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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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A claimant's permanent relocation from Pennsylvania to another state, standing alone, does not support a finding of a permanent and voluntary withdrawal from the workforce.

Mary Ellen Chesik v. WCAB (Department of Military and Veterans Affairs); 758 C.D. 2015; filed November 9, 2015; by President Judge Pellegrini

The claimant sustained a work-related injury to her neck in 2009. In 2013, the employer filed a petition to suspend benefits, alleging the claimant had voluntarily removed herself from the workforce due to her relocation to Nevada. The claimant testified regarding the reasons she moved to Nevada, which included the warmer climate being better for her Lupus and fibromyalgia. The claimant said that she did not receive any medical clearance from a doctor prior to the relocation. Additionally, the claimant retired from her position with the employer in October of 2012 and had applied for disability pension benefits. The claimant testified that she moved for a better quality of life for her body. She also testified it was not her intention to remove herself from the workforce when she moved to Nevada.

The Workers' Compensation Judge granted the employer's suspension petition, explaining that the employer did not need to demonstrate that the claimant is physically able to work or that available work has been referred when the claimant has voluntarily retired or withdrawn from the workforce. The judge found that the claimant removed herself from the workforce for reasons other than her medical condition with regard to her work injury. The claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

However, the Commonwealth Court reversed the decisions of the judge and Board. The court held that the judge erred as a matter of law in relying on the claimant's permanent relocation to Nevada, standing alone, to support a determination that she permanently removed herself from the workforce. According to the court, such a relocation is specifically contemplated by and provided for in § 306 (b) (2) of the Act. The court also concluded that the judge could not solely rely on the claimant's receipt of disability pension to support a suspension of benefits on the basis that she has permanently separated from the workforce. Citing precedent from the Pennsylvania Supreme Court, the court pointed out there is no presumption of retirement arising from the fact that the claimant seeks or accepts a pension. Rather, the acceptance of a pension entitles the employer only to a permissive inference of retirement that must be considered within the totality of the circumstances. II

A claimant's collective statements to the employer, that his increased working hours as a line cook were making his back pain from a prior work injury worse, were sufficient notice of a work injury under § 311 of the Act.

Jamie Gahring v. WCAB (R and R Builders and Stoudt's Brewing Company); 534 C.D. 2015; filed November 23, 2015; by Judge Leavitt

The claimant sustained a work-related low back injury while working for Employer I in 1997 and, thereafter, underwent surgery. In 2002, the claimant settled his claim for indemnity benefits via a Compromise and Release Agreement, and Employer I's liability for future medical treatment continued.

In 2010, the claimant began working for Employer II as a line cook. In 2011, he began to experience increased back pain, which led to another surgery on November 17, 2012. In 2013, the claimant was released to return to work with restrictions that Employer II could not accommodate. The claimant returned to work for another employer.

The claimant then filed a claim petition against Employer I, alleging that Employer I was responsible for the surgery performed in November 2012. Employer I filed a joinder petition against Employer II, alleging that the claimant's injuries and the resulting surgery were due to the claimant's work for Employer II.

The Workers' Compensation Judge found that the claimant sustained a work injury requiring surgery on November 17, 2012, as a result of the work the claimant performed as a line cook for Employer II. Construing the

joinder petition as a claim petition, the judge found that the claimant proved that he suffered a work-related aggravation of his pre-existing back condition while working as a line cook. However, the judge also found that the claimant did not give timely notice of the aggravation within 120 days of the last date of his employment with Employer II, which barred his claim under § 311 of the Act. According to the judge, Employer II first learned that the claimant may have sustained an aggravation of his preexisting back injury on April 8, 2013, the date of a hearing conducted by the judge, which was 148 days after the claimant stopped working. The Appeal Board affirmed, concluding that statements made by the claimant to Employer II were not specific enough to put Employer II on notice that the claimant's work as a line cook was causing his more recent back complaints.

The Commonwealth Court reversed the opinions of the judge and the Board. According to the court, when a work injury results from cumulative trauma—as opposed to a single accident—the "collective communications," or statements made by the claimant to Employer II, were sufficient to put Employer II on notice that he may have a work-related injury. A claimant's notification to an employer that he has an injury can be accomplished in "collective communications." In reviewing the record, the court pointed out that the claimant reported increasing back pain to his supervisor at Employer II. That supervisor admitted when he testified that the claimant not only reported an increase in back pain, but correlated the additional pain to additional hours that Employer II was requiring him to work. The claimant's statements to his supervisor were sufficient to inform Employer II of the possibility that the pain was work related. Although there was a belief that the claimant's back problems were a recurrence of his 1997 injury, the claimant learned otherwise from the testimony of his treating physician who, at a deposition of June 21, 2013, opined that the claimant sustained an aggravation to his preexisting condition. In the court's view, the claimant's several conversations, taken together, put the employer on notice of a potential work-related injury. **II**

The employer had adequate notice that the claimant considered a medical condition part of the work injury, and the Workers' Compensation Judge was authorized to expand the description of injury to include that condition to correct a material defect in the NCP, even in the absence of a petition to review.

