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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

Facial injuries sustained by a claimant from a dog bite that occurred while the claimant was on a smoke break are compensable.

1912 Hoover House Restaurant v. WCAB (Soverns); 309 C.D. 2014; filed November 10, 2014; Judge Cohn Jubelirer

The claimant worked for the employer one night a week as a line cook. One of the claimant's co-workers said that her father would be stopping by with her dog. After the dog had arrived, the claimant went outside to have a cigarette. While on a smoke break, the claimant had a conversation with the co-worker's father. The claimant petted the dog and allowed the dog to lick his face. When the claimant stood up, the dog growled and bit his lower lip.

The claimant was permitted to take smoke breaks and was in an approved area for smoking. The employer supplied an ashtray tower for their employees' use. The claimant was actually smoking a cigarette when he was bitten by the dog.

The claimant filed a claim petition for disfigurement benefits. The employer contested the petition by denying that the claimant was in the course and scope of employment at the time of the injuries. The Workers' Compensation Judge granted the claimant's petition and concluded that the claimant was in the course and scope of employment at the time of the dog bite. The Workers' Compensation Appeal Board affirmed on appeal.

The Commonwealth Court also held that the claimant was in the course and scope of employment. They disagreed with the employer's argument that the injuries occurred while the claimant was actively disengaged from his work. The court rejected the position taken by the employer that, while smoking a cigarette was a temporary departure from work, the act of petting the dog was an active disengagement from employment. According to the court, this was not a pronounced departure from his work. ||

Heart and Lung benefits paid to a claimant by an employer are not actually workers' compensation benefits and are not subject to subrogation against a third-party recovery arising from a motor vehicle accident.

James Stermel v. WCAB (City of Philadelphia); 2121 C.D. 2013; filed November 13, 2014; Judge Leavitt

The claimant, a police officer, had pulled over a motorist for speeding, and while sitting in his cruiser, he was rear-ended by an intoxicated driver and sustained a low back injury. The claimant missed 21 weeks of work. The employer acknowledged the claim by a Notice of Compensation Payable (NCP). The NCP stated that the employer was paying Heart and Lung benefits (full salary) in lieu of workers' compensation benefits. The claimant later settled a third-party claim against the driver who hit his cruiser, as well as against the tavern that served the driver alcohol when he was visibly intoxicated.

The employer filed a petition to review compensation benefit offset, seeking subrogation against the third-party recovery. The claimant challenged this petition, arguing that, because he was a government employee and enjoyed immunity from the subrogation claim, his Heart and Lung benefits are not subject to subrogation under §25 (b) of Act 44 and (2) under §23 of Act 44. The Workers' Compensation Judge granted the employer's petition.

However, the Appeal Board reversed, concluding that there was no right to subrogation against a motor vehicle tort recovery for benefits paid under the Heart and Lung Act. The employer then requested re-hearing, and thereafter, the Board concluded that the employer was entitled to subrogation.

The Commonwealth Court, however, reversed the Board and granted the claimant's appeal. Citing the Supreme Court case of *Oliver v. City of Pittsburgh*, 11 A.3d 960, the court held that there was no right of subrogation for Heart and Lung benefits paid to victims of motor vehicle accidents. According to the court, the NCP, which was issued unilaterally by the employer, did not transform Heart and Lung benefits

into workers' compensation benefits. The court viewed the benefits as separate and subject to different statutory regimes. II

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The court did not address the immunity issue in their opinion. The court said that, because they concluded that the employer was not entitled to subrogation, because the claimant had received Heart and Lung benefits, it was not necessary to address the immunity issue.

Benefits for multiple specific losses arising from the same injury are to be paid consecutively.

Jacqueline Fields v. WCAB (City of Philadelphia); 42 C.D. 2014; filed November 14, 2014; Judge Ledbetter

The claimant sustained injuries to her left shoulder, arm, wrist and hand while restraining an inmate in the course and scope of her employment as a prison guard. Pursuant to a Workers' Compensation Judge's decision, the claimant was awarded total disability benefits. Later, pursuant to a Judge's additional decision, other work-related injuries were added.

A subsequent claim petition for specific loss of the left arm was granted. The Judge ordered that the claimant would continue to receive total indemnity benefits while totally disabled and then receive the specific loss award. Later, another petition was granted for the loss of use of both legs. The Judge ruled that the employer was entitled to a credit for disability benefits paid through the date of the Judge's decision. After an appeal to the Appeal Board, the claimant filed a penalty petition, alleging that the employer violated the Act by unilaterally reducing her payments. Previously, the employer was paying the claimant specific loss benefits concurrently with her wage loss benefits in the weekly amount of $1,351.77. Later, it switched her weekly benefit payments to a total disability rate of $450.59 per week.

