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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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The claimant cannot seek a reinstatement of benefits where the injury is acknowledged by a Medical Only NCP because the Medical Only NCP does not recognize disability.

Sandra Sloane v. WCAB (Children's Hospital of Philadelphia) and Children's Hospital of Philadelphia and Risk Enterprise Management v. WCAB (Sloane); No. 53C.D. 2015; filed October 1, 2015; by Senior Judge Colins

In this case, the claimant sustained an injury to her right elbow in April of 2004. The employer accepted the injury by issuing a Notice of Compensation Payable (2004 NCP). The claimant returned to work in a light-duty capacity, with reduced wages, and received partial disability benefits for the injury. She then suffered a second injury to her right elbow and her right knee in 2006. The 2006 injury was accepted by the employer through a Medical Only NCP (2006 NCP). The claimant returned to light-duty work and received partial disability for the 2004 injury until November 16, 2007, when she underwent surgery for her right knee. The claimant then filed a petition to reinstate temporary total disability benefits for the right knee injury.

The Workers' Compensation Judge granted the reinstatement petition, concluding that the claimant was totally disabled in November of 2007 based on both her 2004 and 2006 work injuries. The employer appealed to the Workers' Compensation Appeal Board, and they reversed a portion of the Judge's decision, granting disability benefits based on the 2006 work injury. The Board concluded that the claimant was required to comply with the three-year limitation of §413(a) of the Act for modification of an NCP rather than the 500-week period for reinstatement of suspended benefits. Because the claimant did not file the petition within three years of the issuance of the 2006 NCP, the Board concluded the claimant was time-barred from receiving benefits for that injury.

In her appeal to the Commonwealth Court, the claimant argued that the issuance of the Medical Only NCP in 2006 put her disability in suspended status, which could be reinstated within 500 weeks of that NCP. The Commonwealth Court, however, rejected that argument and affirmed the Board. According to the court, the effect of issuing a Medical Only NCP is distinct from the effect of a ruling that a claimant has suffered a loss of earning power and that grants a claim petition, but also immediately suspends benefits. The court held that, because no disability had ever been recognized by the employer or established by a Workers' Compensation Judge for the 2006 injury, disability had not been suspended when the 2006 NCP was issued. Therefore, the claimant could not seek to have disability benefits reinstated and the 500-week period of reinstatement of benefits did not govern the case. The court went on to hold that, since no disability compensation had been paid for the 2006 injury, the claimant was required to establish an entitlement within three years of the date of the injury. Thus, the petition the claimant filed in 2011 was untimely under §413 (a) of the Act. II

A company whose main business is the sale of franchises to franchisees is not a statutory employer under the Act and is not responsible for payment of workers' compensation benefits.

Saladworks LLC and Wesco Insurance Company v. WCAB; No. 1789 C.D.2014; filed October 6, 2015; by Judge McGinley

While working at a franchise of a national restaurant, the claimant injured his knees when he walked out of the back of the restaurant to throw away a box. The claimant filed a petition for benefits naming the Franchisor, though that name was later amended to name the Franchisee. The claimant subsequently filed a separate claim petition against the Uninsured Employers Guaranty Fund. The Fund filed a joinder petition against the Franchisor, alleging it was a statutory

employer of the claimant and, therefore, liable for payment of benefits. The Franchisor moved for the dismissal of the joinder petition on the basis that they had no employment relationship with the claimant and were solely a franchisor. The Workers' Compensation Judge granted the motion and dismissed the joinder petition. Ultimately, the Judge granted the claimant's claim petition against the Franchisee.

The Fund appealed the denial of its joinder to the Appeal Board, arguing that the Franchisor was the claimant's statutory employer. The Board agreed and reversed the Judge. According to the Board, the Franchisor had a contractual obligation to ensure that the Franchisee had appropriate coverage in place, which would have protected the Franchisor from liability and ensured the claimant had coverage for his work-related injuries.

In its appeal to the Commonwealth Court, the Franchisor argued that § 302(a) of the Act (statutory employer) does not apply to franchise or franchisee agreements. According to the Franchisor, the key question was whether the work performed by the Franchisee, under their agreement, was a regular or recurrent part of the business, occupation, profession or trade of the Franchisor. The court's analysis of that agreement showed that the Franchisor's main business was the sale of franchises to franchisees that desired to use their name, "system" and marketing expertise. While the Franchisor was connected to the Franchisee through the agreement, the court found that the Franchisor was not in the restaurant business or the business of selling salads. Additionally, the court distinguished this case from the Pennsylvania Supreme Court's landmark decision in *Six L's Packing Company v. WCAB (Williamson)*, 44 A.3rd 1148 (Pa. 2012), by pointing out that, in that case, a subcontractor hired the claimant to perform an essential part of the general contractor's business—the transportation of produce from a warehouse to a processing facility. The court concluded that the Franchisee was the claimant's employer at the time of the injury and liable for payment of benefits. Because they did not have workers' compensation insurance, the Uninsured Employers Guaranty Fund was responsible for payment. **II**

New Jersey Workers' Compensation

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Dario J. Badalamenti

A Judge of Compensation utilizes the "control test" and the "relative nature of the work test" to determine that a dancer at a gentlemen's club is an employee under the NJ Workers' Compensation Act.