Melissa Walter v. WCAB (Evangelical Community Hospital); 139 C.D. 2015; filed November 23, 2015; by Judge Leavitt

The claimant sustained a work-related injury to her left shoulder, which was acknowledged by the employer as a left shoulder strain. The employer later filed a termination petition, and the claimant responded by filing review petitions to amend the injury description on the NCP. The Workers' Compensation Judge denied the employer's termination petition and granted the claiman'ts review petitions, amending the NCP to add multiple conditions to the work injury. Following the review petitions, the claimant underwent a second shoulder surgery paid for by the employer. Thereafter, the employer filed another termination petition, alleging the claimant had fully recovered from her work injury as of the date of an IME. During litigation of that petition, the claimant presented testimony from her medical expert, who said that another left shoulder condition was part of the work injury and that the second surgery was performed to correct the second condition.

The judge partially granted the termination petition, finding that the claimant had fully recovered from some conditions, but not all of them. Additionally, the judge credited the testimony of the claimant's medical expert, that an additional shoulder condition was part of the 2007 work injury, from which the claimant had not fully recovered. The employer appealed to the Appeal Board, which reversed, concluding that it was error for the judge to add this condition in the absence of a review petition. According to the Board, the employer did not have adequate notice of the injury description at issue in the proceeding.

The Commonwealth Court reversed the Board and analyzed the Board's rationale for reversing the judge's decision. The Board noted that a claimant must provide notice of a corrective amendment early in the proceedings, and the notice must be overt, not implied. However, the claimant maintained on appeal that the employer had adequate notice of the corrective amendment since it was announced on the first day of the hearing on the termination petition and was addressed by the medical experts at their depositions. The court agreed and held that the employer had adequate notice and opportunity to contest a corrective amendment to the NCP. **II**

Side Bar

§ 413 of the Act specifically authorizes a Workers' Compensation Judge to amend an NCP during litigation of **any** petition where the evidence presented shows that the NCP is materially incorrect.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division affirms a Judge of Compensation's dismissal with prejudice of the petitioner's claim, finding the workplace assault that caused the petitioner's injuries did not arise out of his employment but, rather, resulted from his own personal circumstances.

Joseph v. Monmouth County, Docket No. A-4044-13T3, 2015 N.J. Super. Unpub. LEXIS 2887 (App. Div., decided December 14, 2015)

The petitioner was a nursing supervisor at a nursing home owned by the respondent. On June 9, 2011, the petitioner was assaulted by his nursing assistant who had worked under his direct supervision for several years. A number of weeks prior to the assault, the petitioner became involved in his assistant's pyramid scheme, which entailed an "investment" in which participants, both employees and non-employees of the respondent, pooled their money and then took turns sharing the amounts

collected. The petitioner became concerned when he failed to receive his scheduled payments. On the morning of the assault, he confronted his assistant about the legitimacy of her scheme. The assistant explained that she had made personal use of some of the money due to a family emergency, but she assured the petitioner that he would soon receive his payments. A few hours later, the assistant attacked the petitioner with a hammer while he rested in the break room.

The petitioner brought a claim with the Division of Workers' Compensation, seeking benefits. The respondent denied the petitioner's claim and filed a motion to dismiss, asserting that the petitioner's assault lacked any nexus to his employment. In ruling on the respondent's motion, the Judge of Compensation referred to N.J.S.A. 34:15-7, which requires that compensation be made only for an "accident arising out of and in the course of employment." Although the petitioner was in the course of his employment at the time of his assault, the judge reasoned that the assault did not arise out of his employment but, rather, resulted solely from his involvement in his assistant's non-work-related pyramid scheme. The judge found in favor of the respondent and dismissed the petitioner's claim with prejudice. This appeal ensued.

