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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

A claimant working in a modified-duty position at her regular wages with her pre-injury employer, who later voluntarily accepts a lower paying job created for her by her pre-injury employer, suffers a loss of earning power caused by the work injury.

Holy Redeemer Health Systems v. WCAB (Lux); No. 768 C.D. 2016; Filed Jun. 6, 2017; Judge Brobson

The claimant worked for the employer as a Telemetry RN. She sustained an injury to her low back on October 11, 2011, and the employer filed a Medical-only Notice of Compensation Payable. The claimant later filed a claim petition, alleging partial disability from the work injury. The employer in turn filed a termination petition, alleging the claimant had fully recovered from her work injury.

The evidence showed that after the work injury, the claimant was released to work light duty. She did not experience any time off from work following the injury, and she returned to a modified-duty position with the employer in the pre-injury Telemetry Unit with no loss of wages. In February 2013, while the claimant was working the modified-duty Telemetry RN job, in addition to a job in the employer's nursing office, the employer created a permanent, available position in their Care Management Department and offered it to the claimant. The claimant was not forced to leave her modified-duty job, nor was she required to stop working that job by her treating physician. She accepted the job voluntarily. The job, though, paid less than her pre-injury average weekly wage, and her attempts to return to her pre-injury Telemetry RN position were unsuccessful. Therefore, the Worker's Compensation Judge granted the claim petition and denied the termination petition.

The employer appealed to the Worker's Compensation Appeal Board, which affirmed. The employer then appealed to the Commonwealth Court, arguing that the testimony of the claimant's medical expert confirmed that the claimant was capable of performing the light-duty position made available to her by the employer and that she never testified that her restrictions due to the work injury forced her to switch to the permanent position in the Care Management Department. The court considered the issue of the effect of the claimant's voluntary acceptance of the permanent Care Management position and whether that resulted in a loss of earning power attributable to the her work injury. The court concluded that it did and dismissed the employer's appeal.

The court pointed out that the claimant did not seek out and apply for the position and noted that the employer specifically created the job and offered it to the claimant. The court said that they could not ignore the fact that the employer, on its own, created and offered the claimant a permanent light-duty position within her restrictions at a loss of earnings, for which it claimed no liability. The court viewed the employer's actions as an attempt to evade the payment of benefits by creating and offering a permanent, lower-paying position that was within the restrictions of the claimant's work injuries. II

An uninsured employer that fails to commence payments following a decision awarding benefits is not relieved of its payment obligations by its financial inability to do so. The Uninsured Employer's Guaranty Fund does not shield an employer from its obligations under the Act.

CMR Construction of Texas v. WCAB (Begly); No. 693 C.D. 2016; Filed Jun. 26, 2017; Judge McCullough

The claimant worked as a sales representative for the employer, soliciting contracts to perform home repairs. In January 2012, in the course and scope of his employment, the claimant fell from a roof and

sustained multiple injuries. He filed a claim petition, which the employer denied on the basis that the claimant was an independent contractor, not an employee. The employer did not have worker's compensation insurance coverage. Therefore, the claimant filed a notice of claim against the Uninsured Employer's Guaranty Fund and, subsequently, a claim petition against the Fund.

The Workers' Compensation Judge granted the claim petition and awarded the claimant temporary total disability benefits as well as partial benefits. The judge also found that the claimant was an employee, not an independent contractor, and directed the Fund to pay the award should the uninsured employer fail, or be unable, to pay.

The employer appealed to the Appeal Board, but its request for supersedeas was denied. In August 2014, the claimant filed a penalty petition alleging that the employer violated the judge's decision and order.

At a hearing on the penalty petition, the employer stipulated that it had not made any payments to the claimant. It pointed out that the Fund began making payments to the claimant as of September 1, 2014. The employer's vice president testified that the employer could not afford to comply with the order due to its poor financial condition. He also said that the employer's financial condition had improved and that they were able to enter into an agreement with the Fund to make monthly payments to them in the amount of $1,000. The witness admitted, though, that the employer made no disability payments to the claimant or paid any of claimant's medical bills, as directed by the Workers' Compensation Judge's April 2014 order.

