What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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Pennsylvania Workers' Compensation

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Petition to reinstate total temporary disability benefits must be filed within 500 weeks of suspension.

Palaschak v. WCAB (US Airways); No. 1699 C.D. 2010 (Pa. Commw. filed January 23, 2012); Opinion by Judge Leavitt

The claimant's total disability benefits from a 1992 work-related neck injury were suspended on February 5, 1996, following his return to work in a full-time position which paid wages equal to or greater than his pre-injury wages. He continued to work for the employer until March 2006, when he was placed on restrictions that the employer could not accommodate.

The claimant thereafter filed a reinstatement petition, alleging that his work injury caused a loss of earnings, along with a modification claim petition. The judge denied these petitions, finding that they were time-barred since they were filed more than 500 weeks after benefits were suspended.

On appeal, the claimant argued that there is no time bar to seeking total disability benefits under § 413(a) of the Act. The court disagreed, finding that this provision specifies that where compensation benefits have been suspended because the employee's earnings are equal to or greater than the pre-injury wage, reinstatement of benefits must be sought during the time period for which partial disability benefits are payable, which is 500 weeks. A different time period applies under § 413(a) where benefits are modified, as in that situation the claimant has three years from the last payment of compensation to file a reinstatement petition. Although the court acknowledged that there may be no sound policy justification for the 500-week limitation on further claims in the case of suspension and not modification, nonetheless, it held that the plain language of the statute and long-standing case precedent must be followed.

The claimant further contended that, since he was limited to performing a light-duty job during the ten years of employment post-injury, he should have three years to seek reinstatement. The court rejected this argument, noting that the Act speaks only to the amount of wage loss benefits, not the type of work performed. ||

Side Bar

The 500-week rule under § 413(a) serves to bar a reinstatement petition where the claimant's benefits were suspended during that time period, but it does not preclude a claimant who has received partial disability benefits during the 500 weeks from petitioning for total disability benefits within three years of the final payment of partial benefits. The difference between the two situations is difficult to reconcile when a claimant receives partial disability benefits and experiences periods of suspension over the 500-week period. The court has not ruled definitively in this area, although the court in Palaschak noted that the statute may require periods of suspension to be included when calculating the 500 weeks for the expiration of partial disability benefits.

A general release of all claims signed in connection with a workers' compensation settlement, with an addendum excluding a current human relations claim, did not preclude a subsequent employment discrimination suit.

Miller v. Tyco Electronics, Ltd., 2011 U.S. Dist. LEXIS 135037 (M.D. Pa. 2011)

The plaintiff in this case filed a workers' compensation claim against her employer two weeks after filing a complaint of discrimination and harassment with the Pennsylvania Human Relations Commission (PHRC). While the PHRC claim was pending, the claimant agreed to settle the workers' compensation claim via a Compromise and Release (C&R) agreement. In connection with the workers' compensation settlement, the employer's counsel prepared a C&R agreement, which included a general release of all claims concerning her employment. The claimant refused to sign the general release; however, a handwritten amendment was agreed to shortly before the C&R hearing that excluded the "currently active Pennsylvania Human Relations Commission docketed" at the indicated case number. The C&R agreement was approved.

The PHRC determined that the discrimination claim lacked probable cause, and the claimant proceeded to initiate an employment discrimination action in federal court against the employer. The employer argued that the claimant waived her right to file the suit under the terms of the general release. The court held that the claimant did not knowingly and voluntarily waive her right to bring suit on the claims in her PHRC complaint. In its discussion, the court noted that the addendum lacked clarity as to whether it preserved only the PHRC investigation of the claim or the right to pursue the claims themselves. The claimant's level of education and the manner in which the release was presented to the claimant fifteen minutes before the C&R hearing were also relevant to the interpretation given to the addendum. Finally, the court noted the fact that no additional compensation was offered for execution of the general release. **II**

Side Bar

The issue of whether to obtain a general release of other employment-related claims in connection with the settlement of a workers' compensation claim via a C&R agreement arises in discussion of the settlement with the employer-insured. The workers' compensation settlement provides an opportunity for the employer, who is often obtaining a resignation of employment in connection with that resolution, to also seek an end to all other actual or potential claims arising out of the employment relationship via a general release. Workers' compensation insurance carriers often do not want their defense counsel to be involved in such matters. We counsel employers that, if a general release is desired, it should be negotiated separately from the workers' compensation settlement. We can also provide separate counsel to handle that matter. Properly handled, a general release obtained at the time of a workers' compensation settlement can effectively preclude the situation in Miller.

