MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 23 | NO. 6 | JUNE 2019

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)


Francis X. Wickersham

Because the claimant's employment was exclusively in Delaware at the time of the work injury, the dismissal of his claim for lack of jurisdiction under § 305.2 (a)(1) of the Act was proper.

James McDermott v. Brand Industrial Services, Inc.; 518 C.D. 2018; filed Jan. 18, 2019; Judge Ceisler

The claimant worked as a union carpenter for the employer, who had a permanent job site located within an oil refinery in the state of Delaware. While working at the employer's Delaware facility, the claimant injured his right shoulder. The employer accepted the injury under Delaware workers' compensation law. Later, the claimant filed a claim petition in Pennsylvania and then a penalty petition, alleging that the employer violated the Act by failing to accept or deny his claim within 21 days. The employer filed answers to the petitions and challenged jurisdiction for any work injury under the Pennsylvania Workers' Compensation Act. The employer contended that the claimant was not employed in Pennsylvania and jurisdiction for the injury lay in Delaware.

The workers' compensation judge dismissed the claimant's petitions, concluding that the claimant's employment was principally localized in Delaware on the date of his injury and, therefore, Pennsylvania lacked jurisdiction. While the claimant worked for the employer at several of its job sites, and in the year 2015 had spent 90 percent of his work time in Pennsylvania, his employment was not continuous. Just prior to beginning work for the employer in Delaware, the claimant had been laid off by the employer, which the judge determined was the end of his working relationship with the employer in Pennsylvania. The claimant appealed to the Workers' Compensation Appeal Board, and they affirmed.

On appeal to the Commonwealth Court, the claimant argued that the workers' compensation judge erred in determining that his employment was principally localize in Delaware at the time of injury. The court rejected the claimant's arguments and dismissed the appeal. In doing so, the court noted that the claimant performed several distinct jobs for the employer, each of which was separated by periods of layoff. At times, the claimant worked for other employers during the layoffs. According to the court, the claimant did not establish that his work for the employer was part of a continuous period of employment and held that, at the time of injury, the claimant worked exclusively in Delaware. II

A voluntary firefighter met his burden of proving entitlement to benefits for cancer under the Act, where the judge accepted the opinion of a medical expert that the claimant's type of lymphoma arose from exposure to group 1 carcinogens in fire smoke and determined that claimant's incident participation report met the reporting requirements of § 301(f) of the Act.

Bristol Borough v. WCAB (Burnett); 464 C.D. 2018; filed Mar. 22, 2019; Judge Simpson

The claimant had been a member of a voluntary firefighter company since 1976. He estimated that he responded to 2,000 incidents during his career. During the 1980s, he worked as a part-time, paid firefighter for Bristol Borough. In February of 2015, he was diagnosed with large B-L NH-lymphoma, for which he received six rounds of chemotherapy. On August 21, 2015, he returned to his regular work as a mailman, without restrictions.

In support of his claim for benefits, the claimant submitted a medical report from an expert who opined that the claimant's cancer arose out of his occupation as a firefighter. The claimant also introduced the deposition testimony of the Pennsylvania Fire Commissioner, who stated that the purpose of PennFIRS was to collect data related to the cause of fires, fire damage, and injuries to civilians and firefighters. He said the report contains no evaluation of the carcinogens found at a fire scene, nor is there a place on the report to catalog the carcinogens to which a particular firefighter would be exposed.

In reviewing the evidence, the workers' compensation judge found that: (1) the claimant established being engaged in firefighting activities for more than four years; (2) prior to his cancer diagnosis, he did not show any signs of cancer; (3) he was exposed to Group 1 carcinogens; and (4) he first learned of the relationship between the exposures and his cancer when he reviewed his expert's report in September of 2015. The judge also accepted the Fire Commissioner's testimony regarding the purpose of the PennFIRS reporting requirements under Act 46 and that exposures to carcinogens at fire scenes are not monitored as part of PennFIRS. Finally, the judge accepted the opinion of the claimant's medical expert as more credible than the opinion of the employer's medical expert.

