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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

A flight attendant was in the scope of her employment when she was injured on a shuttle bus for airport employees she was using for transport to the employee parking lot.

US Airways, Inc. and Sedgwick Claims Management Services, Inc. v. WCAB (Bockelman); 612 C.D. 2017; filed Feb. 22, 2018; by Judge Brobson

The claimant worked as a flight attendant. She drove her own vehicle to the airport and parked in one of two designated employee parking lots for all airport employees. After doing so, she would use a shuttle bus for transport to and from the airport terminal. The employer did not control the shuttle buses, did not require use of the airport employee parking lot, and did not direct employees on how they should commute to work.

On the date of injury, the claimant parked her car in the employee parking lot and rode the shuttle bus to the terminal. At the end of her work day, she departed the terminal to the employee shuttle bus stop. After boarding the shuttle bus, while attempting to lift her suitcase on the luggage racks, she stepped in water on the floor, causing her to slip and fall, injuring her left foot. The claimant filed a claim petition. In its answer, the employer denied that that claimant was in the scope of her employment at the time of the injury.

The Workers' Compensation Judge granted the claim petition, concluding that the injury occurred on the employer's premises, the claimant's presence on the shuttle bus was required by the nature of her employment, and the injury was caused by the condition of the premises. The Workers' Compensation Appeal Board affirmed on appeal.

In its appeal to the Commonwealth Court, the employer argued that the injury did not occur on its premises. Because the employer did not own, lease, or control the shuttle bus and parking lot, they were not integral to the employer's business. Additionally, the employer argued that the claimant was never required to use the shuttle bus.

The Commonwealth Court rejected the employer's arguments and affirmed the decisions of the Workers' Compensation Judge and Appeal Board. The court concluded that, although the employer did not own or exercise control over the parking and shuttle services, the claimant used the shuttle bus as a customary means of ingress and egress, which the employer understood was part of doing airport business. The court found that the shuttle bus was such an integral part of the employer's business that it was part of the employer's premises. Additionally, the court held that the claimant's presence on the bus was necessary and required by the nature of her employment because it was the means by which she traversed between her work station and the parking lot for airport employees. The absence of a directive by the employer instructing the claimant to utilize the shuttle bus was not a factor in the court's analysis. II

Delaware Workers' Compensation

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

Paul V. Tatlow

The Superior Court holds that the Board's decision terminating an undocumented worker's total disability benefits is based upon substantital evidence and is free from legal error.

Magdalena Guardado v. Roos Foods, (C.A. No.: S17A-05-003 RFS – Decided Feb. 7, 2018)

This decision is the latest chapter in this closely watched case involving an undocumented worker and the efforts by the employer to terminate her total disability benefits. The readers will recall that in 2016 the Delaware Supreme Court held that the claimant's status as an undocumented worker is not relevant to the determination of whether she is a *prima facie* displaced worker, but it can be used as a factor when the claimant seeks to show she actually is a displaced worker.

At the remand hearing held before the Board on April 27, 2017, the employer presented testimony from the vocational consultant who conducted the Labor Market Survey and identied 17 potential jobs that were said to be within the claimant's physical restrictions and vocational qualifications. In addition, the employer presented testimony from Dr. Toohey, an Assistant Professor of Economics at the University of Delaware. Briefly, his testimony indicated that, based upon his research and analysis of various data on undocumented workers in Delaware, it was his opinion there were thousands of undocumented immigrants employed in Delaware in each of the occupations and industries corresponding to the jobs listed in the Labor Market Survey. The Board accepted that testimony and granted the review petition, which sought to terminate the claimant's total disability benefits. Claimant's counsel appealed, asserting the Board erred in terminating the total disability benefits since the evidence did not establish the availability of work within the claimant's capabilities and restrictions. That was the issue before the Superior Court in the decision now being discussed.

Judge Stokes of the Superior Court noted that the Board had made three findings in reaching its decision granting the review petition. First, the Board had found that the employer met the burden of showing that the claimant was medically employable. Since the parties had actually stipulated that the claimant's medical and physical ability to work within certain restrictions remain unchanged from the original hearing, there was no question that she was medically employable.

The Board's second finding was that the claimant had rebutted the presumption that she was medically employable by showing that she was a *prima facie* displaced worker. On this issue, the court noted that the undisputed testimony indicated the claimant was 40 years old, unskilled, only spoke Spanish, had the equivalent of a high school degree from El Salvador, could only use her right hand for light-duty work, her left hand as an "assistance hand," wore a brace on her left hand, had only worked for five years, had started taking English classes but did not yet speak it, and had learned to use a smart phone but was still learning how to use a computer. Based on those facts, the court concluded that the Board had properly found that the claimant was a *prima facie* displaced worker.