The Workers' Compensation Judge granted the claimant's penalty petition. The employer appealed to the Appeal Board, which affirmed. On appeal to the Commonwealth Court, the employer argued that the Board ignored the legislative intent behind the creation of the Fund and its demonstrated financial ability to comply with the judge's award. The court pointed out that the employer failed to offer any authority to support an argument that an inability to pay forecloses the imposition of penalties. Additionally, the court rejected the employer's argument on the legislative intent of the Fund. The court said that the Fund was created to protect an injured worker and his right to be compensated for work injuries, not to protect an uninsured employer from its obligations under the Act. II

Although the claimant's injuries stemmed from his misguided decision to jump from a roof, that act was not so deliberate and intentional that it placed the claimant outside the course and scope of his employment.

Wilgro Services, Inc. v. WCAB (Mentusky); No. 1932 C.D. 2016; Filed Jun. 28, 2017; Judge McCullough

While working at a job site, the claimant jumped off a two-story roof and injured his feet and back. The employer issued a notice of denial, contending that the injuries were not work-related and that the claimant's jump from the roof was a deliberate and intentional act. The claimant later filed a claim petition, in response to which the employer maintained that the claimant was beyond the scope of employment and, thus, benefits were not payable.

The claimant testified that he was working as a mechanic for the employer and was assigned to work on a unit located on the roof of a building. He previously accessed the roof by using a ladder that had been placed by roofers, who were also working on the building. He also used the ladder to get down from the roof on his lunch break. On the date of injury, after finishing his job, he gathered his tools and supplies. He looked around and noticed that no one else was on the roof and the ladder was gone. He attempted to try a roof hatch, but it was locked. He did not attempt to call the building owner, because whenever he did, he could never get through to a live person. He also did not call the owner's maintenance man, since he saw him at lunch and was told by him that he was leaving at 1:00. The claimant never considered calling 911 or an emergency number. Rather, he waited for 30 minutes near the employer's entrance, waiting to see if someone entered or exited the building. He saw no one and, therefore, opted to jump from 16 to 20 feet into an area covered with mulch. He felt immediate pain in both feet and was taken by ambulance to a local hospital.

The Workers' Compensation Judge granted the claim petition, finding that the claimant was a traveling employee and furthering the employer's business. The judge further found that the claimant did not intentionally or deliberately attempt to injure himself, was not involved in horseplay when he jumped, did not violate any positive work order, and had not considered jumping from the roof as an appropriate means of getting down at the end of his work day.

The employer appealed to the Appeal Board, which affirmed. On appeal to the Commonwealth Court, the employer argued that the intentional, pre-meditated, deliberate, extreme and high-risk nature of the claimant's conduct precluded benefits under the Act. The court rejected this argument, agreeing with the Workers' Compensation Judge and the Board that the claimant was a traveling employee. The court pointed out that, while jumping off a roof was not one of the claimant's job duties, exiting a worksite was a necessary component of any job and advanced the employer's business and affairs. While the decision to jump was not advisable, it did not rise to the level of job abandonment, and, therefore, the claim was compensable. II

For purposes of an offset under Section 204(a) of the Act, claimant's joint and survivor annuity constitutes the benefit to which an employer is entitled to offset.

David C. Harrison v. WCAB (Commonwealth of Pennsylvania); No. 658 C.D. 2016; Filed Jun. 28, 2017; Judge Simpson

The claimant sustained a work injury in June 2010, which was acknowledged by the employer. The claimant's average weekly wage was $1,273.59, and his compensation rate was $845 per week. In February 2012, the employer issued a notice of worker's compensation benefit offset based on information it received from the Pennsylvania State Employees' Retirement System (PSERS). That information stated that the employer was entitled to a pro rata pension offset for benefits the claimant received in the amount of $1,885.03 per month. The employer calculated the weekly offset to be $434.34, thus reducing the claimant's compensation rate to $410.66 per week. The claimant filed a petition challenging the offset, as well as penalty and a reinstatement petitions.

