What's Hot in Workers' Comp
Significant Workers' Compensation Case Summaries

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Pennsylvania Workers' Compensation

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Commonwealth Remands Review Petition After Determining The Workers' Compensation Judge's Findings Concerning Medical Evidence Amounted To An Independent Medical Determination Not Based On The Proffered Medical Evidence.

Denise M. Liveringhouse v. W.C.A.B. (ADECCO); 1639 C.D. 2008; filed March 19, 2009; by Judge Smith-Ribner

The claimant suffered a work-related injury on May 4, 2006, accepted via a Temporary Notice of Compensation Payable. The injury was described as right shoulder pain. The defendant filed a Termination Petition based upon a February 2006 opinion of full recovery. A Suspension Petition was also filed concerning the full recovery. The claimant filed a Review Petition alleging additional injuries to the cervical spine, a shoulder strain, and carpal tunnel syndrome. The defendant stipulated to the inclusion of all the injuries with the exception of the carpal tunnel syndrome.

The Workers' Compensation Judge granted the Termination Petition, rendering the Suspension Petition moot. The Review Petition was denied concerning the remaining diagnosis of carpal tunnel syndrome. The Workers' Compensation Appeal Board affirmed the decision of the Workers' Compensation Judge.

The claimant, proceeding pro se, appealed to the Commonwealth Court. The basis of the appeal concerned the Review Petition only and the inclusion of the carpal tunnel syndrome into the description of injury. Two physicians testified on behalf of the defendants. The claimant had presented one physician. The claimant argued that all of the physicians agreed she suffers from carpal tunnel syndrome, yet the Workers' Compensation Judge arrived at the conclusion that she was not suffering from carpal tunnel syndrome. In his decision, the Workers' Compensation Judge found there was no clinical corroboration for the EMG findings concerning the carpal tunnel syndrome. Effectively, the Workers' Compensation Judge found that the claimant did not have carpal tunnel syndrome, ignoring medical evidence to the contrary from both parties' experts. The Commonwealth Court remanded this matter because the question to be answered is whether the condition is work-related, not whether the claimant has carpal tunnel syndrome. The court determined that the Workers' Compensation Judge is not competent to make independent medical determinations. In other words, the decision of the Workers' Compensation Judge did not match up with the medical testimony, as all of the physicians agreed that the claimant was suffering from carpal tunnel syndrome. It was merely a question of whether this was related to the work injury. II

Where The Claimant Seeks Disability Benefits For A Work Injury That Aggravates A Prior Work Injury, The Claimant Must Provide Notice To The Employer Of The Subsequent, Aggravating Work Injury In Accordance With The Act.

Jacqueline Matthews v. W.C.A.B. (Elwyn Institute); 1413 C.D. 2008; filed March 12, 2009; by Judge Leavitt

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In this case, the claimant sustained an injury to her knee when a resident at the facility she worked for kicked her twice on the same day. Later, the claimant sustained an additional injury to her knee when she was involved in a car accident. The claimant was allegedly driving to physical therapy for her original right knee injury at the time of the motor vehicle accident, and she contended the accident worsened her injury.

The Workers' Compensation Judge granted a Claim Petition for benefits for a closed period. The Workers' Compensation Judge specifically found the subsequent motor vehicle accident to be unrelated to the claimant's work injury. The Appeal Board, however, vacated the Workers' Compensation Judge's decision in part, noting that if the accident occurred while the claimant was en route to treatment for a work injury, the injury she sustained in the accident would be compensable as long as she met the necessary burdens. On remand, the Workers' Compensation Judge found that the injuries sustained by the claimant in the motor vehicle accident were related to her original work injury and granted a Claim Petition for total disability benefits. The Appeal Board, however, reversed on appeal, concluding there was no evidence the claimant notified the employer that she had suffered an additional work injury as a result of the motor vehicle accident at any point during the 120-day notice period prescribed by §311 of the Pennsylvania Workers' Compensation Act.