In affirming the judge's ruling, the Appellate Division relied on *Coleman v. Cycle Transformer Corp*., 105 N.J. 285 (1986), in which the Supreme Court set forth the "but for test," also known as the "positional risk test," for use in determining if an accident can be said to arise out of employment as required under the Act. The test asks whether it is more probably true than not that the injury would have occurred during the time and place of employment rather than elsewhere. Unless it is more probable that the injury would not have occurred under the normal circumstances of everyday life outside the employment, the necessary causal connection has not been established.

The Appellate Division reasoned that the petitioner's assault did not arise out of a risk of employment but, instead, from a risk solely attributable to the petitioner's own personal circumstances. As the Appellate Division concluded:

> Had petitioner not been a participant in his assistant's pyramid scheme, the attack would not have occurred. Once he became involved and questioned his assistant about the . . . money, he was attacked at a location that just happened to be their place of employment. The mere fact that it occurred at the workplace with a co-employee is not enough when no part of the activity which led to the injury was remotely connected to the employment. ||

Side Bar

The "but for test," or "positional risk test," includes as one of its components an assessment of the type of risk that causes the injury. Those risks distinctly associated with the employment—when a painter falls from a scaffolding—or neutral risks that arise from uncontrollable circumstances—being struck by lightning at work—are compensable. However, solely personal risks that have little, if any, connection with the employment are not compensable. The assault arising out of the petitioner's involvement in his assistant's pyramid scheme in the instant case is an example of just such a personal risk.

Delaware Workers' Compensation

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Paul V. Tatlow

Board allows the employer to reimburse the Fund more than it was seeking after a decision granting the termination petition. In return, the employer is given a credit against the claimant's remaining entitlement to partial disability benefits.

Parent Kare Solutions v. Damon Jordan, (IAB No. 1364931 - Decided September 17, 2015)

This case came before the Board on the employer's motion and involved an unusual twist on reimbursement to the Fund for the compensation benefits that it had paid. The claimant had suffered a compensable work injury and began receiving compensation for total disability at the rate of $330.78 per week. On February 12, 2015, the employer filed a termination petition, alleging that the claimant was no longer totally disabled. As of that date, the Fund picked up the total disability payments and continued making them until June 30, 2015, when the Board granted the employer's petition and terminated the total disability benefits as of the date of filing. The Board's decision further put the claimant on partial disability status at the rate of $22.76 per week, and those benefits legally can continue for up to 300 weeks.

Following the Board's decision, the Fund sent a letter to the employer requesting repayment in the amount of $448.70, representing 19.7 weeks of partial disability from the day when the petition was filed until the Board's decision date. The Fund had actually paid the claimant the total amount of $6,521.09, since he was receiving total disability benefits while the petition was pending. The employer's motion to the Board now sought to repay the Fund the remaining $6,072.39, with the assertion that this would represent the remaining 266.8 weeks owing in partial disability benefits. The employer contended that, when that amount was added to the 19.7 weeks partial disability benefits covered by the initial payment it had already made to the Fund, the employer would then have a total credit of 286.5 weeks for partial disability payments made. In essence, the claimant would not repay any of the money he had received from the Fund, and the Fund would not experience any loss on the claim because the employer would repay everything that the Fund had paid, but, in return, the employer would be given a sizeable partial disability credit.

After considering the competing arguments, the employer's motion was granted. The Board ruled that the claimant could keep the money he had already received from the Fund and the employer would pay the remaining $6,072.39 to the Fund, which would make the Fund whole for the compensation benefits it had paid. In return for paying that full amount, the employer was given a credit of 286.5 weeks for partial disability benefits that would otherwise be owing. As such, the claimant only had entitlement to 13.5 weeks of remaining partial disability benefits. ||

Side Bar

This case illustrates a creative approach to reimbursing the Fund, as opposed to the traditional approach where the Fund is simply reimbursed the amount it is seeking and the claimant then receives the benefits as ordered by the Board. The impact of this result is that the claimant is deprived of a windfall he would otherwise receive since, even though the Board's decision ultimately found that as of the filing date of the petition on February 12, 2015, the claimant was only entitled to partial disability benefits, he had, in fact, received total disability benefits from the Fund up until the decision date of June 30, 2015. The employer's strategy appears to have been to reimburse the Fund completely, thereby avoiding any surcharges against it from the Fund for additional money, as well as to prevent the windfall to the claimant. The only potential downside this writer can see is that, if following the decision the claimant had actually returned to work at wages greater than the average weekly wage and thereby have no entitlement to partial disability benefits, the employer would not, in fact, have had to pay them, even if it only reimbursed the Fund the lower amount originally being sought.

