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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

The Supreme Court holds that grace period payments made to the claimant are considered compensation, and the employer is entitled to reimbursement of them from the Supersedeas Fund.

Department of Labor and Industry, Bureau of Workers' Compensation v. WCAB (Excelsior Insurance); 46 MAP 2011; Decided November 21, 2012; By Justice Baer

The employer filed a petition to modify a claimant's workers' compensation benefits, which it later amended to a suspension petition. In connection with the petition, the employer requested supersedeas. The employer's request was denied by a Workers' Compensation Judge. After the supersedeas denial, the claimant settled a related third-party case and entered into a Third Party Settlement Agreement with the employer. As part of that agreement, the parties calculated the weekly pro-rata share of the expenses of recovery and determined that the employer would pay the claimant $164.42 per week during a grace period.

A few months after the Third Party Settlement Agreement, the Judge granted the employer's petition suspending the claimant's benefits. The employer then filed an Application for Supersedeas Fund Reimbursement for the amounts paid to the claimant from the date the petition was filed through the date of the Judge's decision, including the grace period payments. The Bureau challenged the application, arguing the payments made by the employer were not considered compensation under the Act but, rather, were payments of counsel fees.

A Judge granted the employer's application. The Appeal Board affirmed, as did the Commonwealth Court. The Bureau appealed to the Supreme Court of Pennsylvania.

The Supreme Court affirmed the decisions below, holding that the payments made by the employer to the claimant were considered compensation under the Act. In fact, the Court pointed out that the language of §319 is consistent with viewing grace period payments as compensation since it instructs that those payments "shall be treated as an advance payment by the employer on account of any future installments of compensation." According to the Court, the employer paid the funds as compensation to the claimant to satisfy the employer's obligation to the claimant pending the Judge's final decision on its petition. The Court held that the employer should be reimbursed for the full amount of compensation it paid as a result of the denial of supersedeas relief. II

Side Bar

When an employer has filed a petition to suspend/modify benefits against a claimant receiving grace period payments, claimant's attorneys will often make the same argument made by the Bureau in this case. This decision has effectively eliminated the legitimacy of that argument.

In a physical/mental injury claim, claimant need not prove that physical disability caused mental disability or show that a physical injury continues during the life of the psychic disability.

New Enterprise Stone and Lime Co., Inc. v. WCAB (Kalmanowicz); 1492 C.D. 2012; Filed December 6, 2012; By Judge Covey

The claimant was employed by the employer as an equipment operator and was involved in a work-related accident while operating a tractor trailer. The tractor trailer collided head on with another vehicle, and

the claimant observed the driver of the oncoming vehicle looking directly at him at the time of impact. The driver of the other vehicle died as a result of the accident. The collision forced the claimant's truck down an embankment. The claimant was eventually taken to the emergency room of a local hospital and diagnosed with injuries to the left chest, right wrist and left shoulder.

The claimant continued to work for the employer. Initially, the claimant did not drive, since his trailer was destroyed. Ultimately, the claimant resumed his pre-accident duties, but within a few months, the claimant began receiving treatment for post-traumatic stress disorder. After missing some time from work, the claimant returned to the employer as a laborer at a lower weekly wage.

The claimant filed a claim petition, alleging he sustained PTSD as a result of the motor vehicle accident. The Workers' Compensation Judge granted the petition, concluding that the claimant had met his burden of proving a physical/mental injury that resulted from a "triggering physical event." The Board affirmed.

On appeal to the Commonwealth Court, the employer argued that the Board erred by applying the standard for a physical/mental injury as opposed to a mental/mental injury. The Commonwealth Court, however, rejected the employer's argument and affirmed the decisions below. The court held that the claimant did meet his burden of proving a physical/mental injury and concluded that the physical/mental analysis was properly applied by the Judge and was supported by substantial evidence. The court further concluded that the mental/mental standard was inapplicable because, in other mental/mental cases, physical stimulus was not the cause of psychological injury. II

Side Bar

Employers should be mindful that the threshold for a physical/mental claim is significantly lower than the threshold for a mental/mental claim and that claimants pursuing psychiatric injury claims may attempt to use this case to their advantage. Physical stimulus leading to mental disability simply does not compare to the mental/mental standard of showing abnormal working conditions.