Suspension of benefits based upon a claimant's withdrawal from the workforce requires proof of intent to not return to work. An application for a disability pension and a failure to look for work is insufficient to proof of intent.

City of Pittsburgh v. WCAB (Marinack); No. 100 C.D. 2011 (Pa. Commw. filed February 7, 2012); opinion by Judge Leavitt

The claimant, a firefighter who sustained a work-related torn rotator cuff, an aggravation of lumbar disc disease and a psychological adjustment disorder, was fired from his job when he failed to disclose that he was earning wages in construction while collecting disability compensation. The employer filed a suspension petition on the basis that the claimant had removed himself from the workforce, citing his application for a disability pension, which was denied due to his firing and his lack of effort to find a job.

The judge granted the employer's petition on this basis. The Board reversed, and the Commonwealth Court agreed. The court emphasized that it is the employer's burden of proving that a claimant has withdrawn from the workforce. To meet this burden there is no presumption of such withdrawal when a claimant applies for or collects a disability pension, whereas there is a presumption when a claimant accepts a retirement pension. The employer failed to meet, according to the court, the difficult burden of proving intent to withdraw from the workforce, which must be established before any consideration of the failure to look for another job. In this case, the court held that the employer did not show that, under the totality of circumstances, the claimant had withdrawn from the workforce. **II**

Side Bar

In a footnote the court mentioned that the employer did not seek suspension based on the firing of the claimant for misconduct, which may have been easier to prove and could have supported a suspension of benefits. To prove withdrawal from the workforce, the court made it clear that the employer has a heavy burden and must establish an "intent to withdraw," citing as examples a claimant's admission that he does not intend to work again, acceptance of a retirement pension or acceptance of a disability pension and refusing suitable employment within the claimant's restrictions.

New Jersey Workers' Compensation

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Dario J. Badalamenti

An internet-based investigation yields evidence of fraud, resulting in a dismissal with prejudice of the petitioner's claim and forfeiture of his rights to compensation.

Dubrel v. Maple Crest Auto Group, Docket No. A-3321-10T3, 2012 N.J. Super. Unpub. LEXIS 188 (App. Div., decided January 30, 2012)

The petitioner was employed as a mechanic by the respondent when, in February of 2004, he sustained a slip and fall on a concrete floor at the respondent's premises, resulting in injury to his neck and back. The petitioner received an approximate two-year course of authorized medical treatment, including surgery of the lumbar spine. He subsequently filed a claim for permanency benefits with the Division of Workers' Compensation. Although the respondent stipulated as to the compensability of the petitioner's claim, a trial ensued as to the nature and extent of the petitioner's permanent disability.

At trial, the petitioner testified that he experienced chronic and severe pain of the neck and back which limited his recreational activities and activities of daily life. On cross examination, the petitioner explained that he had a hobby of raising horses for harness racing and that he and his family were forced to move their farm to Maryland shortly after the accident because they could not afford to keep their horses in New Jersey. The petitioner testified that he was no longer able to ride horses, train horses or care for them as a result of the accident, and that he now simply supervised others in performing these tasks.

Following this testimony, the respondent served upon the petitioner documentation from the United States Trotting Association ("USTA") website indicating that the petitioner was the trainer of various race horses and had been the driver of those horses in many competitive races in the years following his injury, including one race just a week prior to his testimony at trial. Following proper foundational testimony and authentication, the court did allow the respondent to admit into evidence certain portions of the USTA documents.

At the conclusion of trial, the respondent moved for dismissal of the petitioner's claim pursuant to N.J.S.A. 34:15-57.4(c)(1) which provides:

> If a person purposely or knowingly makes, when making a claim for benefits pursuant to N.J.S.A 34:15-1 et seq., a false or misleading statement, representation or submission concerning any fact which is material to that claim for the purpose of obtaining benefits, the Division may order the immediate termination or denial of benefits with respect to that claim and a forfeiture of all rights of compensation or payments sought with respect to the claim.

Based on the discrepancies between the petitioner's own testimony and the USTA documents, the Judge of Compensation concluded that the petitioner had purposely and knowingly made false statements that he could no longer drive horses and that he had done so "in order to enhance his prospective award of benefits." Accordingly, the Judge of Compensation dismissed the claim with prejudice, ordered the termination of benefits and forfeiture of rights to compensation with respect to the claim, and referred the matter to the Director of the Division of Workers' Compensation for a determination of whether law enforcement should be notified. An appeal ensued.