The Appeal Board dismissed the employer's appeal. On appeal to the Commonwealth Court, the employer argued that § 301(f) of the Act requires a volunteer firefighter to use PennFIRS reports to prove exposure to a known Group 1 carcinogen and that the workers' compensation judge erred in allowing testimony from the Pennsylvania Fire Commissioner concerning the § 301(f) requirements for the forms of proof for volunteer firefighter claims. The employer also argued that the Appeal Board failed to require proof that the claimant's specific cancer was directly related to exposures as a firefighter. The Commonwealth Court affirmed the decision below and dismissed the employer's appeal.

In doing so, the court noted the Supreme Court's decision in *City of Philadelphia Fire Department v. WCAB (Sladek)*, 144 A.3d 1011 (Pa. Cmwlth. 2018), rev'd, 195 A.3d 197 (Pa. 2018) wherein it was held that under § 108(r) of the Act, the claimant is only required to establish a general causal link between the type of cancer and a Group 1 carcinogen and is not required to prove that the identified Group 1 carcinogen actually caused the claimant's cancer.

According to the court, the employer's argument that § 301(f) requires a volunteer firefighter to only use PennFIRS documentation to establish direct exposure to a Group I carcinogen by documenting his presence at an incident and the carcinogen encountered at the incident was an overly restrictive interpretation of the provision, which would lead to an unreasonable and impossible to execute result. The PennFIRS's reporting requirement under § 301(f) is to document a volunteer firefighter's presence at a type of fire, and the court held that the claimant satisfied these reporting requirements. They also held that there was no abuse of discretion by the workers' compensation judge in determining that the Fire Commissioner's testimony was competent evidence of the limited purpose of the PennFIRS's reporting requirements. The court also held that the opinion of the claimant's medical expert on causation satisfied the general causation requirement in § 108(r) of the Act. The court further rejected the employer's argument that they produced rebuttal evidence sufficient to overcome the presumption of compensability in § 301(f) on the basis that the workers' compensation judge rejected that rebuttal evidence as not credible. **II**

Commonwealth Court holds, where an employer challenges the Medical Fee Review Section's fee determination on the basis that the service was not rendered by a provider as defined in the Act, that threshold question must be decided by the Fee Review Hearing Office.

Armour Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office (Wegmans Food Market, Inc.); 1725 C.D. 2017; filed Mar. 29, 2019; President Judge Leavitt

The employer had denied payment of compound pain creams that were dispensed to the claimant by Armour Pharmacy. The pharmacy then filed three fee reviews. The Bureau's Medical Fee Review Section ordered payment, and the employer filed requests for *de novo* hearings. The Fee Review Hearing Office vacated these three determinations, directing the employer to reimburse the pharmacy for medications it had dispensed to the claimant.

Later, the employer filed a motion to dismiss its own challenges/appeals to the fee review determinations, arguing that, because the pharmacy was not a provider within the meaning of the Act, the hearing office lacked jurisdiction. The pharmacy opposed the motion, maintaining that the employer had waived this argument by not raising the issue at the time it denied the pharmacy's bills. The employer's motion was granted. In the pharmacy's appeal, it argued that it was denied due process since it was left without a forum to challenge the employer's refusal to reimburse it for medications it dispensed to the claimant for his work injury.

The Commonwealth Court held, where an employer challenges a fee determination of the Medical Fee Review Section on the basis that the medical service was not rendered by a "provider" within the meaning of the Act, that threshold question must be decided by the hearing office. Jurisdiction, as a quasi-judicial matter, is not to be decided by the Medical Fee Review Section, whose sole responsibility is administrative and whose inquiry is limited to the timeliness of payment and the correct amount of reimbursement owed to the provider. The court reversed the hearing office's adjudication and remanded the matter for determination of whether the pharmacy was a provider, within the meaning of the Act. **II**

Florida Workers' Compensation

By Linda Wagner Farrell, Esquire (904.358.4224 or lwfarrell@mdwcg.com)

Linda W. Farrell

First DCA finds that the work-from-home arrangement does not mean that the employer imports the work environment into a claimant's home and the claimant's home into the work environment.

