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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

An employer does not violate the Act by recouping retroactive disability benefits after their reporting by the claimant on an LIBC 756 form, and the form satisfies an employer's duty to notify the claimant of her reporting obligations.

Stacy Gelvin v. WCAB (Pennsylvania State Police); 1503 C.D. 2014; filed July 13, 2015; by Judge McCullough

The claimant, a state trooper, was awarded workers' compensation benefits by a Workers' Compensation Judge for disability resulting from work-related post-traumatic stress disorder as of December 21, 2006. A few weeks before the decision was circulated, the employer had accepted liability for the injury by filing a Notice of Compensation Payable.

In February 2011, the claimant applied for disability pension benefits with the Pennsylvania State Employment Retirement System and began receiving them in February of 2012. The pension was retroactive to February 2011—the date on which she applied—and the claimant received a lump sum payment. On March 16, 2012, the claimant reported the disability pension benefits on an Employee Report of Benefits form (LIBC-756). Thereafter, the claimant received a Notice of Workers' Compensation Benefit Offset from the employer, informing her that her benefits would be suspended starting on April 21, 2012, and restored on March 5, 2013.

The claimant filed reinstatement and penalty petitions, alleging that the employer unilaterally stopped her indemnity benefits and improperly took an offset based on her receipt of a disability pension.

The claimant testified she suffered a hardship because she went nearly a year without receiving any compensation and exhausted all financial resources to pay her bills. The Workers' Compensation Judge found that the employer was entitled to a retroactive credit as of March 16, 2012—the date the claimant returned the LIBC-756 form—and granted the claimant's reinstatement petition as of April 21, 2012, at a reduced rate to reflect her receipt of disability pension benefits. The Judge further found that the employer violated the Act and imposed a penalty on the employer of 50% of benefits payable during the time the employer suspended the claimant's benefits. The Judge additionally awarded an unreasonable contest counsel fee.

The employer appealed to the Workers' Compensation Appeal Board, which reversed. The Board held that the employer was entitled to recoup from the claimant's retroactive payment of disability pension benefits and that the employer did not violate the Act or unreasonably contest the claimant's petitions.

The claimant appealed to the Commonwealth Court, which affirmed the Board. According to the court, the employer satisfied its duty to notify the claimant of her reporting requirements by way of the LIBC-756 form, which was sent in December of 2011. The claimant received disability pension benefits in February of 2012. The employer sent another LIBC-756 form in March of 2012. Although the claimant was subjected to a large retrospective offset, the amount the employer recouped was not related to a lack of diligence on the employer's part. Additionally, the court found that the claimant's contention that the Workers' Compensation Judge found financial hardship in the case was incorrect. The Judge merely summarized the testimony given by the claimant that she experienced a severe hardship, which does not constitute a finding. II

An employer is not required to first seek an agreement from a claimant on an IRE physician before filing a request with the Bureau to designate an IRE physician.

William Logue v. WCAB (Commonwealth of Pennsylvania); 1882 C.D. 2014; filed July 14, 2015; by Senior Judge Colins

In 2002 the claimant sustained a work-related injury to his right wrist. In November of 2012, the employer filed a request with the Bureau

of Workers' Compensation to designate a physician to perform an IRE under §306 (a.2) of the Act. The Bureau designated an IRE physician, but the claimant objected, arguing that the employer was required to reach an agreement with the claimant on an IRE physician before filing a request with the Bureau to designate an IRE physician. The claimant refused to appear for the IRE with the physician. Thereafter, the employer filed a petition to compel the claimant to appear for the IRE. The employer's petition was granted, and the claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

The Commonwealth Court disagreed with the claimant's position and dismissed the appeal. According to the court, §306 (a.2) (1) merely lists two alternative methods for selecting the IRE physician and does not state that the designation by the Bureau is limited to a situation where the parties are unable to agree. According to the court, if, in fact, the legislature intended the parties' attempt to agree on an IRE physician before asking the Bureau to designate one, §306 (a.2) would have read, "[s]hall be chosen by agreement of the parties, or, if the parties cannot agree, as designated by the department." The court, therefore, interpreted the claimant's appeal as a request of the court to rewrite §306 (a.2), which the court said it was not able to do. II

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The court concluded its opinion by saying that imposing a requirement on employers to go through the additional step of seeking agreement on an IRE physician from the claimant before requesting the Bureau designation would cause unnecessary delay and inefficiency, contrary to the purpose of §306 (a.2) of the Act.

