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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Pennsylvania Supreme Court concludes that the word "compensation," as used in Section 314 (a), does not per se include payment of medical benefits.

Giant Eagle, Inc. v. WCAB (Givner); No. 14 WAP 2010; decided March 13, 2012; by Mr. Justice McCaffery

The claimant sustained a work injury and began receiving wage loss benefits. Later, the employer filed a suspension petition, alleging the claimant failed to attend the physical examination it scheduled. The petition was granted by a Workers' Compensation Judge, and the claimant was ordered to attend the physical examination. The employer also stated that if the claimant failed to attend the examination without good cause, the failure could result in a suspension of his benefits.

The claimant violated the order and did not attend the examination. The employer filed another petition, requesting a suspension of the claimant's benefits. The judge granted the petition, and a suspension of wage loss benefits was ordered. Arguing that medical expenses should have been suspended as well, the employer appealed to the Workers' Compensation Appeal Board. The Appeal Board dismissed the appeal, concluding that medical expenses are considered compensation under the Act when an employer has not yet been determined to be liable but are not considered compensation when liability has already been established.

The Commonwealth Court affirmed. However, it also held that a judge could, within his or her discretion, suspend both medical and wage loss benefits pursuant to § 314 (a).

The Supreme Court held that, under proper circumstances, compensation under § 314 (a) may include medical benefits as well as wage loss benefits. The Court viewed § 314 (a) as a discretionary mechanism to order a claimant to attend a physical examination or expert interview. The Court, in analyzing § 314 (a) within its proper context, exploring its plain language and applying principles of statutory construction, concluded that the term "compensation" as used in § 314 (a) need not always include medical benefits or, for that matter, wage loss benefits. ||

SIDE BAR

The Supreme Court essentially affirmed the Commonwealth Court's interpretation of the word "compensation" as used in Section 314 (a). Their holding, therefore, permits employers to request not only the suspension of wage loss benefits, but medical benefits as well, in cases where a claimant fails to attend an IME ordered by a judge. It is important to remember that the judge will ultimately decide whether a suspension of benefits is warranted. In most cases, the judge will simply suspend wage loss benefits. Most likely, judges will be more inclined to suspend medical benefits in cases where a claimant has settled the wage loss portion of the claim but medical treatment remains open, or where a claim has been recognized by a medical only NCP.

Claimant's attempt to identify a new injury after receipt of total and 500 weeks of partial disability is denied because his evidence did not support two separate injuries and *res judicata* precluded the attempt to relitigate total disability.

Cytemps Specialty Steel v. WCAB (Crisman), No. 42 C.D. 2011 (Pa. Commw., filed March 15, 2012), opinion by Judge Leavitt

In litigation spanning two decades and involving multiple petitions and alleged injuries, the Commonwealth Court addressed the issue of whether the claimant was totally disabled as a result of a neck injury sustained when a metal bar jerked from his hand while working for the employer. The claimant had received total disability benefits and 500 weeks of partial disability based on a Notice of Compensation Payable (NCP) dated May 7, 1993, which identified the neck injury.

After his disability benefits terminated following the receipt of 500 weeks of partial disability, the claimant filed multiple new petitions, including a claim petition alleging he was totally disabled as a result of a head, neck and shoulder injury on September 23, 1992. The claimant insisted that his 1993 work injury was to his shoulder and that the NCP for that injury was wrong in identifying his neck injury as of that date. Medical evidence submitted in support of the petition noted that the claimant reported an injury to his neck, head and shoulder on the date in 1992, which was diagnosed as a cervical strain, stenosis and radiculopathy, whereas the 1993 injury was reported only as involving the shoulder.

The Workers' Compensation Judge found in favor of the claimant and ordered payment of total disability benefits as of November 7, 1995, based on an injury date of September 23, 1992, but he gave the employer credit for total disability benefits paid for the 1993 injury. The Appeal Board affirmed the judge's ruling, but the Commonwealth Court sent the case back to the judge to make a finding of whether the claimant sustained two neck injuries—one in 1992 and another in 1993—or whether there really was only one cervical injury that the employer mistakenly dated. On remand, the judge found that the claimant sustained two separate injuries, but did not address the possibility that the NCP simply had the wrong date. After the Appeal Board again affirmed the judge, the employer appealed, arguing that the evidence did not support a finding of two different neck injuries and that the doctrines of *res judicata* and/or collateral estoppel barred the claim of total disability.