In connection with these petitions, the employer presented testimony from a claims representative for the third party administrator, the PSERS' director of benefit administration and an actuary employed by PSERS. The benefits director testified there were various payment options the claimant could select from, some of which provided a greater monthly payout than others. However, PSERS does not take into consideration the selected option in calculating the offset. Rather, the offset is always

based on the participant's maximum single life annuity (MSLA). The actuary testified that a calculation is made to determine the extent to which the Commonwealth funds an employee's pension by determining how much money will be needed to fund the pension for the rest of his life. Once that determination is made, a calculation as to the amount the employee contributes over the course of his life can be made. When the employee's contribution is deducted from the total amount of funding needed, the amount the Commonwealth contributes to the pension can be determined.

The Workers' Compensation Judge dismissed the claimant's petitions, concluding he failed to meet his burden of proof. The judge found the calculations for the pension offset to be sound and the methodology accurate in calculating the employer-funded portion of the defined benefit plan. The Appeal Board affirmed on appeal, pointing out that, even though the claimant took a lower paying option, that decision did not impact the amount of money required to fund the claimant's pension for the remainder of his life, as well as his wife's life.

The claimant appealed to the Commonwealth Court, which affirmed the Board. The claimant argued that the actuary erred in taking an offset in the amount of $1,885.03 per month since he opted for a lower monthly payout, which also provided for pension payments to his spouse should he predecease her. Thus, the claimant actually received approximately $700 less per month than if he opted for the standard option (MSLA). The court disagreed, holding that the claimant's pension benefit under the choice he selected remained the actuarial equivalent to the standard option. Although the claimant was receiving a reduced payment under the option he selected, the employer was not receiving a corresponding reduction in the amount it must fund the claimant's pension benefits. The court held that under Section 204(a) of the Act, the employer is entitled to a workers' compensation offset for pension benefits an employee receives to the extent funded by the employer. **II**

New Jersey Workers' Compensation

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Dario J. Badalamenti

Appellate Division affirms order granting the petitioner's motion for medical and temporary benefits based on a finding that the petitioner's disability was the result of the occupational stresses of his subsequent employment and not simply a worsening of his prior work injury.

Hendrickson v. United Parcel Service, Docket No. A-3267-15T2, 2017 N.J. Super. Unpub. LEXIS 1706 (App. Div., decided Jul. 11, 2017)

The petitioner was employed by the respondent in various capacities for approximately 30 years, beginning in 1977. While working as a package car driver in 2002, the petitioner sustained an injury to his low back as he was lifting a package. He was diagnosed with bulging discs at L4-L5 and L5-S1. He filed a claim with the Division of Workers' Compensation and received an award of 15% of partial total disability. Due to complaints of continued and worsening low back pain, the claim was reopened in 2004, at which time the petitioner received an award of 17 ½% of partial total with a credit for his prior award. The petitioner's employment with the respondent continued.

In 2006, the petitioner began working as a feeder driver, driving tractor-trailers throughout the New York metropolitan area. He drove a single-axle truck without air ride suspension, which he testified transmitted pronounced shock and vibration due to the pot-hole-riddled roads he drove regularly. The petitioner testified that his low back pain was exacerbated by the poor suspension of the vehicles he drove and the poor road conditions he experienced on a daily basis. He underwent occasional acupuncture treatments, which did little to alleviate his pain.

The petitioner began working as a shifter driver in 2008 or 2009. As the petitioner testified, a shifter uses his tractor to move trailers at slow speeds in order to reposition them around the terminal. His work involved backing his tractor into a trailer and "hitting the pin" in order to connect the two. He testified that every time he made that connection, which was approximately 75 times a day, there was a strong impact, which he compared to "getting punched in the back." The petitioner's low back pain worsened during his tenure as a shifter driver.

In 2012 or 2013, as a result of pain and numbness radiating down his legs bilaterally, the petitioner sought treatment with a spine specialist, who, based on MRI findings, recommended bilateral nerve root blocks at L4-L5 and a disc decompression at L3-4 and L4-5. The petitioner underwent surgery in March of 2014 to decompress the disc at L4-5 and remained out of work for several weeks. Although he received a brief period of relief following surgery, his pain soon returned, and he was again instructed out of work pending a recommendation for additional surgery.