The Judge dismissed the penalty petition, concluding that, where there are multiple specific losses arising from the same injury, the claimant could elect to receive specific loss benefits rather than indemnity benefits, but could not receive multiple awards of specific loss benefits concurrently. The Judge also concluded that the employer was required to pay 1,210 weeks of specific loss benefits plus the healing period in weekly, consecutive installments. The Appeal Board agreed with the dismissal of the penalty petition, but split on the issue of whether specific loss benefits should be paid consecutively or concurrently.

The Commonwealth Court held that, while a claimant can choose to receive specific loss benefits rather than total disability benefits, the specific loss benefits must be paid consecutively under §306 (c) (21) of the Act. The court also rejected the claimant's argument that §306 (c) (23) gives the Board discretion to determine that the best option for severely injured claimants is concurrent payments. According to the court, this was an argument that was, in reality, an attempt by the claimant to perform a "back door commutation request" or a request to accelerate the payment of benefits. II

The Uninsured Employer Guarantee Fund is not obligated to pay unreasonable contest attorneys fees assessed against an employer.

Kris Trautman v. WCAB (Blystone Tree Service and Pennsylvania Uninsured Employer Guarantee Fund); 328 C.D. 2014; filed November 14, 2014; Judge Brobson

The claimant worked for the employer as a tree climber. He sustained serious injuries after falling approximately 25 feet from a tree. The claimant filed a claim petition against the employer and, thereafter, a petition against the Uninsured Employers Guarantee Fund (UEGF) because the employer did not have workers' compensation insurance.

The Workers' Compensation Judge granted the claimant's petition and, in doing so, found that the employer did not present a reasonable basis for contest. The Judge awarded counsel fees for unreasonable contest against the employer. The Judge also rejected an argument made by the claimant that the fees should be paid by the UEGF. The claimant appealed to the Appeal Board, and they affirmed.

The Commonwealth Court agreed with the Judge and the Board, affirming the decision not to order the UEGF to pay unreasonable contest counsel fees. According to the court, the clear language of §1601 of the Act specifies that the UEGF is not subject to unreasonable contest counsel fees. II

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§1601 of the Act specifically says, "The Fund shall not be considered an insurer and shall not be subject to penalties, unreasonable contest counsel fees or any reporting and liability requirements under §440 [of the Act]."

Commonwealth Court holds that substantial evidence did not support a Judge's decision finding that a psychiatric injury was caused by abnormal work conditions because there was no expert testimony specifically delineating a cause of injury or proving that the injury was anything more than a subjective reaction to normal working conditions.

Frog, Switch & Manufacturing Company v. WCAB (Johnson); 149 C.D. 2014; filed December 4, 2014; Judge Covey

The claimant's claim petition alleged that she sustained atypical depression causally related to abnormal working conditions. The employer fabricates steel products, and the claimant's job as a "rover" required her to operate over-head cranes. She was one of two females and the only African American female in a work force of 200 employees. The claimant alleged that she was subjected to three separate workplace incidents that amounted to sexual and racial harassment. The Workers' Compensation Judge granted her claim petition, and the Appeal Board affirmed.

The employer appealed to the Commonwealth Court and argued that the Judge's decision was not supported by substantial evidence. The court agreed and granted the employer's appeal. The court noted that, for example, the Judge found the testimony of the claimant's treating psychologist to be "credible," yet, the treating psychologist did not testify. Rather, a letter from the psychologist and his progress notes were admitted into evidence. Moreover, the letter and notes did not reference a specific incident the claimant alleged to have occurred in her claim petition but, instead, indicated that a diagnosis of depression was being given for stressful and overwhelming working conditions. According to the court, there was not substantial evidence to support a finding of psychic injury caused by the claimant's reaction to abnormal working conditions where there is no expert testimony proving that the injury was anything more than subjective reaction to normal working conditions. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

Dismissal of the plaintiff's tort action affirmed based on a finding that the defendant was the plaintiff's "special employer."

