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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

Claimant is not barred by collateral estoppel from raising an issue before the Workers' Compensation Judge that is different from an issue decided by the judge in prior litigation.

Frank Lindemuth v. WCAB (Strischock Coal Co.); 812 C.D. 2015; filed February 24, 2016; by Judge Cohn Jubelirer

The claimant sustained injuries to his eyes and face when a battery exploded, causing acid and shrapnel to strike him in his head and face. The employer accepted the injury by Notice of Compensation Payable (NCP), and total disability benefit payments began. The claimant then filed a claim petition, alleging complete loss of sight in the right eye, facial scarring and partial loss of sight in the left eye. The employer filed a review petition seeking to limit the claimant's work injury to the loss of use of his right eye with no disability separate and apart from the specific loss of his right eye. The Workers' Compensation Judge (judge) found that the work injury had additionally resulted in headaches that are causally related to the work injury, but that the headaches did not result in any disability separate and apart from the loss of use the claimant's right eye. The judge also found that, with respect to the headaches, the opinion of the claimant's medical expert was credible, noting that the expert did not find any disability separate and apart from the loss of use of the claimant's right eye.

The judge's decision was affirmed by the Workers' Compensation Appeal Board (Board) and by the Commonwealth Court. While the claimant's appeal with the Commonwealth Court was pending, he filed new petitions, seeking a reinstatement of benefits for a worsening of head pain. The same Workers' Compensation Judge presided over litigation of the new petition.

In a second decision from 2013, the Workers' Compensation Judge concluded that the claimant failed to sustain his burden of establishing

a change or worsening of his condition from the time of the prior 2009 decision and had failed to establish that the work injury included "trigeminal nerve neuralgia, or symptoms associated with the same." Additionally, the judge found that the claimant's increased subjective reports and the frequency and intensity of his headaches were not causally related to the work injury.

The claimant appealed to the Board and argued that the judge's decision was inconsistent with the prior decision, asserting that the judge was bound by the doctrine of collateral estoppel to conclude that a trigeminal nerve injury was sustained and that the claimant continued to require treatment for headaches. The Board concluded that the judge was not bound by the findings on trigeminal nerve injury from his prior 2009 decision and held that the claimant was precluded by collateral estoppel from raising the issue of whether he suffered a trigeminal nerve injury after that issue had been fully litigated in 2009.

The claimant appealed to the Commonwealth Court. His main argument was that the Board erred by not concluding that the judge was barred by collateral estoppel from finding that the claimant's headaches were unrelated to his work injury as the judge made a contrary finding in his 2009 decision. The claimant also argued that the Board erred by unilaterally applying collateral estoppel to the claimant and concluding that the claimant was barred from arguing that the work injury included trigeminal nerve damage.

The court agreed with the claimant that the judge's 2013 conclusion that the claimant failed to establish that his work injury resulted in a trigeminal nerve neuralgia was in conflict with the 2009 decision. In the previous case, the claimant's expert testified that, in his opinion, the claimant suffered from this work-related condition and the judge accepted that testimony as credible. Consequently, the court concluded that the judge was bound by law to reach the same conclusion in the second decision. Nevertheless, the court held that this fact was not relevant because, in the second round of litigation, the issue the judge was asked to address was whether the claimant's headaches had worsened since

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What's Hot in Workers' Comp is published by our firm, which is a defense litigation law firm with 500 attorneys residing in 20 offices in the Commonwealth of Pennsylvania and the states of New Jersey, Delaware, Ohio, Florida and New York. Our firm was founded in 1962 and is headquartered in Philadelphia, Pennsylvania.

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the prior decision, not whether those headaches constituted disability separate and apart from the specific loss of the claimant's right eye. The court also held that, because the claimant raised the issue of collateral estoppel on appeal, it was not unfair for the Board to apply the doctrine to the claimant. But, the court agreed that the claimant was not barred by the doctrine from seeking a reinstatement of disability benefits based

on the theory that the claimant's headaches (which had already been established to be related to the work injury) had worsened to a point where they were now disabling. The court concluded that the judge's decision denying the claimant's request for a reinstatement of benefits for those headaches was supported by substantial evidence and was a reasoned decision under the Act. **II**

NEW JERSEY WORKERS' COMPENSATION

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwvcg.com)



The Appellate Division affirms a Judge of Compensation's dismissal of plaintiff's violent assault by her ex-husband at work as it did not have sufficient causal nexus to her employment for a finding of compensability.