Under the Construction Work Place Misclassification Act, an individual in the construction industry is required to sign a written contract prior to injury in order to be considered an independent contractor and not an employee.

Scott Lee Staron, d/b/a Lees Metal Roof Coatings and Painting v. WCAB (Farrier); 2140 C.D. 2014; filed July 17, 2015; by Senior Judge Friedman

In response to an advertisement seeking a painter, the claimant told the employer he had 20 years of experience, was self-employed, did his own work and owned his own truck, tools and equipment. The employer agreed to pay the claimant $100 per day for the job. The employer also told the claimant he would need to sign a document, Independent/Sub-contractor Agreement, in order to work for the employer. The claimant began working for the employer, primarily using his own painting equipment. However, the employer forgot to have the claimant sign the Independent/Sub-contractor Agreement before he started work on the job. Later, the claimant suffered injuries after falling off a roof, and he signed the agreement at a meeting with the employer after he was released from the hospital. The agreement was dated May 6, 2011, the date of the injury.

The claimant filed a Claim Petition, which the employer defended on the basis that the claimant was an independent contractor, not an employee. The Workers' Compensation Judge granted the claim petition and found that the claimant had not entered into the agreement at the time he sustained his work injury on May 6, 2011; therefore, he was the employer's employee and not an independent contractor. The employer appealed to the Workers' Compensation Appeal Board, which affirmed.

The Commonwealth Court affirmed the Board and dismissed the employer's appeal. The court pointed out that the claimant worked for the employer for several days in exchange for remuneration and did not sign the Independent/Sub-contractor Agreement until after he was injured. The court further pointed out that §3 (1) of the Construction Work Place Misclassification Act was unambiguous, saying "[a]n individual who performs services in the construction industry for remuneration is an independent contractor only if . . . he has a written contract to perform such services." 43 P.S. §933.3 (a) (1). II

A claim petition filed against the Uninsured Employers Guaranty Fund is not barred because the claimant files a civil action against the uninsured employer for protection against the running of the statute of limitations in the civil case.

Jose Osorio Lozado v. WCAB (Dependable Concrete Work and Uninsured Employers Guaranty Fund); 21 C.D. 2014; filed August 5, 2015; by Judge Cohn Jubelirer

The claimant filed claim and penalty petitions against the employer for injuries sustained on May 11, 2007. After it was filed, the Bureau of Workers' Compensation informed claimant's counsel that its research indicated the employer did not have workers' compensation insurance on the date of injury. Shortly thereafter, as the statute of limitations was about to expire, the claimant filed a personal injury action against the employer via writ of summons, seeking damages for his injuries. In January 2010, the claimant also filed a petition against the Uninsured Employers Guarantee Fund (Fund).

While the petitions against the employer and the Fund were pending, an arbitrator in the claimant's action against the employer awarded the claimant a default judgment totaling $50,000 in damages, which the claimant appealed. The Judge then issued two separate decisions denying the petitions filed against the employer and the Fund.

With respect to the petition against the employer, the Judge found that the claimant chose a tort remedy, instead of seeking benefits under the Act, and dismissed that petition. With respect to the petition filed against the Fund, the Judge found that the claimant did not file the Notice of Claim within the required 45 days of learning the employer was uninsured and the claimant filed his claim petition against the Fund concurrently with a Notice of Claim—instead of waiting 21 days as required.