The petitioner filed an occupational claim with the Division of Workers' Compensation alleging exposure to extreme occupational stress for the period from 2006 through 2014, resulting in injury to his low back. He filed a simultaneous Motion for Medical and Temporary Benefits, seeking authorization for the recommended surgery.

The respondent denied the claim based on its assertion that the petitioner's injuries were the natural progression of the trauma he sustained in 2002. The respondent asserted that the claim was barred by *Peterson v. Herman Forwarding Co*., 267 N.J. Super. 493 (App. Div. 1993). In *Peterson*, the petitioner suffered a work-related injury and then asserted a claim of occupational exposure against a subsequent employer, alleging that the subsequent employment aggravated the original injury and caused increased disability. The *Peterson* court held that the petitioner's subsequent employment did not legally and materially contribute to his disabilities and that, therefore, the subsequent employer could not be held liable.

In granting the petitioner's motion, the Judge of Compensation rejected the respondent's contention that the petitioner's claim was barred by *Peterson*. Rather, the judge likened the petitioner's claim to

Singletary v. Wawa, 406 N.J. Super. 558 (App. Div. 2009), where the Appellate Division held that the determinative issue in finding an employer liable is whether the employment materially contributed to the petitioner's disability. In that respect, the Appellate Division explained:

> [T]he length of time worked for a particular employer may be relevant. Very short periods of employment, such as in *Peterson* ... , may allow no reasonable inference of material contribution to disability. In contrast, long periods of physically taxing employment, such as the five years that Singletary worked at Wawa after her December 2001 accident, may reasonably support a finding of material contribution to disability.

The Judge of Compensation concluded that here, as in *Singletary*, the petitioner's continued employment with the respondent resulted in additional "physical insult" to his low back that was "materially attributable to [his] job duties." As such, the judge granted the petitioner's motion. This appeal ensued.

The Appellate Division affirmed the judge's ruling, finding that, based on the petitioner's detailed testimony about the different stresses to his back from the different jobs he held with the respondent, the judge correctly concluded that, "[T]he overwhelming cause of Hendrickson's current medical condition was his work at UPS from 2006 to 2013, making this case consistent with *Singletary* and unlike *Peterson*." ||

Side Bar

In *Singletary*, the Appellate Division held that there must be a finding of objective medical evidence of a significant increase in the petitioner's disability that is directly attributable materially to a meaningful degree to the work performed by the petitioner in her subsequent employment. Of significance, the Appellate Division made it a point of clarifying that, "[t]his is not a case where [petitioner's] subsequent employment merely caused pain from pre-existent conditions to be manifested. Rather, Singletary suffered additional physical insult every day she worked at Wawa because of the heavy lifting and other stressful tasks required by her job."

Delaware Workers' Compensation

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Paul V. Tatlow

Superior Court holds that the Board properly denied the claimant's request for reimbursement of a medical expert witness fee when his counsel had incurred an unnecessary expense by permitting the deposition to proceed despite having already received a formal offer of settlement from counsel for the employer.

Torres-Molina v. Allen Family Foods, (C.A. No. S16A-05-001 THG – Decided Nov. 7, 2016)

In this appeal taken by the claimant, the issue before the Delaware Superior Court was whether the Board had erred in denying the claimant's request for reimbursement of the witness fee of the claimant's medical expert. The claimant had filed a DCD Petition, alleging she sustained a work injury to her low back on January 13, 2015, and seeking acknowledgment of the injury and payment of all medical expenses. The petition was filed on November 16, 2015, and by letter dated February 29, 2016, counsel for the employer sent an offer of settlement to claimant's counsel, agreeing to acknowledge the injury as compensable and to pay all medical bills upon receiving proper documentation. Counsel for the claimant did not respond to the settlement offer until March 14, 2016, when he advised that the offer would be accepted, provided the employer agreed to pay the expert deposition fee of Dr. Green, which had, in fact, been taken on that same day.