The Commonwealth Court agreed and affirmed the Appeal Board's decision on appeal. The court noted that the claimant failed to provide the employer with the notice required in order for the injuries sustained in the car accident to be compensable, having failed to advance an argument that she was excused from notifying the employer that the injury was work-related. The court also concluded the claimant failed to show that the employer had imputed notice of the additional injuries as there was no evidence the employer's panel doctor, an employee of the insurer, or the employer's counsel were agents of the employer "regularly employed" at the place of employment. II

The Commonwealth Court Holds That The Pennsylvania Workers' Compensation Act Does Not Require An Employer To Reimburse A Claimant For Premium Payments Made To Secure Comprehensive Health Insurance.

Calex, Inc. & Inservco v. W.C.A.B. (Vantaggi); 1788 C.D. 2008; filed March 26, 2009; by Judge Leavitt

The claimant filed a Claim Petition, alleging he sustained multiple injuries in the course and scope of his employment as the result of a motor vehicle accident that occurred in California when the tractor trailer he was operating collided with a guard rail. During litigation, the claimant testified about the costs of his medical treatment and said that part of the costs were paid by New Jersey Medicaid and part by his health insurance coverage, which was provided through the employer's group plan. After the claimant stopped working, he continued his coverage through the employer-sponsored plan by making monthly COBRA premium payments. The claimant's COBRA premium for 10 months of coverage was $3,986.18. The Workers' Compensation Judge issued a decision granting the Claim Petition and ordering reimbursement of the COBRA insurance premium payments made.

Although the Commonwealth Court affirmed the Workers' Compensation Judge's decision awarding benefits, the court set aside the reimbursement of COBRA premium payments. The court held that, pursuant to §306 (f.1) of the Act, the sum total of an employer's obligation for medical compensation does not include payment of premiums for a health insurance policy that covers any and "all illnesses and injuries no matter what they are." II

Where A Claimant Fails To Prove That The Work Injury Was The Cause Of His Wage Loss, The Claimant Is Not Entitled To Reimbursement Of Costs In That He Did Not Prevail On Any Contested Issue.

Robert Reyes v. W.C.A.B. (AMTEC); 643 C.D. 2008; filed March 16, 2009; by Judge Leavitt

The claimant, employed as a cable technician, was involved in a work-related motor vehicle accident. The claimant filed a Claim Petition and alleged total disability as of the date of the accident. Two weeks after the accident, the employer issued a Notice of Compensation Denial, acknowledging a work injury but disputing the claimant's assertion he was disabled by his injury. The employer also filed an Answer to the Claim Petition.

The Workers' Compensation Judge granted the Claim Petition for a closed period, but only as to medical benefits. The Workers' Compensation Judge found that the claimant's wage loss was related to his termination for cause, falsifying work orders and billing for work that was not completed. Noting that the parties agreed that the claimant was in a work-related motor vehicle accident and that the issue in controversy was the nature of the injury and the extent of disability, the Workers' Compensation Judge held that the claimant's loss of earnings was caused by his willful misconduct, not by his work injury. The Workers' Compensation Judge also denied the claimant's request for reimbursement of litigation costs. The Appeal Board affirmed the decision of the Workers' Compensation Judge.

The Commonwealth Court held that both the Workers' Compensation Judge and the Appeal Board correctly determined that the claimant did not prevail on any issue in dispute and properly denied his request for litigation costs. The court pointed out that the Workers' Compensation Judge specifically found that the contested issue in the case was the nature of any injury and extent of disability, a finding which the claimant did not challenge. Moreover, the Notice of Compensation Denial acknowledged the claimant's injury but disputed his disability as a result of the injury. The Notice of Compensation Denial did not dispute medical benefits, and the claimant failed to present any evidence that unpaid medical bills were incurred for the treatment of his work injury. II

Where A Change In A Claimant's Status To Partial Disability Based On An Impairment Rating Of Less Than 50% Is Obtained Through Adjudication, The Change Shall Be Effective As Of The Date Of The Evaluation Of The IRE Physician.

Ford Motor/Vistian Systems v. W.C.A.B. (Gerlach); 1944 C.D. 2008; filed April 1, 2009; by Senior Judge Flaherty

The employer filed a Modification Petition seeking to convert the claimant's benefit status from total to partial disability, based on a 19 percent impairment rating that was given on August 24, 2006. The petition was granted by the Workers' Compensation Judge, and the claimant's disability status was changed from total to partial disability effective August 20, 2006. On appeal, however, the Appeal Board adjusted the date of partial disability to December 30, 2007, which was 60 days after the Workers' Compensation Judge's decision granting the Modification Petition.