The claimant appealed, and the Appeal Board affirmed, reasoning that §302 (d) of the Act barred all of his petitions because of the tort action. The claimant then appealed to the Commonwealth Court as to the dismissal of the Fund petitions.

The issue considered by the court was whether a claim petition against the Fund was barred by §305 (d) of the Act where, after learning that an employer is uninsured, a claimant preserves a simple remedy by filing a "savings action" at law against an uninsured employer. The court also considered whether a claimant's failure to give timely notice to the Fund that the employer is uninsured acts as a complete or partial bar to a claim against the Fund. The court held that the claimant did not violate §305 (d) when he filed a civil action to preserve his ability to recover in tort prior to the expiration of the statute of limitations. The court pointed out that the claimant faced a practical dilemma at the time. The court

further pointed out that after a default judgment was awarded, the claimant appealed and later filed a Motion to Stay Proceedings, pending resolution of the workers' compensation petitions. According to the court, this showed that the claimant's first choice was not to recover tort damages.

However, the court did hold that the claimant failed to file the Notice of Claim with the Fund within the 45-day requirement of §1603 (b) of the Act. The court said the claimant had 45 days from the date he received the letter from the Bureau informing him that the employer did not have workers' compensation insurance on the day of the alleged injury to file his Notice of Claim. Instead, the claimant waited until January of 2010 to do so, well beyond the requirement of the Act. As for the harm caused by the late filing, the court held that §1603 (b) does not serve as a bar to all compensation but, rather, delays the provision of compensation to the date notice is given. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division utilizes the criteria set-forth in recent Supreme Court decision in *Estate of Kotsovska* in finding a limousine driver to be an independent contractor.

Babekr v. XYZ Two Way Radio, Docket No. A-3036-13T3, 2015 N.J. Super. Unpub. LEXIS 1887 (App. Div., decided August 6, 2015)

As a limo driver, the petitioner provided chauffeuring services to the respondent, a limousine service. The petitioner typically worked between ten to twelve hours per day, six days a week, and chose the specific days and hours he wanted to work. He received no vacation time from the respondent, nor did he accrue any retirement benefits as a result of the work he did for the respondent. The petitioner used his own car for transporting passengers and paid for his own automobile insurance. The respondent provided each driver with a computer to be installed in his vehicle for the purposes of communication with the respondent. When a driver chose to work, he alerted the respondent via his computer, and the respondent would then place the driver in line behind other drivers who were also waiting for passengers. After transporting a passenger to his destination, a driver had to request to be placed in line again and had to wait for a new passenger. A driver was free to reject any offer to transport a passenger, but if he did so, he was placed at the back of the line. The respondent forwarded to its drivers a percentage of the fares paid by each passenger a driver transported. The respondent deducted no taxes from the payments it issued to its drivers. Rather, each driver received a 1099 Form at the end of the year for submission to the taxing authority.

On October 21, 2011, while transporting a passenger for the respondent, the petitioner was involved in a motor vehicle accident and sustained bodily injury. The petitioner filed a claim with the Division of Workers' Compensation seeking medical and temporary benefits from the respondent. At trial, the Judge of Compensation found that the petitioner was not an employee of the respondent, but rather an independent contractor, and was not entitled to workers' compensation benefits under the Act. The petitioner appealed.

In affirming the Judge's ruling, the Appellate Division relied on *Estate of Kotsovska v. Liebman*, 221 N.J. 568 (2015), in which the New Jersey Supreme Court utilized the following criteria to determine if an individual is an employee under the Act:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation–supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

Applying the *Estate of Kotsovska* factors, the Appellate Division concluded that the record supported the Judge's finding that the petitioner was not an employee of the respondent at the time of the accident and that his injuries were not compensable.

Of significance, the Appellate Division found that, although transporting passengers was an integral part of its business, the respondent was never dependent upon any one particular driver to carry out the job of transporting passengers. As the Appellate Division reasoned:

> The understanding between [the respondent] and the drivers was that, in exchange for producing passengers for the drivers, the drivers would transport the passengers and take a percentage of the fare. . . . If one driver was not available to pick up and transport a passenger, another was waiting in line to do so. No one driver was ever so essential to the effective functioning of the business to become a cog in its wheel.