The third finding made by the Board was that the employer had presented evidence showing that there were regular employment opportunities within the claimant's capabilities and limitations. This was the key issue since the claimant was arguing that the Board had erred in making this finding. In analyzing this issue, it was noted that when the Supreme Court decided the earlier appeal in this case, they were presented with an issue of first impression, namely, whether an employer can meet its burden of proof that work is available to an undocumented worker and what constitutes sufficient evidence to satisfy that burden. The Supreme Court had stated that what is required of the employer who has the burden of showing that jobs are actually available for an undocumented worker is to address that reality by presenting reliable market evidence that employment within the worker's capabilities is available to undocumented workers. However, importantly, the Supreme Court stated that there is no requirement that the employer must present affidavits from prospective employers confessing to their willingness to knowingly violate the law by employing undocumented workers.

The Board's decision, following the remand hearing, had agreed with the decision of the vocational consultant to not inform prospective employers about the claimant's undocumented worker status because it would be unrealistic to have employers admit that they may illegally hire undocumented workers. Despite the vocational consultant not doing that, the Board found that the updated Labor Market Survey provided reliable and sufficient information regarding actual jobs available to the claimant within her capabilities and limitations. Likewise, the Board found that the testimony of Dr. Toohey provided reliable and relevant evidence on the prevalence of undocumented workers in Delaware in the specific occupations and industries listed on the Labor Market Survey.

The Superior Court concluded that the Board's decision to terminate the claimant's total disability benefits was based upon substantial evidence and free from any error of law. Specifically, the court stated that combining the Labor Market Survey evidence and the testimony of Dr. Toohey, the Board had properly found that the employer was successful in establishing the appropriate nexus between actual jobs available in the Labor Market Survey and the prevalence of undocumented workers in those job categories in Delaware. Therefore, by so doing, the employer had successfully rebutted the claimant's showing that she was a *prima facie* displaced worker. The Superior Court concluded that the employer had complied with the Supreme Court's directives on presenting "reliable market evidence that employment within the worker's capabilities is available to undocumented workers." The Board's decision was affirmed, although it is likely that this case will once again be going to the Supreme Court of Delaware. ||

Florida Workers' Compensation

By Linda W. Farrell, Esquire (904.358.4224 or lwfarrell@mdwcg.com)

Linda W. Farrell

The 1st District Court of Appeal rules that statue of limitations was not tolled by fusion hardware.

Ring Power Corp. and USIS v. Andrew Murphy, No. 1D17-1316, 1st DCA Fla., Decision date Feb. 23, 2018

The employer appealed a ruling from the Judge of Compensation Claims, who held that the statute of limitations was tolled by rods and screws from a fusion surgery. The claimant had a fusion surgery a few months after his 2006 work injury. Rods and screws were used to stablize his spine while the bone grew back together. Within one year, the fusion was solid. Therefore, it was argued that they no longer performed any fuction, although they remained attached and inside of the claimant.

The employer last provided workers' compenation benefits in 2013. Later in 2016, the claimant filed a petition for benefits. The employer asserted a statute of limitations defense. The claimant cited Section 440.19(2), which states that the time period is tolled "for a period of one year from the payment of compensation or furnishing of remedial treatment." The claimant further cited *Gore v. Lee County School Board*, 43 So. 3d at 849, where the 1st DCA held that the "continued use" of a medical apparatus will toll the statute of limitations. That case involved a claimant who used a knee prosthesis, which the court opined counted as continual, remedial treatment.

The Judge of Compensation Claims agreed with the claimant and held that the statute of limitations was tolled due to the fusion hardware.

On appeal, the 1st DCA said that *Gore* does not apply here because the claimant was not "using" the rods and screws. According to the court, the "rods and screws were used for a temporary purpose, but for years they have served no function at all. Therefore, their placement does not toll the statute of limitations." **II**

News from Marshall Dennehey

Andrea Rock (Philadelphia, PA) has been named the 2018 Co-Chair of the Philadelphia Bar Association's Workers' Compensation Section. The section serves as an ongoing resource for members practicing in the area of workers' compensation.

On Thursday, April 12, 2018, **Niki Ingram** and **Tony Natale** (Philadelphia, PA) will be presenting "Workers' Compensation Fraud – Don't Forget the Data!" at this year's Philly I-Day conference. This engaging session will focus on the application of workers' compensation fraud intelligence. The discussion will focus on changes in the practice of workers' compensation law, identifying red flags of fraud, the interplay between lawyers and doctors, and perspectives on fraud from all involved parties. For more information or to register for this event, please visit www.phillyi-day2018.com.