In affirming the Judge of Compensation's dismissal of this claim, the Appellate Division found that the record was replete with evidence to support the Judge of Compensation's finding that the petitioner purposely and knowingly made false statements. In quoting the Judge of Compensation, the Appellate Division concluded:

> As to the seriousness of Petitioner's false testimony, [we] find that claiming under oath that he does not drive horses anymore, just one week after driving a horse in a harness race, is so flagrantly galling as to constitute a serious violation per se for the purposes of N.J.S.A. 34:15-57.4(c)(1). **II**

Side Bar

This opinion demonstrates the usefulness of internet-based investigation as a supplement to more traditional investigative methods in impeaching the credibility of a claimant. As private investigators will often explain, the internet tends to lull people into a false sense of anonymity, causing them to behave carelessly and without consideration for the potential consequences of their on-line activities.

Delaware Workers' Compensation

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

Paul V. Tatlow

The employer's termination petition is denied, despite the fact that the claimant was an illegal alien who had since been deported from the United States, where there was no medical evidence showing the claimant's disability had ceased and the arguments that the claimant had procured his employment by means of a fraud or forfeited his right to compensation by not submitting to a medical exam were rejected by the Board.

Saul Melgar Ramirez v. Delaware Valley Field Services; IAB No. 1363724 - Decided December 19, 2011

This case involved a termination petition filed by the employer seeking to terminate the claimant's total disability benefits on the basis that the claimant had obtained his employment by way of a fraud and/or had forfeited his benefits by refusing to submit to a medical exam. The facts show that the claimant had initially worked for the employer as an independent contractor and later became employed in its business of doing mortgage field work. The claimant sustained a compensable work injury to his back on January 20, 2011, when he slipped and fell down a set of steps. The only medical evidence was from the claimant's physician, indicating the low back injury resulted in ongoing total disability. By the time of the hearing, the claimant had been deported to Honduras and testified by way of video conference at the Board hearing. The evidence produced before the Board showed that the claimant had obtained his employment by providing the employer with a false resident alien identification number and a false Social Security number.

The employer made several arguments in support of its request for a termination. The employer contended that under the Immigration Reform Control Act (IRCA) of 1986, the employment of illegal aliens was unlawful and that, since the claimant was an illegal alien, his contract of employment was void and unenforceable. The Board noted that § 2304 of the Act provides that there were two ways by which a person could be found to be an employee: one being a contract of hire and the other being performing services for a valuable consideration. The Board reasoned that in this case it was not disputed that the claimant had performed services for a valuable consideration and that he, therefore, fit the statutory definition of employee. The Board concluded that the Act does not expressly prohibit the receipt of benefits to an employee merely because he is an illegal alien. The Board also noted that the IRCA does not expressly pre-empt the award of workers' compensation benefits.

The employer next argued that the claimant forfeited his right to benefits since, having been deported to Honduras, he could not submit to a defense medical exam at reasonable times and places as required by the Act. The Board rejected that argument, finding that it was not, in fact, reasonable to have this particular claimant evaluated in Delaware since he had been deported. In addition, the Board refused to equate the claimant's deportation to a "refusal" to be examined since, it pointed out, there were physicians in Honduras who could do such an exam and the claimant was, in fact, treating with a physician there.

The employer's final argument was that the claimant forfeited his right to compensation under the statute which provides that being incarcerated after an adjudication of guilt bars the right to compensation benefits. The Board rejected that argument on the basis that, even if the deportation were equated to an adjudication of guilt, the statute also required incarceration. The claimant was living in Honduras, but the Board noted that he was not incarcerated. The Board's decision was, therefore, that since there was no medical evidence that the claimant's total disability had ceased and the employer's arguments for denying benefits on either a forfeiture or suspension basis were rejected, the termination petition was denied. **II**

Side Bar

Given the facts of this case, it was no doubt a frustrating result for the employer, which made several compelling arguments. There was one missing piece of evidence which could have helped the employer meet its burden and that was medical evidence that the claimant's disability had been reduced and that, given the facts, this would have required retaining a defense medical expert in Honduras to evaluate the claimant.

New Feature:

Ask Our Attorneys

Future issues of What's Hot in Workers' Comp *will feature a new column* ***"Ask Our Attorneys."*** *Please send us your workers' compensation questions, and our authors will answer them in this publication. Send your questions to tamontemuro@mdwcg.com.*

News from Marshall Dennehey

Michele Punturi (Philadelphia, PA) has been recognized for her contribution to the newly enacted Workers' Compensation UTBMS Codes.