The case went to a hearing before the Board on March 31, 2016, where claimant's counsel indicated that the sole issue was whether the employer was obligated to pay Dr. Green's expert fee. Dr. Green's deposition was submitted into evidence, and the doctor testified that the treatment he provided to the claimant was medically necessary and reasonable. He had also testified that, pursuant to his office policy, he would not charge a deposition fee so long as the deposition was cancelled one week ahead of the scheduled date. The Board denied the claimant's request for payment of the expert witness fee.

On appeal, the court affirmed the Board's decision, holding that the Board had correctly identified the issue and that the decision denying the request for reimbursement of the expert fee was free from legal error and supported by substantial evidence. In so holding, the court reasoned that claimant's counsel had the formal settlement offer in hand as of February 29, 2015, yet failed to communicate it to the claimant due to a language barrier. According to the court, counsel for claimant could have reached out to the employer's counsel and acknowledged receipt of the offer and requested additional time to respond. Instead, claimant's counsel chose to proceed with taking the deposition of Dr. Green when there was clearly no need to do so given the fact that the employer had acknowledged the injury as compensable. The court commented that counsel for the claimant had received the employer's offer to accept the claim two weeks prior to the scheduled deposition. Therefore, by allowing the deposition to go forward, counsel had clearly incurred an unnecessary expense. As such, the Board did not err in finding that the employer had no obligation to pay such an unnecessary medical witness fee. ||

News from Marshall Dennehey

For the fifth year running, the *Philadelphia Business Journal* has named Marshall Dennehey Warner Coleman & Goggin one of the Philadelphia region's "Best Places to Work." 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 is proud to have earned this annual recognition since 2013. **Read more…**

Michele Punturi (Philadelphia, PA) successfully litigated a termination petition on behalf of a retailer. The claimant sustained a hand injury for which he underwent surgery. Michele presented substantial, competent and credible evidence via the defense medical expert, who had the opportunity to review all of the claimant's medical records and diagnostic study films, as well as perform two comprehensive physical examinations. The doctor ultimately concluded upon the second exam that the claimant was fully recovered. His testimony was accepted by the Workers' Compensation Judge, and the termination petition was granted.

In another matter, **Michele** successfully defeated the claimant's petition to review a utilization review and successfully terminated the claimant's benefits. The Workers' Compensation Judge based his decision on a very detailed analysis of the IME expert's opinion and his review of all of the medical records and diagnostic studies, as well as the comprehensive physical examination, which was recognized as extremely thorough and having considered the claimant's complaints, the accepted injury and the lack of objective physical findings. In addition, the utilization reviewer's report was submitted, along with addendum reports further challenging the treatment of the treating physician, who had been treating the claimant since 2009. The utilization reviewer's competent expertise and ability to provide a very thorough and detailed analysis was contrary to the treating physician, who failed to support the basis for his treatment and any ongoing disability related to the work injury.

Ross Carrozza (Scranton, PA) successfully prosecuted a termination petition in a case where the claimant had his leg run over by a garbage truck while at work. After the recovery period, the claimant contended that he could not perform his pre-injury job, or go back to work, and that he needed further treatment for RSD/Complex Regional Pain Syndrome. Ross was able to successfully prosecute the petition to terminate benefits before the Workers' Compensation Judge, who found that the claimant had fully and completely recovered from his work-related injuries and that he was able to return to work without restriction.

Lori Strauss (Philadelphia, PA) successfully defended claim and penalty petitions filed by the claimant in which he alleged he sustained Charcot foot and specific loss of three toes as a result of an injury that occurred at work. Lori offered testimony from three employer fact witnesses. Additionally, there was testimony from medical experts regarding the serious nature of the injury and causality. During cross examination, Lori was able to obtain an admission from the treating doctor that an incident that occurred while the claimant was on vacation was a substantial, contributing factor to the need for surgery. Ultimately, the Workers' Compensation Judge found the employer's fact witnesses and medical expert to be more credible than the claimant and his doctor. There was a significant lien, which the employer would have also been responsible for had the claim been found to be related. However, both petitions were dismissed, and no appeal was filed by the claimant. ||