On Thursday, April 13, 2018, **Tony Natale** (Philadelphia, PA) is presenting "Workers' Compensation Fraud – Don't Ignore the Data!," at Pennsylvania's 2018 Insurance Fraud Conference. The session will focus on the application of workers' compensation fraud intelligence for a dual purpose: reporting the claim to the authorities where applicable, but even more compelling, using the data in each case to shroud the veracity of the claim itself. For more information and to register, click here.

On Friday, April 13, 2018, **Niki Ingram** (Philadelphia, PA) is speaking at the 2018 Smith College Women of Color Conference. In "Finding Your Place at the Table," Niki will share professional development strategies for thriving—and excelling—in a male-dominated business culture. She will discuss how communication, behavior and leadership are the keys for women of color to succeed in the modern workplace. For more information, click here.

On Thursday, April 12 and 13, 2018, **Heather Byrer Carbone** and **Linda Wagner Farrell** (Jacksonville, FL) are speaking at the 2018 Florida Bar Workers' Compensation Forum. Heather is presenting "Average Weekly Wage and Indemnity Benefits (Other Than PTD)," while Linda is presenting "Medical Marijuana in Workers' Compensation." The Forum will feature advanced legal programming, centered around the Bar's traditional Workers' Compensation Board Certification Review Course. Attendees will learn from some of today's most qualified and highly recognized Board Certified speakers, judges, medical and industry professionals. For more information, click here.

Tony Natale (Philadelphia, PA) successfully defended a regional can corporation in the litigation of a brain injury case. The claimant was struck in the lower extremities by a form of sheet metal, which caused him to become unconscious. Nearly three years later, he filed a petition in which he alleged that he sustained a brain injury with post concussion syndrome and cervical disc herniations as a result of the incident. Tony presented fact witness testimony from witnesses

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at the scene of the accident who directly contradicted the claimant's version of the facts. Moreover, Tony demonstrated the weaknesses in the claimant's medical expert's opinions on cross examination as to causation. The Workers' Compensation Judge found the claimant did not sustain a brain injury, post concussion syndrome or cervical disc herniations related to his employment.

Ashley Talley (Philadelphia, PA) obtained a defense verdict on a claim and review petition, while successfully prosecuting termination and suspension petitions on behalf of a regional non-profit organization. The claimant was involved in two separate work-related motor vehicle accidents while working for the employer. The first accident resulted in left shoulder injuries, and possibly a labral tear (although not accepted by the carrier). The second injury generated a claim for sprains/strains of the left shoulder, left wrist and thoracic spine. A claim petition was filed for wage loss benefits and the inclusion of additional injuries in the nature of cervical segmental dysfunction, cervical radiculopathy, thoracic segmental dysfunction, and an aggravation of a pre-existing labral tear in the left shoulder. Ashley was successful in defending against these injuries, with the exception of a cervical sprain/strain, by attacking the qualifications of the claimant's medical expert and demonstrating that her opinion was based upon equivocal, subjective evidence. This presented highly complex medical questions and required testimony from a board-certified occupational expert and a board-certified orthopedic surgeon to rebut the allegations of the claimant's expert. Ultimately, the Workers' Compensation Judge accepted the employer's argument, finding the medical evidence supported a complete recovery from the work injury, along with an unreasonable refusal of a pre-injury job offer. A suspension and termination of benefits was awarded on this basis, while the claimant's claim and review petitions, although granted in part, had no practical impact on future liability.

Michele Punturi (Philadelphia, PA) successfully defended a national car company in a case that involved prosecuting a termination petition and defending against the claimant's petition for review of the utilization review determination, petition to review compensation benefit off-set, and petition for penalties. The case included a 2013 injury involving low back sprain/strain and an aggravation of degenerative disc disease with radiculopathy and facet arthropathy. The defense expert, a board certified orthopedic surgeon, reviewed all of the claimant's pre- and post-injury medical records and diagnostic study films. The claimant admitted that he had increases of pain with activities not associated with work (long drives, shoveling snow, housework), which he had failed to report to the IME physician or his own treating doctor. The Workers' Compensation Judge ordered the termination of all of the claimant's benefits. The judge also dismissed the claimant's petition to review the URO, finding the treating physician's treatment to be no longer reasonable and necessary. Finally, the claimant's penalty petition was dismissed.

Kacey Wiedt and **John Zeigler** (Harrisburg, PA) are speaking at the Central PA Spring Educational Seminar, hosted by One Call and ReMed. Kacey and John are presenting a "Case Law Update," and will discuss recent court decisions affecting the practice of workers' compensation in Pennsylvania. For more information, click here.