Kacey Wiedt (Harrisburg) gave a presentation to claim personnel at School Claims Services on the proper use of Pennsylvania Bureau forms.

Mary Kohnke Wagner (Philadelphia, PA) is co-presenting *Workers' Compensation Issues Involving the Larger Employer* in conjunction with the Pennsylvania Bar Institute. The course will provide valuable insight into the unique aspects of Pennsylvania workers' compensation from the perspective of the large employer. The program will address the challenges involved with a multiple location, multiple jurisdiction employer with a large and diverse workforce, especially in a health care provider setting. The course will be offered in Philadelphia and Pittsburgh on March 1 and March 14 respectively. Visit www.pbi.org for more information and to register to attend.

The Pennsylvania Chamber of Business and Industry has asked **Tony Natale** (Philadelphia, PA) to participate in the upcoming *Unemployment Compensation Roundtable*. He joins officials from the Pennsylvania Bureau of Unemployment Compensation and other top field experts to provide answers on how and when benefits apply and how to handle different situations businesses may face. Tony will specifically address the do's and don'ts of unemployment compensation hearings, including tips on how to prepare for the appeal, review of the due process elements, what to expect at an unemployment referee hearing, the burden of proof and how to avoid common mistakes. The event will take place on March 8, 2012, at the Hilton Scranton & Convention Center and on March 16 at Crowne Plaza Valley Forge in King of Prussia. For more information or to register to attend, visit www.pachamber.org/www/conferences/main.php.

Shannon Fellin and **Kacey Wiedt** (Harrisburg, PA) are the featured speakers at an upcoming meeting sponsored by the Susquehanna Human Resources Management Association. Their presentation will cover Pennsylvania workers' compensation from the employer's perspective. The educational program is scheduled for March 20 in Lewisburg, Pennsylvania. Visit shrma.shrm.org for more details and registration information.

Kacey C. Wiedt (Harrisburg, PA) obtained a favorable decision in a case involving a claim and penalty petitions. The claimant alleged that she sustained head, right shoulder, neck, back and leg injuries when a donut rack fell on her. The claimant reported the injuries immediately to her supervisor and underwent surgery to repair a labrum tear one month later. Kacey was able to show that the claimant had pre-existing back and shoulder problems. Kacey also showed through store video that the claimant was physically fine following the alleged incident. The judge found that the claimant's medical condition was not related to this incident.

Jeff Watson (Harrisburg, PA) successfully defended review and reinstatement petitions. After being laid off in 2010, the claimant filed the petitions seeking to expand the description of an injury and reinstatement of benefits relative to a 1991 work injury. The claimant alleged he suffered disability from a symptomatic neuroma arising out of a 1992 finger amputation. After receiving specific loss benefits and upon returning to work, the claimant's benefits were suspended in 1992 by Supplemental Agreement. The claimant alleged that the neuroma was latent and argued that the "discovery rule" permitted a reinstatement despite last receiving benefits in 1992. In his decision, the judge agreed with Jeff's arguments that the petitions were time barred. It was further found that the claimant's medical expert failed to establish that the symptomatic neuroma was separate and apart from the amputation and specific loss. The employer did not present a medical defense but, rather, offered testimony of the claim personnel regarding timing of the last payments to the claimant.

Angela DeMary (Cherry Hill, NJ) obtained an order of dismissal with prejudice in Freehold Division of Workers' Compensation following a full trial. The petitioner filed a claim petition alleging that his employment duties aggravated his underlying diabetes condition, resulting in an above-the-knee amputation. Although never formally amending his original claim petition, the petitioner later augmented his allegations to include exposures resulting in an infection, thus leading to the amputation. Both the petitioner and the respondent presented lay witness and medical expert testimony. Issues of qualification of the respondent's expert, admittance of prior criminal conviction information, and the credibility of witnesses all arose during trial. After a full trial, the judge of compensation found that the petitioner had not sustained his burden of proof due to the significant credibility issues and dismissed the claim in its entirety.

Tony Natale (Philadelphia, PA) successfully defended against a fatal claim petition involving issues of first impression in the state of Pennsylvania. The question of whether the limitations of actions built into the Act for death claims applies to situations of medication overdose has now been answered in favor of employers. The factual scenario involved the decedent's tragic suicide due to ingestion of pain medication. The burden of proof on employers to demonstrate suicide is difficult, but by using statements made by the claimant on her deathbed and the coroner's report as to the manner of death, Tony successfully convinced the judge to deny and dismiss the fatal claim petition. ||