New Jersey Workers' Compensation

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Dario J. Badalamenti

Allocation of liability among respondents. A questionable application of the Peterson Doctrine.

Allison v. L&J Contracting Co., Inc., Docket No. A-1352-11T4, 2012 N.J. Super. Unpub. LEXIS 2197 (App. Div., decided September 27, 2012)

The petitioner was employed as a tile finisher with the respondent. On July 27, 2006, the petitioner fell in a hole while in the course of his employment and sustained injury to his lumbar spine. The petitioner filed a claim for workers' compensation benefits. The respondent filed a motion to join the petitioner's subsequent employer, with whom the respondent alleged the petitioner had sustained two subsequent accidents. The Judge of Compensation granted the respondent's motion, and the subsequent employer was joined as a party to the claim. The petitioner thereafter filed a separate claim for workers' compensation benefits against his second employer. A consolidated trial of these claims ensued.

At trial, the petitioner testified that, although he continued to experience low back pain with radiation into his right leg on a daily basis following his July 27, 2006, accident, he did resume work as a tile finisher in March of 2007 with the second employer, where he performed functions very similar to those he did while employed with the respondent. The petitioner testified that he was initially able to function normally, but his back and leg pain worsened over time. He further testified that the pain he experienced while working for the second employer was the same pain he experienced after his July 27, 2006, accident. As to the respondent's allegations that the petitioner sustained two subsequent accidents while in the employ of the second employer, the petitioner admitted to the occurrence of lifting incidents in June of 2007 and March of 2008. However, the petitioner testified that he neither reported these incidents to the second employer nor did he seek treatment for his complaints, as he considered the symptoms from these incidents to be a "flare up of his previous symptoms."

At the conclusion of trial, the Judge of Compensation dismissed the petitioner's claim against the second employer and entered an order for judgment against the respondent. The Judge reasoned that the petitioner's current disability was related solely to the progression of his disability from the original accident of July 27, 2006, and that the incidents in June 2007 and March 2008 were "descriptive of occupational activities" rather than "accidents or traumatic events," as contemplated by the Workers' Compensation Act, *N.J.S.A. 34:15-1 et seq*. The respondent appealed.

In affirming the Judge's holding, the Appellate Division relied on *Peterson v. Hermann Forwarding Co*., 267 N.J. Super. 493 (App. Div. 1993), in which the claimant was injured in an accident that occurred on October 1, 1982, while in the employ of Hermann Forwarding Company. The claimant filed claims against several subsequent employers alleging that he had suffered an aggravation of his injuries

due to occupational exposure following his October 1, 1982, accident. In reversing the Judge's finding of permanent and total disability against the claimant's last employer, the *Peterson* Court found that the evidence showed that the claimant suffered his injury while working for Hermann and had manifested his disability continuously thereafter. The *Peterson* Court found no credible evidence that the claimant's subsequent employments materially contributed to his increase in disability but, instead, concluded that the claimant's increased disability was due to the natural progression of his disease.

As in *Peterson*, the Appellate Division in this case determined that the evidence presented established that the petitioner's ultimate disability was attributable to the injuries he sustained as a result of his July 27, 2006, accident, which progressively worsened over time. The Appellate Division found that the evidence supported the Judge's finding that the petitioner did not suffer any subsequent injury while in the employ of the second employer that materially contributed to his disability and, as such, there was no basis to support an apportionment of liability to the second employer. **II**

Side Bar

Despite the Appellate Division's affirmation, the Judge's findings in this matter are somewhat questionable from a defense perspective. At trial, the petitioner's treating physician testified that the petitioner had been doing well following his return to work with the second employer in March of 2007, until he had a recurrence of "severe low back pain with radiation into the right leg" while lifting a "bag of material" in June of 2007. Similarly, the petitioner's symptoms had been largely quiescent when he again experienced low back pain with right-sided sciatica after lifting "a ninety-two pound bag of sand" at work. Of significance, the petitioner's treating physician noted on several occasions that his pathology increased with activity and decreased with "rest and recumbancy." In light of the petitioner's pattern of worsening symptoms with increased work activity—as well as the occurrence of two subsequent lifting incidents after which the petitioner reported the return of severe back pain with radiculopathy—it is difficult to understand how neither the Judge nor the Appellate Division found that the petitioner's employment with the second employer contributed materially to his disability.