Dario J. Badalamenti

Rosario v. State of New Jersey, Docket No. A-4526-13T3, 2016 N.J. Super. Unpub. LEXIS 165 (App. Div., decided January 28, 2016)

On May 23, 2007, while the petitioner was leaving her office, she was violently attacked with a knife by her ex-husband, against whom she had obtained a restraining order following the kidnapping and attempted murder of her mother. Although the ex-husband had been in jail on these charges, he was released on bail and attempted to contact the petitioner on a number of occasions. The petitioner had informed the respondent of the threat of danger posed by her ex-husband and provided her employer with a copy of the restraining order as part of her request to relocate to another office following her ex-husband's release from prison. The petitioner's request was granted, and she was transferred to another office. However, her ex-husband was able to locate her just prior to the May 23rd attack when a receptionist with the employer unknowingly informed him of the petitioner's new location.

Following the attack, the petitioner filed a claim with the Division of Workers' Compensation seeking medical and indemnity benefits. The respondent denied the claim based on its assertion that her injuries did not arise out of her employment. At the conclusion of a bifurcated trial as to the issue of compensability, the Judge of Compensation found that the assault lacked any nexus to the petitioner's employment as it arose out of her relationship with her ex-husband, which was of a completely personal nature. He dismissed the petitioner's claim with prejudice. This appeal ensued.

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Coleman v. Cycle Transformer Corp.*, 105 N.J. 285 (1986), in which the New Jersey 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 "but for test" or "positional risk test" includes as one of its components an assessment of the type of risks that cause the injury. Those risks distinctly associated with the employment—such as when a painter falls from a scaffolding—or neutral risks that arise from uncontrollable circumstances—such as being struck by lightning at work—are compensable. However, solely personal risks that have little, if any, connection with the employment are not compensable.

Applying the *Coleman* analysis, the Appellate Division found that the petitioner's injuries were not compensable because they arose out of a situation entirely unrelated to her employment. As the Appellate Division reasoned:

[T]he judge determined the incident could have taken place anywhere because the ex-husband initially tried to find petitioner by calling her cell phone, as he did not know where she was living, and only contacted her office after he decided it would be best to meet her in a public setting, which, the judge found, was not limited to her place of employment.

Under the circumstances, the Appellate Division found that the petitioner's assault did not arise out of a risk of employment but, rather, from a risk solely attributable to her own personal circumstances. **II**

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The Judge of Compensation rejected the petitioner's argument that her injuries arose out of her employment because the employer was negligent in disclosing her location to her ex-husband after being advised of his potential threat to her. The Appellate Division concurred with the Judge of Compensation's reasoning that whether an employer actually commits a negligent act is irrelevant to a determination of compensability:

[T]he Act provides employees who have sustained work-related injuries medical treatment and limited compensation without regards to the negligence of the employer. Accordingly, regardless of whether the [State] committed a negligent act, liability would be imposed if petitioner's injuries arose out of her employment. Like the judge of compensation, however, we conclude they did not.

DELAWARE WORKERS' COMPENSATION

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



Paul V. Tatlow

The Superior Court affirms the denial of the employer's termination petition where the labor market survey evidence did not establish that employment was available to the claimant who was an undocumented worker.

Roos Foods v. Magdalena Guardado, (C.A. No. S15A-05-002-ESB – Decided January 26, 2016)

The claimant, whose job was to operate a machine that made cream, suffered a compensable work injury on June 22, 2010, when she slipped on the floor at work and injured her left wrist. She underwent surgery that included a fusion of the left wrist and was later released to light-duty, one-handed work. The evidence also showed that the claimant was 38 years old, had been born in El Salvador and had come to the United States in 2004. She had the equivalent of a high school diploma but no other training. She only spoke Spanish and was not able to legally work in the United States.

The Board denied the employer's termination petition, finding that the claimant was a prima facie displaced worker and that the employer had not shown that work was available to the claimant given her work capabilities and physical limitations.

The employer's primary argument on appeal was that the Board had erred in considering the claimant's immigration status since it was unrelated to the work injury. The Board had made three critical findings in reaching its decision denying the termination petition. First, the employer met the burden of showing that the claimant was medically employable. Secondly, the claimant had rebutted that presumption by showing that she was a prima facie displaced worker. Third, the employer did not present evidence showing that there were regular employment opportunities within the claimant's capabilities and limitations.