News from Marshall Dennehey

We are pleased to announce that in December 2015 the firm received the "Vision Award" from the Young Lawyers Division (YLD) of the Philadelphia Bar Association, presented annually to a law firm that supports the professional development of young lawyers, as well as the YLD in its philanthropic mission and public service works. Throughout 2015, our associates participated in various Philadelphia Bar Association and YLD initiatives, including Law Week activities, the YLD school supply drive, "Legal Line" coordination, "Harvest for the Homeless" and the Guest Chef program supporting Ronald McDonald House. "We are very proud of our associates and the commitment they have made to the great works of the Young Lawyers Division," said Butler Buchanan, III, managing attorney of our Philadelphia office. "Their enthusiasm and dedication to the leadership and wide scope of YLD volunteer activities is inspiring and very much encouraged and appreciated by our firm."

On March 3rd, **Robin Romano** (Philadelphia, PA) will be speaking at the National Retail and Restaurant Defense Association 2016 Annual Conference in Florida. Robin is part of the panel discussion, "Stacking the Deck for Your Defense Counsel," which brings together defense counsel, claim administrators and employers to discuss winning strategies for handling workers' compensation cases. For more information on the conference, click here.

On March 2nd, **Niki Ingram** (Philadelphia, PA), director of the Workers' Compensation Department, will be a featured speaker at the 13th Annual National Workers' Compensation Insurance ExecuSummit. In her presentation, "Exploring the Rising Use and Costs of Compounded Medications in Workers' Compensation," Niki will address the recent trend of utilizing compounded medication as a reasonable alternative to traditional prescription care. This ala carte drug preparation is being billed as the treatment du jour for injured workers nationwide. But for those footing that bill, the result is often not what the doctor ordered, with otherwise manageable claims seeing swift and steep increases in exposure to medical expenses. With many unanswered questions surrounding the efficacy, regulation, consistency, and overall utilization of compounded medication, what is the payers' remedy for cost control? Discussion topics will include what compounded medications are and how they are impacting the workers' compensation system, best practices in identifying compounded medications claims exposures, how the legislature and judiciary are responding to such claims, and how the Affordable Care Act is impacting pharmacy and compounded medication costs. The Worker's Compensation Insurance ExecuSummit is specifically designed for worker's compensation insurance professionals. The summit producers are at the forefront of the workers' compensation insurance industry, monitoring and researching emerging issues and trends and conveying this strategic intelligence as it is developing. For more information and to register, click here.

On April 7th, **Niki Ingram** (Philadelphia, PA) will be speaking at the 2016 CLM Annual Conference in Orlando, Florida. Niki joins a panel of distinguished workers' compensation professionals in "The First 48 Hours: CSI," which focuses on the essential information to be gathered through an incident report from both the claims and litigation perspectives, as well as how this information affects the path of a claim. For more information on the conference, click here.

Audrey Copeland (King of Prussia, PA), a member of our appellate practice group, convinced the Pennsylvania Commonwealth Court to affirm the decisions of the Workers' Compensation Appeal Board and Workers' Compensation Judge, granting the employer's termination petition as the employer met its burden in proving a full recovery from the work injury. The court found no error in denying a petition to review because the claimed disc herniation was not work related, and the judge issued a reasoned decision finding the employer's expert more credible than the claimant's expert, having explained the former's superior qualifications and thorough physical examination. The judge did not err in finding the employer's termination of the claimant to be reasonable because the judge did not credit the testimony of the claimant and his physician that the claimant's contentious and threatening conduct was the result of a prescription drug prescribed for the work injury. Finally, the judge did not err in denying penalties as the notice stopping temporary compensation payable was timely filed and the claimant relied upon a "due" date which fell on a Sunday. *Gower v. WCAB (Haines & Kibblehouse)*, 572 C.D. 2015 (Pa. Cmwlth. November 17, 2015).

Audrey also persuaded the Commonwealth Court to affirm the decision in the employer's favor in *Tipton v. WCAB (Pleasant Township)*, 165 C.D. 2015 (Pa. Cmwlth. December 7, 2015), which upheld the calculation of the employee's wages as a volunteer firefighter based on an average weekly wage of $836. The court found that the statewide average weekly wage used to calculate benefits for volunteer firefighters was the same as the maximum compensation payable. Because the claimant earned less than the statewide average weekly wage, she was entitled to use that wage to calculate her compensation rate and, thus, received the proper compensation rate equal to two-thirds of the statewide average weekly wage. The court agreed with the employer that the claimant was not entitled to the maximum compensation payable as her compensation rate. ||