Destine Colvin v. Coconuts, CP# 2013-16306 (Division of Workers' Compensation, decided July 31, 2015)

The petitioner was a dancer who performed at respondent gentlemen's club. She worked an average of five shifts per week, with each shift lasting between eight and twelve hours. Although the petitioner set her own schedule, she was required to arrive timely and remain at the club until her shift was completed. Throughout the course of each shift, the petitioner would be called on stage by the DJ to dance for the patrons, from whom she received tips. The petitioner received no salary. In between performances, she was required to converse with the club's patrons. The petitioner purchased her own drinks and supplied her own wardrobe.

On April 26, 2013, the petitioner was assaulted by a patron during her shift and sustained bodily injury. She filed a claim with the Division of Workers' Compensation, seeking medical and indemnity benefits. The respondent filed an answer denying the petitioner's claim and brought a motion to dismiss, asserting that the petitioner was not the respondent's employee but, rather, an independent contractor, ineligible for workers' compensation benefits under the Act.

In finding that the petitioner was the respondent's employee within the meaning of the Act, the Judge of Compensation relied on *Pollack v. Pino's Formal Wear & Tailoring*, 253 N.J. Super. 397 (App. Div. 1992), in which the Appellate Division developed two tests to help determine if an individual is an independent contractor or an "employee" within the meaning of N.J.S.A. 34:15-36—i.e., the "control test" and the "relative nature of the work test." Both tests are designed to draw a distinction between those occupations which are properly characterized as separate enterprises and those which are, in fact, an integral part of the employer's regular business.

The control test focuses on the degree of control exercised by the employer over the means of completing the work; the source of compensation; the source of the worker's equipment and resources; and the employer's termination rights. Under the relative nature of the work test, a petitioner must show a "substantial economic dependence" on the employer, which is demonstrated when there is a "functional integration" of the parties' respective operations.

The Judge of Compensation found that application of the control test required a finding that the petitioner was the respondent's employee. Despite the fact that the petitioner set her own hours, the Judge found that she could not come and go as she pleased. Rather, she was expected to arrive timely and stay until her shift was completed. She was required to dance and to converse with patrons between dances. The respondent provided the dance floor, pole and couches on which the petitioner danced, as well as the DJ who arranged the music. As to the right of termination, the petitioner testified that after she was injured, she tried to return to work but was told by the respondent that she'd been fired. Although the Judge acknowledged that the petitioner's lack of compensation was inconsistent with a finding of an employer-employee relationship, she determined that it was not dispositive of the issue.

As to the "relative nature of the work test," the Judge of Compensation found that the petitioner's dancing was an integral part of the respondent's business as a gentlemen's club. Similarly, the petitioner was economically dependent on the respondent as her only source of income at the time of her injury.

Accordingly, the Judge of Compensation denied the respondent's motion to dismiss and found the petitioner to be the respondent's employee and entitled to workers' compensation benefits under the Act. ||

Side Bar

Although an excellent illustration of the process of determining employment status, this decision also demonstrates the significant role that judicial assessment of witness credibility plays at trial. Here, the Judge of Compensation provided clear and articulate reasons to explain her decision, including specific findings as to witness credibility. The court did not find the testimony of either the club's former owner or manager, both of whom testified on behalf of the respondent, to be credible. However, as to the petitioner's testimony regarding the details of her employment, the Judge of Compensation found her "entirely credible and consistent," as well as "forthcoming and cooperative."

News from Marshall Dennehey

The *Philadelphia Business Journal* has named Marshall Dennehey Warner Coleman & Goggin one of its 2015 Best Places to Work award recipients in the Philadelphia region. The award recognizes the company's achievements in creating a positive work environment that attracts and retains employees through a combination of benefits, working conditions and company culture. Marshall Dennehey, which was the only law firm named to the list in 2015, was also recognized in 2013 and 2014.

Hundreds of companies submitted nominations to the program, which ranks the top employers according to scores given to the companies by their own workers. Marshall Dennehey's Delaware Valley locations, including its Philadelphia headquarters and offices in King of Prussia, Doylestown and Cherry Hill, were included in the survey.

"I always like to tell people that this is a firm that really cares about its employees, and being selected for this award for the third year in a row validates that our employees think this is a great place to work," said Marshall Dennehey President and CEO, Thomas A. Brophy. "We take great pride in our company culture and values, and will continue to do whatever we can to maintain and improve the working environment so that all of our employees, from attorneys to support staff, are engaged and have the opportunity to succeed." ||