screenings.

The employer presented medical testimony from a forensic pathologist and toxicologist who concluded that, based on the blood studies, the claimant had ingested a moderate amount of cocaine within a few hours prior to the work injury and had marijuana in his system. However, the expert could not pinpoint the exact time the claimant had ingested that drug since it stayed in one's system longer. The medical expert concluded that the combined effect of those substances was a substantial factor contributing to the claimant's work injury and that it played a significant role in the occurrence of the work injury.

In assessing the defense of whether the claimant had willfully failed to use a safety appliance, the Board determined that the claimant was an experienced steel worker and had testified as to justifiable reasons for not using the retractable tying procedure on the day of the injury. Therefore, the Board concluded that those reasons did not rise to the level of "willful" failure to use the device without justifiable excuse. The Board found that the claimant did not forfeit his benefits based on his willful failure to use a safety appliance. However, on the intoxication issue, the Board determined that the medical testimony of the employer's expert was unrefuted and was credible in establishing that the claimant was impaired by the combination of marijuana and cocaine at the time of the work injury and that this impairment substantially contributed to the work injury itself.

Therefore, the Board found that the claimant forfeited his right to receive compensation for the work injury since it was the result of his own intoxication. Accordingly, the claimant's Petition to Determine Compensation Due was dismissed. ■

### SIDE BAR

The two defenses raised by the employer in this case are ones that should always be kept in mind in evaluating any DCD Petition alleging a compensable work injury. Importantly, the burden of proving these defenses rests on the employer. As to the intoxication defense, it is not enough to establish that the employee was intoxicated but also that the intoxication was at such a level that it caused the injury to occur. Section 2353(b) of the Act contains the forfeiture defense for failing to use a safety appliance. This statute requires that there be a "willful failure or refusal to use a reasonable safety appliance," which means that it must be done intentionally, knowingly, purposely and without justifiable excuse. Those terms should be distinguished from an act that is merely done carelessly, thoughtlessly, heedlessly or inadvertently, which would not be enough to establish this defense.

## NEWS FROM MARSHALL DENNEHEY

**Niki Ingram**, Director of the Workers' Compensation Department, is speaking at the 14<sup>th</sup> Annual Pennsylvania Workers' Compensation Conference, which will be held on June 1-2 at the Hershey Lodge and Convention Center. In "Basic WC Law, Part 2," Niki joins four additional industry professionals for a panel discussion on the specific claims processes from the moment of injury until the final adjudication from both the injured worker's and the employer's point of view. 2015 marks the 100<sup>th</sup> anniversary of the enactment of the Pennsylvania Workers' Compensation Act. This year's conference has a special focus on the last century of workers' compensation in Pennsylvania while sharing practical, useful and timely information for today.

**Jim Pocius** is speaking at the 35<sup>th</sup> annual SEAK National Workers' Compensation and Occupational Medicine Conference. During the informational session "High Anxiety: Medical Marijuana, Workers' Comp, and Occupational Medicine," Jim will review the latest developments in the rapidly evolving interplay between the spreading legalization of marijuana and the workers' compensation and occupational medicine arena. He will discuss discovery and HIPAA issues; reimbursement issues; liabilities for employers and insurance companies who do not pay for medical marijuana; and the safety implications for employers. Jim will also offer practical suggestions for when employers, insurers, and self-insurers can and need to pay for medical marijuana. ■