The Commonwealth Court reversed this adjustment, holding that subsections (5) and (6) of §306 (a.2) of the Act, and not subsections (1) and (2), were controlling. Those subsections provide for a self-executing, automatic modification of benefits when the employer requests an IRE within 60 days after the claimant receives 104 weeks of total disability. Here, however, the employer was proceeding through the traditional administrative process. Consistent with §123.102 of the Act 57 regulations, which instructs that in all cases where a change in the claimant's disability status to partial disability based on an impairment rating of less than 50 percent is obtained through an adjudication, the change shall be effective as of the date of the evaluation of the IRE physician, the court concluded that the effective date of the modification to partial disability is the date when the IRE physician examined the claimant. II

Commonwealth Court Applies The Holding Of The Supreme Court Decision In Triangle Building Center v. W.C.A.B. (Linch) To Address The Issue Of Concurrent Employment And The Effect Of A Position Offered After The Work Injury But Before The Resulting Disability.

Jesse Ostrawsky v. W.C.A.B. (UPMC Braddock Hospital); 497 C.D. 200; filed March 26, 2009; by Senior Judge McCloskey

The claimant suffered a work-related injury in the nature of a right foot fracture on April 8, 2004, but continued to work at his pre-injury wages. At the time of the injury, the claimant had concurrent employment with Amguard American Services (Amguard). In June of 2004, the claimant resigned from the Amguard position effective July 24, 2004, due to his acceptance of a higher paying position with Leonard Security (Leonard) set to begin on July 25, 2004.

The position at Leonard was delayed due to a contract issue between Leonard the third-party.

The claimant had surgery on his right foot on September 13, 2004, and was unable to work. On October 13, 2004, Leonard called to advise him that the position was available. However, the claimant was unable to return to this position due to the September 13, 2004, surgery.

On January 18, 2005, the claimant filed a Review Petition claiming that the defendant failed to include the wages from the Amguard position that he held prior to the injury in his average weekly wage. This was also accompanied by a Penalty Petition and a request for attorney's fees under §440 of the Pennsylvania Workers' Compensation Act. On April 11, 2005, the claimant filed a Modification Petition arguing that he "had" the position at Leonard in July of 2004, prior to his surgery in September of 2004, which caused his disability. But for the fact that there was a contract issue

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completely beyond his control, he would have been able to return to work at this higher paying position in July of 2004 before he became totally disabled as a result of the September 13, 2004, surgery. Therefore, the higher wage offered through the Leonard position should have been included in the average weekly wage calculation for concurrent employment.

The path that this case took to the Commonwealth Court can only be described as a procedural quagmire. The original Workers' Compensation Judge granted the Review and Modification Petitions. She then assessed a penalty upon the higher average weekly wage calculation based upon the position with Leonard. The request for attorney's fees was denied.

The Appeal Board, in an order dated March 22, 2007, reversed the grant of the Review and Modification Petitions. While the Workers' Compensation Judge found that the penalties were appropriate, since the Modification and Review Petitions had been reversed, the matter needed to be remanded to a Workers' Compensation Judge.

Enter Workers' Compensation Judge II. Workers' Compensation Judge II found that while the Act was violated, the violation was *de minimis* and the penalty was not appropriate. In such situations, the Workers' Compensation Judge has discretion to award a penalty.

In a March 6, 2008, order, the result of the appeal of the claimant from Workers' Compensation Judge II's decision, the Appeal Board made final the March 22, 2007, order and affirmed the remainder of the decision rendered by Workers' Compensation Judge II. An appeal to the Commonwealth Court followed.

Before the Commonwealth Court, the claimant argued the Appeal Board erred in not utilizing the higher average weekly wage afforded by the Leonard position. The claimant averred he had the job at the time of disability but it had just not started. It was the claimant's position that the average weekly wage should include "potential earning power." The focus must be on pre-existing earnings versus post-injury earning power. The fact the Leonard position did not begin until after his surgery was completely out of his control.