Sedgwick v. Valcourt-Williams, No. 1D17-96, 1st DCA, April 5, 2019

Although assigned to the employer's Lake Mary, Florida office, the claimant, a workers' compensation claims adjuster, worked remotely from her home in Arizona. She began her workday at 4 AM local time to coincide with the Florida office's 7 AM start time. On the date of the accident, she had been working for three hours when she got up to get a cup of coffee. As she reached for a cup in her kitchen, she fell over one of her two dogs. In her workers' compensation claim, she asserted the fall resulted in knee, hip and shoulder injuries. The employer denied the claim, contending that the injuries did not arise out of her employment. The judge of compensation claims found in favor of the claimant. The employer appealed. The First DCA reviewed the case de novo regarding the judge's application of law to the undisputed facts.

The judge of compensation's findings deemed the injury compensable, concluding the work-from-home arrangement meant the employer "imported the work environment into the claimant's home and the claimant's home into the work environment." The First DCA stated that the question is not whether a claimant's home environment becomes her work environment, rather, the question is whether the employment—wherever it is—"necessarily exposes a claimant to conditions which substantially contribute to the risk of injury." In this case, the relevant risk was the claimant's tripping over her dog while reaching for a coffee cup in her kitchen. The First DCA held that risk exists whether the claimant is at home working or she is at home not working. The majority opinion went on to say that it existed before she took her job and it will exist after her employment ends. Because the risk did not arise out of the employment, the First DCA reversed the judge's ruling.

There were two very strong dissenting opinions by Judges Bilbrey and Makar. Judge Bilbrey expressed great concern about employers being subject to civil liability in these types of injuries. Both judges opined that the majority opinion bucks decades of precedent regarding the personal comfort doctrine. They felt that the claimant had a trip and fall accident during work hours, in her workplace, when she fell over personal property while attending to a personal comfort. Judge Makar felt that the key factual inquiry should have been whether the employer prohibited dogs in the home work environment and, if not, was it foreseeable that this type of accident might arise in a personal comfort break. He wrote that the employer did not limit pets and made no effort to control the environment and that a trip over a dog was foreseeable. ||

News from Marshall Dennehey

WCCP Claims Management Conference: The firm is proud to be a sponsor of the annual WCCP Claims Management Conference being held from June 9-12, 2019, in Bonita Springs, Florida. **Linda Farrell** (Jacksonville, FL) will be co-presenting "Opioids…The Not So New Epidemic." For more information, click **here**.

National Council of Self Insurers Conference: on June 10, 2019, **Niki Ingram** (Philadelphia, PA) will present "Confronting Unconscious Biases in Workers' Compensation Litigation." For more information, click **here**.

Pennsylvania Super Lawyers: Three of our Workers' Compensation Department attorneys attorneys have been selected to the 2019 edition of *Pennsylvania Super Lawyers** magazine. Those attorneys are **Niki Ingram**, **Lori Strauss** and **Raphael Duran**.

**A Thomson Reuters business, Super Lawyers is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Each year, no more than five percent of the lawyers in the state are selected for this honor. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html.*

Kacey Wiedt (Harrisburg, PA) obtained a favorable decision on a claim petition on behalf of a transportation company. The claimant alleged that he developed Legionella's disease while in the course of his employment and was hospitalized in a coma as a result of contracting the disease. Kacey was able to obtain a dismissal of the claim petition for failure to prove any causal connection between the claimant contracting the disease and his employment. ||

New Jersey Workers' Compensation

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

Dario J. Badalamenti

The Appellate Division affirms dismissal of plaintiff's tort action against defendant based on a finding that plaintiff was a "special employee" at the time of her injuries, limiting her remedies under the New Jersey Workers' Compensation Act.