The court agreed, holding that the claimant's evidence showed a neck injury in 1992 and a separate shoulder injury in 1993. More significant, *res judicata* foreclosed the claim of disability as of November 1995, as the court noted that, in earlier petitions granting modifications to partial disability, the judge had twice rejected the claim of ongoing total disability. This doctrine served to prevent the claimant from once again claiming total disability. ||

Side Bar

This case illustrates the importance of accurately identifying the specific injury and date thereof in a Notice of Compensation Payable. It also cautions to be attentive to the specific issues that are decided by a judge in litigation, as those decisions can preclude a claimant from re-litigating a claim that has been adjudicated to a final conclusion. In a footnote, the court stated that the claimant had been aware for 10 years that he had received disability benefits under the wrong date of injury and had told his counsel, but the issue had not been addressed. This note suggests that in any claim petition, counsel should question a claimant carefully on the specific date of injury and all injuries occurring at that time in order to help preclude the type of protracted litigation involved here.

Pennsylvania Supreme Court hears argument on appeal challenging established precedent that recovery for post traumatic stress disorder in cases involving state troopers require abnormal working conditions.

Payes v. WCAB (Pennsylvania State Police), No. C.D. 2011, oral argument April 18, 2012, on appeal from *Payes v. WCAB (State Police)*, 5 A.3d 855 (Pa. Commw. 2010) (appeal granted May 17, 2011)

The claimant, a state trooper driving his patrol car to the station, struck a mentally disturbed woman who ran in front of his vehicle. Although the claimant attempted to resuscitate the woman, she ultimately died. The claimant later filed a claim petition, alleging that he sustained post traumatic stress disorder as a result of the incident. The State Police denied the claim, asserting that the claimant had been trained to handle such incidents.

The Workers' Compensation Judge granted the claim petition, concluding that the claimant's mental injury was sustained as a result of an abnormal working condition. The judge also concluded that there was evidence supporting a finding that the accident victim was attempting to commit suicide. The claimant theorized the woman was committing "suicide by cop."

The Appeal Board reversed the judge's decision, holding that the incident did not constitute an abnormal working condition given the nature of the claimant's profession. The Commonwealth Court agreed and affirmed the Appeal Board's decision. The court held that, because the claimant was employed as a police officer, the nature of his job was highly stressful and one where horrible tragedy is expected to be witnessed. In the court's view, the events that took place were not above and beyond what would be considered normal working conditions for a state trooper.

Before the Pennsylvania Supreme Court, claimant's counsel argued that this case is distinguishable from other decisions that have declined to extend workers' compensation benefits in similar situations because it involved an apparent suicide attempt that was unforeseeable. Justice Max Baer challenged this position, noting that the determination of an

attempted suicide was made by the judge, not the officer. Counsel for the State Police pointed to the officer's actions on the night of the accident as the "best evidence" that the claim was not compensable and that, under the totality of evidence, the case did not establish abnormal working conditions. Justice Baer then asked hypothetically what would have made this situation an abnormal working condition, such as the victim vomiting in his face or having been dressed as a ghost. ||

Side Bar

This case tests the prevailing view in the Commonwealth Court that police officers and firefighters are exposed to circumstances in their jobs that involve tragedy, violence and loss of life which are not unusual or unexpected. These situations do not rise to the level of abnormal working conditions so as to permit a recovery for purely emotional injuries, such as PTSD. The Court's decision is eagerly anticipated as it has not ruled on this precise issue.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The "exclusive remedy" provision of the Workers' Compensation Act withstands an "intentional wrong" challenge.

James Mackenzie v. Macy's, Inc., Docket No. A-2264-10T2, 2012 N.J. Super. Unpub. LEXIS 747 (App. Div., decided April 5, 2012)

The plaintiff was employed by the defendant as a roving engineer. On November 8, 2007, the plaintiff was assigned to assist an outside contractor in the installation of HVAC equipment on the defendant's premises. The work was being supervised by an employee of the defendant.