Pineda v. Zulueta and Zulueta, Docket No. A-1552-13T4, 2014 N.J. Super. Unpub. LEXIS 2527 (App. Div., decided October 23, 2014)

In January of 1990, the plaintiff was hired by a jewelry store, which was owned by the mother of the defendants. The plaintiff's job was to clean the jewelry store as well as the mother's home. In 2004, the mother instructed the plaintiff to work full-time at the home of the defendants, her son and his wife. From 2004 through 2011, the plaintiff worked in the defendants' home from Monday through Friday from about 8:30 a.m. to 5:00 p.m., cooking, cleaning, laundering clothes and performing other incidental tasks required to maintain the household. The plaintiff was also a full-time nanny to the defendants' three children. The defendants directed the plaintiff's day-to-day work duties and controlled her working conditions in their home. The jewelry store paid the plaintiff's wages for her work as the defendants' full-time housekeeper and nanny. At no time did the defendants themselves pay wages to the plaintiff.

In early 2011, while in the defendants' backyard cleaning dog waste, the plaintiff slipped and broke her ankle. She filed a personal injury claim against the defendants alleging that they negligently maintained a dangerous condition on their property that resulted in her injury. The defendants denied liability, and at the close of discovery, moved for summary judgment pursuant to N.J.S.A. 34:15-8, which bars an employee from pursuing a tort remedy against his or her employer. The plaintiff opposed the defendants' motion based on her assertion that she was not the defendants' employee but, rather, was an employee of the jewelry store. The trial judge granted the defendants' motion, finding that the defendants were the plaintiff's "special employer" and that, as such, were shielded from tort liability for the plaintiff's injuries. The plaintiff appealed.

In affirming the trial judge's ruling, the Appellate Division relied primarily on *Blessing v. T. Shriver & Co*., 94 N.J. Super. 426 (App. Div. 1967). A "special employment" analysis is used primarily where a temporary employment agency lends one of its employees to a client of the agency. In such situations, the employee is considered to be temporarily employed by the borrowing or "special employer." In *Blessing*, the Appellate Division described a five-factor test to be utilized in determining if a special employment relationship exists:

> The court must consider whether: (1) an express or implied contract existed between the special employee and the special employer; (2) the work was essentially that of the special employer; (3) the special employer had the right to control the details of the work; (4) the special employer paid the employee's wages; and (5) the special employer had the power to hire, release or re-hire the employee.

Here, as to the first *Blessing* factor, the Appellate Division concluded that the trial court appropriately found that the plaintiff had an implied employment agreement with the defendants. As the Appellate Division reasoned:

> For almost seven years until the time of her fall and injury, plaintiff took direction from defendants and performed services for their benefit in their home. She was paid for her services, albeit not directly by defendants. These facts showed there was an implied employment contract.

As to the second *Blessing* factor, the Appellate Division found unconvincing the plaintiff's argument that the defendants could not be her employer as they were not themselves business owners. As the Appellate Division reasoned:

> [O]ne need not be a business entity to employ others to perform services. Plaintiff's taking care of defendants' children, cleaning their home, cooking for them, doing their laundry, and other similar tasks, all under the direction of the defendants, showed that plaintiff was employed by defendants.

With regards to the third *Blessing* factor, the Appellate Division referred to the petitioner's own testimony that the defendants alone instructed her on what specific work needed to be done at their home.

The Appellate Division did concede that the fourth *Blessing* factor—*i.e*., who paid the employee's wages—did on its face favor the plaintiff's argument that she was not the defendants' employee. However, the Appellate Division concluded that this factor was not controlling and that it was likely "that defendants were deriving some tax or other benefits by having the family business retain their personal nanny and housekeeper on its books[.]"

As to the fifth and final *Blessing* factor, the Appellate Division found that the defendants did have the right to terminate the plaintiff's services in their home and with their children if they so chose.

Based on its analysis under *Blessing*, the Appellate Division found that that defendants were the plaintiff's "special employer" and, as such, are entitled to protection from tort liability for the plaintiff's injuries. As the Appellate Division concluded:

> Because four of the five *Blessing* factors showed that plaintiff was a special employee of defendants, and the fifth factor is not dispositive, the trial court correctly concluded that the workers' compensation bar prohibits plaintiff from suing defendants for tort recovery. **II**

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As the Appellate Division's ruling demonstrates, courts must consider the totality of the circumstances when applying the *Blessing* test. No single factor is necessarily dispositive, and not all five factors must be satisfied in order for a special employment relationship to exist. *See Walrond v. County of Somerset*, 382 N.J. Super. 227 (App. Div. 2006).

Delaware Workers' Compensation

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Paul V. Tatlow

In a course of employment case, the Board finds that the claimant's slip and fall in a parking area adjacent to the employer's premises was not compensable under the "going and coming" rule.