Theezan v. Allendale Cmty. for Senior Living, Docket No. A-1650-17T2, 2019 N.J. Super. Unpub. LEXIS 890 (App. Div., Decided Apr. 16, 2019)

The plaintiff worked as a housekeeper for the defendant. Her responsibilities included cleaning residents' rooms, dusting, mopping and making beds. In or about 2015, the management of Allendale's housekeeping staff, including hiring, firing and compensation, was outsourced to Health Services Leasing Group (HCSG), for which Allendale paid a monthly service fee. Under the terms of their agreement, Allendale and HCSG "share[d] the right of direction and control" over the housekeeping staff. Allendale "retain[ed] sufficient direction and control" over the housekeeping staff "without which [Allendale] would be unable to conduct its business." That notwithstanding, HCSG retained "sufficient authority as to maintain a nonexclusive right of direction and control" with respect to the housekeeping staff, including a "right to hire, discipline, demote, promote, compensate, terminate, layoff or otherwise discharge or reassign" any of the housekeeping staff. The agreement further provided that the housekeeping staff "shall be considered employees of [Allendale] and [HCSG]" for purposes of the agreement. An on-site HCSG supervisor oversaw the housekeeping staff. Although Allendale did not evaluate the day-to-day performance of the housekeeping staff, it could request that housekeeping staff address issues such as cleaning or taking out the garbage, if necessary, and if dissatisfied, Allendale could request that HCSG replace certain housekeeping staff.

On March 14, 2016, the plaintiff fell in an office she was cleaning, sustaining an injury to her arm and shoulder. She subsequently filed a workers' compensation claim against HCSG and sued Allendale in tort for her injuries.

At the conclusion of discovery, Allendale filed a motion for summary judgment based on the Workers' Compensation Act's so-called "exclusivity provision," N.J.S.A. 34:15-8, which provides, in relevant part, that "if any injury ... is compensable under the Act ... a person shall not be liable to anyone at common law or otherwise on account of such injury." The Workers' Compensation Act covers all work-related injury claims brought by an employee against her employer. N.J.S.A. 34:15-8. An employee is broadly defined as one "who perform[s] service for an employer for financial consideration[.]" N.J.S.A. 34:15-36. Under *Antheunisse v. Tiffany & Co., Inc.*, 229 N.J. Super. 399 (App. Div. 1988), an employee can have both a general and a "special" employer. See also, *Hanisko v. Billy Casper Golf Mgmt., Inc.*, 437 N.J. Super. 349 (App. Div. 2014). Recovery against one employer bars the employee from maintaining a tort action against the other for the same injury. As the plaintiff was a "special employee" at the time of her injuries, the defendant argued, she was limited to those remedies provided under the Workers' Compensation Act. The trial judge agreed and granted the defendant's summary judgment motion. This appeal followed.

In affirming the lower court's granting of summary judgment, the Appellate Division relied on *Kelly v. Geriatric & Med. Servs., Inc.*, 287 N.J. Super 567 (App. Div. 1996). In *Kelly*, the court established a five-part test to be used in assessing whether a special employment relationship exists: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done by the employee is essentially that of the special employer; (3) the special employer has the right to control the details of the work; (4) the special employer pays the employee's wages; and (5) the special employer has the power to hire, discharge or recall the employee. Although no single factor is dispositive, the *Kelly* court held that the most significant factor is the element of control. As the Appellate Division in the instant case reasoned:

> Here, plaintiff and the housekeeping staff were subject to Allendale's control because Allendale management dictated where plaintiff cleaned and could request plaintiff revisit her work if unsatisfied. Plaintiff was staffed at Allendale on an indefinite basis, meaning she was dependent on Allendale for work. Even though HCSG provided direct on-site supervision and retained hiring and firing authority, the contract between Allendale and HCSG indicated this authority was "nonexclusive." Allendale "retain[ed] sufficient direction and control with respect to the Assigned employees without which [Allendale] would be unable to conduct its business." It was necessary for Allendale to retain control because providing its residents with a clean facility was essential to its business. Therefore, factor three is satisfied.

The Appellate Division further held that factors four and five were also satisfied as Allendale paid a monthly service fee to HCSG consistent with indirect compensation for the plaintiff's services, and Allendale's on-site supervisor, who could request that any employee be transferred to a new location, had the functional equivalent of the power to discharge. As such, the Appellate Division concurred with the trial court's finding that the plaintiff was a "special employee" of Allendale at the time of her injuries and, as such, was barred from bringing a tort action against Allendale. ||