Accordingly, the Appellate Division found that there was sufficient credible evidence in the record to support a finding that the petitioner was not an employee of the respondent, and thus, the injuries he sustained as a result of his motor vehicle accident were not compensable. II

Side Bar

The Appellate Division's use of the term "cog in the wheel" is a reference to the Supreme Court's recent holding in *Estate of Kotsovska*, in which the court explained that, in determining whether a worker was an integral part of the business of the alleged employer, one should "look to whether the [worker's] labor was a cog in the wheel of [the employer's] operation . . . in as realistic a sense as the [work] being done by the [employer's] regular employees."

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board denies claimant's motion to dismiss the employer's termination petition on the grounds that a prior Board decision had established that claimant was a displaced worker.

Priscilla Stove v. Aramark c/o Wesley College, (Hearing No. 1258714 - Decided July 23, 2015)

Before the Board was the employer's review petition seeking to terminate total disability benefits. Prior to the hearing, claimant's counsel filed a motion to preclude the Board from hearing that petition on the grounds that it was barred by the legal doctrines of *res judicata* and collateral estoppel. Specifically, the motion asserted that a prior Board decision issued back in June 2012 had determined that the claimant was a *prima facie* displaced worker.

In addressing this motion, the Board focused on §2347 of the Act, which in its opening provision states, "On the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in six months, review any agreement or award."

The Board also cited the 2010 Superior Court case of *Shively v. Allied Systems, Ltd*. for the proposition that a Board decision is an adjudication as to the condition of the claimant at the time it is entered and is conclusive as to all matters applicable at that time, but it is not an adjudication as to the claimant's future condition and does not preclude subsequent awards or subsequent modifications of the original award. The court noted that any rule to the contrary would render §2347 meaningless.

The Board denied the claimant's motion, finding that the principles of *res judicata* and collateral estoppel would only prevent it from reconsidering the correctness of the 2012 decision. Those legal principles would not prevent the Board from adjudicating the current petition, which deals with the wholly separate issue of whether the claimant at the present time continues to be a *prima facie* displaced worker. The employer's counsel indicated that they were prepared to present new evidence in the form of a Labor Market Survey showing that the claimant was employable within the current job market and, thus, not a displaced worker. Therefore, the Board concluded that the employer was well within its rights in filing the termination petition in order to have the Board reconsider whether the claimant's current status had changed such that the total disability benefits should be terminated. ||

Side Bar

It should be noted that, while the Board's denial of the claimant's motion allows the employer to proceed with litigation on the termination petition, the Board is in no way indicating the final outcome of that case. In order to meet its burden of proof on the termination petition, the employer must show that there has been a change in the claimant's condition such that the claimant is medically able to return to work and that employment is available within the claimant's restrictions. The change does not have to be a significant diminishment of the claimant's work injury, but there must nevertheless be some change where there has been a prior decision finding that the claimant was at that point totally disabled. The evidence required to meet that burden of proof typically includes an updated defense medical evaluation along with a Labor Market Survey from a vocational consultant.

News from Marshall Dennehey

On Tuesday, October 27, 2015, **Kacey Wiedt** and **Shannon Fellin** (Harrisburg, PA) are presenting at the 2015 Fall Conference hosted by the Human Resource Professionals of Central Pennsylvania. Their presentation, "Back on the Job! Returning Injured Workers To Gainful Employment," will provide practical tips and actionable information to expedite the return of injured employees to gainful employment, while avoiding litigation under the Workers' Compensation Act. For more information about the conference and register, click here.

Tony Natale (Philadelphia, PA) was published in the August 25, 2015, edition of *The Legal Intelligencer*. His article, "The Treating Physician: A Misnomer in Workers' Comp Litigation," discusses the defense perspective on the treating physician. To read Tony's article, click here. ||