Rene Saravia v. Cloudburst, (IAB No. 1408076 – Decided July 16, 2014)

This case involved the claimant's petition to determine compensation due, in which he alleged that he sustained a compensable work injury—slip and fall—on December 18, 2013. The employer filed a motion to dismiss the petition on the basis that the claimant was not in the course and scope of his employment at the time of the injury. The evidence taken at the legal hearing showed that the employer was in the business of installing underground irrigation systems and that their business location had a chain link fence across the property line. Employees were not permitted to park within the fence line but were told to park on the street, which is a public right of way. The employees generally parked outside the fence on the paved shoulder of the street with their cars being up against the fence. On the day in question, the claimant had parked in that location and was closing the trunk of his car on his way into work when he slipped and fell.

At the outset, the Industrial Accident Board noted that Delaware, like many jurisdictions, follows the "going and coming" rule, which precludes an employee from receiving workers' compensation benefits for injuries that are sustained while traveling to and from the place of employment. That rule, of course, does not apply if the injury actually occurs on the employer's premises. In this case, the claimant fell prior to crossing the employer's property line, and therefore, he was not on the actual legal premises. However, the Board then did a detailed analysis of parking lot cases, which are a common exception to the premises rule. The term "premises" has been interpreted to include a parking lot if the employer exercises some element of control over the lot, such as by instructing the employees where to park, by providing security cameras to cover the parking area, and by providing security guards to escort employees to and from the lot. Strict legal ownership of the property by the employer is not needed so long as the employer exercises sufficient control of the parking area.

Applying those legal principles to this case, the Board noted that the parking area was clearly not the employer's property since it is the shoulder of a public roadway. The Board further found that the employer exercised no control over that parking area, other than occasionally giving the employees common sense suggestions on appropriate parking practices. Therefore, the Board concluded that, at the time of his slip and fall, the claimant was still in the process of traveling to work and that, since he had not yet entered the employer's premises, his claim was barred by the "going and coming" rule. ||

Side Bar

There are many reported parking lot cases, and they tend to be fact specific. In a footnote, the Board noted that a parking lot need not be adjacent to the employer's property to be considered part of the premises. In fact, where the employer exercises control over a parking lot that is not adjacent to its premises, the employer thereby becomes responsible for travel between that lot and the premises under the theory that the employer has created the necessity for encountering the hazards lying between these two portions of the premises. Employers need to be aware of this point because, by having a parking lot they control for the benefit of the employees, they are also creating potential liability for any injuries or accidents that happen to employees when using those lots or going from them to the actual work location.

News from Marshall Dennehey

Michele Punturi (Philadelphia, PA) will be a speaker at The Claims and Litigation Management (CLM) Alliance Annual Conference on March 26, 2015. Michele's topic will be "The Dream Team Approach to Workers' Compensation Case and Litigation Management." She will be joining other insurance industry professionals to discuss how to achieve successful case and litigation management in workers' compensation by balancing the interests of the employer, broker, claims adjuster, and defense counsel. For more information, visit https://www.theclm.org/Event/ShowEventDescription/2860 or the Events page of our website, www.marshalldennehey.com.

Tony Natale (Philadelphia, PA) successfully defended the Philadelphia Flyers in a case of first impression. The claimant was invited to the Flyers hockey camp as part of a professional team try-out. The claimant was known as an "enforcer" in professional hockey circles, which meant that he had the propensity to fight during games. During the camp, the claimant injured and/or aggravated a pre-existing injury to his dominant hand during a drill, thus eliminating his ability to hit, check or fight. The claimant then filed a claim petition alleging that he was an "employee" of the Flyers at the time of the injury and was entitled to medical and lost wages. Tony was able to defend the claim with the use of the Flyer's Collective Bargaining Agreement and testimony from the team's general manager. The Judge formulated a complex, bifurcated decision accepting all of Tony's arguments as they related to Pennsylvania contract law. The claimant was found not to be an employee of the Flyers, and his claim was dismissed in its entirety.

Michelle Punturi (Philadelphia, PA) was successful in limiting exposure on a claim petition and a penalty petition based upon three strong factual witnesses from the employer. These witnesses were able to provide evidence to support the fact that the claimant executed an Employee Rights and Duties form at the time of hire and time of injury, yet failed to treat with the panel physician for 90 days. Based on that evidence, the Judge found that the employer was not liable for medical expenses for the period of time up until the denial. Further, strong medical evidence from an IME physician, who had the opportunity to review all the medical records past and subsequent to the work injury, as well as the diagnostic study films, persuaded the Judge to accept that the claimant had fully recovered from the work injury. As a result, the claim was limited to two months. ||