The installation required the use of an A-frame ladder approximately seven feet in height, which was provided to the plaintiff and the outside contractor by the defendant. It was the defendant's property and exhibited its logo and a label indicating that it had a capacity of three-hundred pounds. The plaintiff and the outside contractor ascended and descended the ladder individually throughout the project and occasionally occupied the ladder simultaneously. While the outside contractor was on the ladder with the plaintiff making adjustments to the HVAC equipment, one of the ladder's rear legs collapsed, causing the plaintiff to fall to the ground and severely injuring his shoulder and lacerating his head. It was subsequently discovered that the ladder's two rear legs had each been wrapped in two places with packaging tape to cover vertical cracks in both legs extending to the level of the ladder's second rung.

The plaintiff filed a complaint against the defendant for compensatory and punitive damages, alleging intentional wrongdoing. The plaintiff's engineering expert opined that the likely cause of the ladder's collapse was the combined weight of the outside contractor and the plaintiff, in addition to the pre-existing defect in the ladder. In deposition testimony, both the plaintiff and the outside contractor stated that they had not noticed the tape on the ladder prior to its use. Although the defendant testified that he had made notice of the tape, he neither mentioned it to the plaintiff nor suggested use of another ladder. The defendant further testified that prior to the accident, he had observed both the outside contractor and the plaintiff occupying the ladder simultaneously, but failed to instruct them against this practice. "[I]t's unsafe to work that way," the defendant admitted, "but I have done it myself in the past working with my partners." The defendant stated that at no point prior to the accident did he observe the ladder's stability to change when climbed, nor did he see or hear anything that would suggest that either the outside contractor or the plaintiff were in any danger.

At the conclusion of discovery, the defendant filed a motion for summary judgment based on the Workers' Compensation Act's so-called "exclusivity provision," N.J.S.A. 34:15-8, which provides, in relevant part, that "if any injury... is compensable under the Act ... a person shall not be liable to anyone at common law or otherwise on account of such injury ... except for an intentional wrong." The defendant's motion was granted, and the matter was dismissed. The plaintiff appealed.

In affirming the lower court's ruling, the Appellate Division relied primarily on *Laidlow v. Hariton Machinery Co., Inc.*, 170 N.J. 602 (2002), in which the court delineated a two-prong test for judges to consider in deciding summary judgment motions based on the workers' compensation exclusivity provision:

> [T]he trial Court must make two separate inquiries. The first is whether, when viewed in a light most favorable to the employee the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar.

The Appellate Division found that the evidence in the instant case, when viewed in the plaintiff's favor, was insufficient to support the claim

that the defendant knew that its actions were substantially certain to result in injury. As the court reasoned:

> [T]here was no evidence presented in this case that [the defendant] regularly supplied its employees with faulty equipment. Further, although the presence of the tape on the ladder suggested that some repair had been attempted prior to the accident, there was no evidence that would lead anyone present to believe that the repair had been unsuccessful or that the damage was particularly serious. Thus, before the accident, the ladder appeared to be safe. It was steady, it did not move or shake when climbed, and it did not creak or otherwise manifest signs of damage.

As the plaintiff failed to establish the conduct prong of the *Laidlow* rule, the Appellate Division found it unnecessary to examine the context prong. II

Side Bar

The Workers' Compensation Act's exclusivity provision, N.J.S.A. 34:15-8, is an essential component of the New Jersey workers' compensation scheme. It enters by operation of law into every contract of hiring made in New Jersey and requires a surrender by the parties of their rights to any other method of compensation. By accepting the benefits of the Workers' Compensation Act, an employer assumes an absolute liability but gains immunity from common-law suit, and the employee foregoes his right to sue his employer for negligence but gains a speedy and certain, though smaller, measure of damages for all work-connected injuries, regardless of fault. Only if an employee can prove an "intentional wrong" on the part of his employer will he be permitted to proceed against his employer at common law.

News from Marshall Dennehey

On April 18, 2012, **Ross Carrozza** (Scranton, PA) presented Medicare Conditional Payments and Set Asides to over 50 adjusters at the Maryland Automobile Insurance Fund.