The Commonwealth Court relied upon the Supreme Court decision in *Triangle Building Center v. W.C.A.B. (Linch)*, 560 Pa. 540, 760 A.2d 1108 (2000). The court found that the claimant's resignation from the Amguard job was voluntary and precluded the claimant from making the argument that these were concurrent wages. Further, in reference to the Leonard position, the claimant had not started working this position until after he was disabled. In other words, it was just a case of bad timing. **II**

New Jersey Workers' Compensation

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A Broader Application Of The "Provisional Risk Test" In Determining Compensability Under *__Coleman v. Cycle Transformer Corp.__*

Sexton v. County of Cumberland/Cumberland Manor, Docket No. A-6414-06T16414-06T1 (App. Div., decided January 9, 2009)

The petitioner, a licensed practical nurse, was employed by Cumberland Manor, a nursing home owned and operated by the County of Cumberland. On January 3, 2004, the petitioner alleged to have sustained an aggravation of her pre-existing chronic obstructive pulmonary disease (COPD) when she inhaled a particular perfume sprayed on three separate occasions throughout the day by a co-employee on the employer's premises. As a result of this exposure—as well as two episodes of intubation during her subsequent hospitalization for acute pulmonary distress—the petitioner became oxygen-dependent on an almost constant basis and never returned to gainful employment. The petitioner filed a Claim Petition with the Division of Workers' Compensation alleging she had been rendered permanently and totally disabled as a result of this work-related incident.

At trial, the Judge of Compensation dismissed the Claim Petition. In doing so, he relied primarily on *Coleman v. Cycle Transformer Corp.*, 105 N.J. 285 (1986). In *Coleman*, an employee ate her lunch in the employer's break-room during an unpaid lunch hour. After eating, the employee struck a match to light a cigarette and inadvertently set her hair on fire. In finding that the employee's claim was not compensable, the *Coleman* Court reasoned that "neither the tasks of her employment, nor the place where she was eating her lunch at the time, nor any act on the part of any of her co-employees" caused her injuries or created a risk of their occurrence. Therefore, the requisite causal connection between the employment and the injury was not present. In applying the *Coleman* ruling, the Judge of Compensation concluded that any aggravation of the petitioner's pre-existing COPD did not arise out of her employment as the presence of a perfume sprayed by a co-employee on the employer's premises constituted neither a risk of her employment nor a condition of the workplace. The Judge of Compensation reasoned that the probability of the aggravation of the petitioner's pre-existing COPD at work was no greater than it would be under "the normal circumstances of life," and, as such, the petitioner's injuries were not compensable.

In reversing and remanding to the Division of Workers' Compensation for further findings, the Appellate Division concluded that the Judge of Compensation had based his ruling

on an overly mechanistic and literal interpretation of *Coleman*. Rather, the Appellate Division opined that *Coleman* required a considerably broader application of the two-prong "positional risk test" in determining compensability. Under this test, a causal nexus between the injury and the employment will be found to exist where the employment is a contributing cause of the injury and the risk of the occurrence is reasonably incident to the employment. The Appellate Division determined that the factual findings at trial were sufficient to satisfy both prongs of the positional risk test and firmly establish the compensability of the petitioner's claim.

As to the first prong, the Appellate Division found that a positional relationship between the employment and the injury plainly existed as the petitioner would not have been exposed to her co-employee's perfume had she not been at work on the day of the incident. With regards to the second prong, the Appellate Division rejected as being dispositive the Judge of Compensation's reasoning that the petitioner's exposure could just as easily have occurred in the ordinary circumstances of her everyday life. Rather, the Appellate Division found that exposure to her co-employee's perfume was indeed a risk of the petitioner's employment. "The nature of the risk," the Appellate Division explained, "was that a co-employee might do something to injure the petitioner. A co-employee might irrationally attack her, accidentally bump into her, or spill a substance on the floor on which she might slip and fall. The specific nature of this injurious conduct need not be foreseen." Once sprayed into the air, her co-employee's perfume became a condition of the workplace and an instrumentality of the petitioner's injuries. As the very fact of the petitioner's employment placed her co-employee in a position to do her harm, the Appellate Division concluded that the risk of the occurrence was reasonably incident to her employment.

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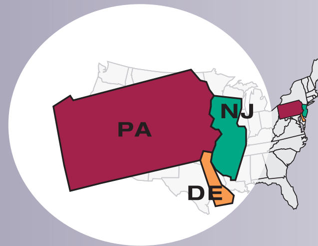

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