With regard to the first finding, the Superior Court concluded that the claimant was, in fact, medically employable since both medical experts agreed that she could do one-handed, light-duty work with the right hand and use her injured left hand as an assistance hand.

As to the displaced worker finding, the court concluded that the claimant was a displaced worker on a prima facie basis. The court commented that the claimant, given her limited vocational capabilities and physical limitations from the work injury, would have a very difficult time finding a job.

The Board's third determination was the key one; whether they properly determined that the employer failed to provide a Labor Market Survey showing that jobs were available to the claimant taking into consideration her capabilities and limitations. The employer's evidence consisted of vocational testimony showing that eight potential jobs were located which were said to be suitable for her. Importantly, the vocational consultant was not aware of the claimant's legal inability to work

in the United States and did concede that it would be relevant to employers, but that they had not been asked whether they would hire an undocumented worker. The court concluded, based on the evidence, that the Board had properly found that the employer did not carry its burden to show that work was available to the claimant with her qualifications and limitations since the vocational witness could not testify that there was any work available to the claimant in light of her undocumented worker status.

The court also rejected the employer's contention that the Board had improperly considered the claimant's undocumented worker status since it was unrelated to the work injury. To the contrary, the Superior court stated that the employer must take the claimant as she was when they hired her and at that time she had been an undocumented worker. ||

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The court relied on the decision in *Campos v. Daisy Construction Company*, 107 A.3d 570 (Del. 2014), which stands for the proposition that an employer who hires an undocumented worker who later suffers a work injury properly bears the burden of the difficulty in establishing job availability for such a claimant. The court in this case likewise stated that the employer could have prevented the problem from which it was complaining if it had only checked the claimant's immigration status before hiring her. Since they had not done so, the court states that the employer must now deal with the difficult problem of showing available work for the claimant given her age, low education level, lack of skills and work experience, physical limitations and illegal immigration status. The likelihood is that the Delaware Supreme Court will have the last word on the outcome of the *Roos Foods* case.

NEWS FROM MARSHALL DENNEHEY

Niki T. Ingram, Director of the Workers' Compensation Department, has been named a Fellow of the College of Workers' Compensation Lawyers. Niki was inducted into the College during the American Bar Association's 2016 Workers' Compensation Midwinter Seminar and Conference, held March 11 – 12 in New Orleans. The College of Workers' Compensation Lawyers was established to honor attorneys who have distinguished themselves in the practice of workers' compensation law. Niki is among a select group of attorneys in Pennsylvania, and across the country, who have earned this prestigious honor.

John Zeigler (Harrisburg, PA) will be speaking at the RIMS 2016 Annual Conference & Exhibition on April 11, 2016. In "The War on Employee Misclassification: Risks and Costs to Employers and Insurers," John will review state and federal actions and trends on the misclassification of employees and the impact on employer and insurer costs and risk. When workers are labeled independent contractors, employers avoid taxes as well as workers' compensation and unemployment insurance coverage. Conversely, misclassified workers who file suit for injuries sustained on worksites create tremendous liability risk for both employers and insurers. Joining John as a presenter is Stephanie Watts, a resolution manager at Gallagher Bassett. For more information, [click here](#).

Judd Woytek (Allentown, PA) recently obtained two favorable decisions in Federal Black Lung claims for his clients. In the first, Judd successfully argued to the Administrative Law Judge that the miner had failed to prove that he was totally disabled due to coal workers' pneumoconiosis. The judge found that the miner had worked in the coal mines for 13 years and was suffering from clinical pneumoconiosis, but that he had failed to prove that he suffered from a totally disabling respiratory or pulmonary condition or that he was totally disabled due to pneumoconiosis. The judge, therefore, denied the miner's claim for benefits.

In the second matter, **Judd** successfully argued to the Administrative Law Judge that the miner's widow was not entitled to survivor's benefits under the Black Lung Benefits Act. The miner had not successfully obtained benefits during his lifetime, but the widow alleged that his death at 102 years of age was caused by coal workers' pneumoconiosis. Judd proved through medical evidence that the miner did not definitively have coal workers' pneumoconiosis and that he was not totally disabled due to pneumoconiosis at the time of his death. Therefore, the judge found that the widow could not meet her burden of proving that her husband's death was due to pneumoconiosis and that she was not entitled to survivor's benefits. ||