Jessica Julian and **Keri Morris** (Wilmington, DE) spoke at the May 2, 2012, annual workers' compensation seminar sponsored by the Workers' Compensation Section's of the Delaware State Bar Association and the Industrial Accident Board.

On June 8, 2012, **Niki Ingram** and **Mary Kohnke Wagner** of our Philadelphia office will participate in the Pennsylvania Chamber of Business & Industry's *Workers' Compensation Roundtable*. Niki will give a presentation "Understanding Workers' Compensation Benefits." Mary will give a presentation "What' s Happening Now in Workers' Compensation" and "The Top 10 Things Companies Do Wrong before Going to WC Litigation." This seminar is open to non-members. For more information about this event, visit http://www.pachamber.org/www/conferences/conference.php?ID=1220.

Join the **Marshall Dennehey Workers' Compensation Department** and representatives from **Solomon & Associates** for Happy Hour on Thursday, July 19 from 4 p.m. – 8 p.m. at Bahama Breeze at the Cherry Hill Mall (Rt. 38). II

Ask Our Attorneys

Send your questions about Pennsylvania, New Jersey or Delaware workers' compensation to tamontemuro@mdwcg.com.

Delaware Workers' Compensation

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

Paul V. Tatlow

Employer's termination petition denied despite undisputed evidence that claimant can do light-duty work. Labor market survey evidence was rejected by the Board in favor of claimant's testimony as to her diligent job search efforts, which had not resulted in any employment offers.

Jacki Poore v. Howell F. Wallace, (IAB No. 1337349 Decided January 18, 2012)

This case involved an application by the Board of the *Watson v. Wal-Mart* case to a termination petition with an unfavorable result for the employer.

The claimant, a horse handler for the employer, sustained a compensable work injury to her back on June 1, 2009, when she was mucking a stall and felt a pop in her back. The employer later filed a petition for review to terminate the claimant's total disability benefits, alleging the claimant was able to do light-duty work. The medical evidence was undisputed that the claimant had been released by her treating physician to light-duty work, and the defense medical witness agreed that light-duty work was appropriate for the claimant. The employer's evidence also included testimony from a vocational consultant who documented a labor market survey, with nine of the eleven jobs being approved by the defense medical examiner. The evidence showed that the employer did not have light-duty work they could offer to the claimant.

The claimant did not present medical evidence, but her testimony did show that between July 2011 and January 2012, she applied for twenty-nine jobs. She kept a log of her job applications and the results, which indicated she did not obtain any interviews or job offers. The claimant's evidence also indicated that by October 2011, she went to the Division of Vocational Rehabilitation and started a training program to learn administrative and computer skills so that she could attempt to obtain office work within her restrictions. The evidence indicated that the claimant was not rejected from any of the jobs for which she applied because of her physical limitations, but, rather, the responses indicated she did not meet the vocational requirements for the positions.

The Board found that, despite undisputed evidence that the claimant could do light-duty work, the claimant was economically totally disabled. Therefore, the termination petition was denied. The Board noted that the claimant could prove that she was a displaced worker by showing that she made a reasonable effort to locate employment but was unable to obtain any due to her disability. The Board found that the claimant had conducted an adequate job search by applying for twenty-nine jobs over a period of six months and, in addition, had sought additional help with the Division of Vocational Rehabilitation by pursuing computer and clerical skills training. The Board's reasoning was that the claimant's reasonable job search was not overcome by the vocational evidence presented by the employer, which the Board found insufficient to prove that the claimant was employable. The Board rejected the employer's argument that the *Watson* case was distinguishable from this case and, instead, found there were numerous similarities between the cases. The Board concluded that the claimant was a displaced worker and remained economically disabled, entitling her to ongoing total disability benefits. II

Side Bar

This case illustrates the heightened burden of proof that the *Watson* case puts on an employer in litigating a termination petition. If an actual job offer cannot be made by the time-of-injury employer, the efforts made by the claimant to obtain employment need to be challenged in order to determine whether they were, in fact, bona fide and legitimate as opposed to merely an attempt to undermine the Labor Market Survey evidence.