Delaware Workers' Compensation

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Paul V. Tatlow

Despite undisputed medical evidence that claimant could do modified work, the Board denied the employer's termination petition based on a finding that claimant, who had an eighth grade education and had only worked as a housekeeper, was a displaced worker.

Priscilla Stove v. Aramark c/o Wesley College, (IAB No. 1258714-Decided June 26, 2012)

The claimant sustained a compensable work injury to her low back on October 8, 2004, and began receiving compensation for temporary total disability. The claimant's treatment for the work injury included surgery to two levels of the lumbar spine on August 19, 2011. Later, in December 2011, the employer filed a review petition seeking to terminate the claimant's total disability benefits, alleging the claimant was capable of returning to work in a sedentary capacity. The claimant asserted that she continued to be totally disabled or, in the alternative, was a displaced worker.

The only medical evidence presented by the employer was the testimony of the defense medical examiner. This evidence showed the claimant was capable of full-time sedentary to light-duty work within certain restrictions. The employer also submitted, with the agreement of claimant's counsel, a Labor Market Survey without the need for testimony from the vocational consultant. The Labor Market Survey identified ten jobs that were asserted to be within the claimant's physical and vocational restrictions, although eight of the jobs required or preferred a high school diploma or GED. The only evidence presented by claimant's counsel was the testimony of the claimant, a 63-year-old woman who testified that she had an eighth grade education and had worked her entire life as a housekeeper. The claimant acknowledged that, following her lumbar spine surgery, her treating physician indicated she could return to work in a sedentary capacity for up to four hours a day, although the claimant did not think she was capable of even doing that level of work.

The Board found that, while the claimant was credible as to her severe ongoing low back pain, they could not ignore the undisputed medical evidence. Therefore, they concluded that the claimant was medically capable of doing modified work. However, the Board went on to conclude that the claimant was a *prima facie* displaced worker. That term refers to a worker who, while not completely physically disabled from working, is so disabled as a result of a compensable injury that she is no longer regularly employable in any well known branch of the competitive labor market. The Board found that the

claimant satisfied this criteria since she was 63 years old, had an eighth grade education, had difficulty with reading and spelling, had never used a computer, and was not able to type. The Board concluded that the employer's Labor Market Survey did not rebut this finding and that it failed to demonstrate regular employment existed within the claimant's physical and academic capabilities. Therefore, the Board found that the employer failed to meet the burden of proof in order to obtain a termination of the total disability benefits. II

Side Bar

It appears in this case that the Labor Market Survey was based on certain assumptions as to the claimant's vocational background, including her having a high school diploma or GED, which turned out to be incorrect. Based on those inaccuracies, the vocational evidence was found to be not credible by the Board. In Delaware, a claimant is not required to submit to a vocational interview, but it is strongly suggested that one should nevertheless be requested by the employer's vocational consultant. Doing this allows the consultant to obtain detailed and accurate information as to the claimant's educational and vocational background. If the vocational interview is refused, the employer can at least argue that the lack of having full information was due to the claimant's refusal to participate in the vocational process.

News from Marshall Dennehey

We are happy to announce that **Kristy Olivo** (Cherry Hill, NJ) was elected a shareholder of the firm at our annual shareholders' meeting in December 2012.

On February 15, 2013, **Bob Fitzgerald** (Cherry Hill, NJ) will participate in the Insurance Society of Philadelphia's seminar *Workers' Compensation Law Update*. Current information regarding developments in workers' compensation law in Pennsylvania and New Jersey will be provided. Case law, statutory law and regulatory changes will be discussed with indications of the practical implications for these issues. Topics include:

- Emerging judicial interpretations of reform measures.
- Case handling strategies and recommendations stemming from statutory changes
- Developments in subrogation law
- Significant statute of limitation cases

To register, visit http://www.insurancesociety.org/course_workshop.asp.

On April 9, 2013, **Robin Romano** (Philadelphia, PA) will be a speaker for the Pennsylvania Bar Institute's presentation *Tough Problems in Workers' Compensation 2013*. This seminar will provide attendees with the necessary tools to manage tough problems in workers' compensation. The distinguished faculty will address how to master the ins and outs of compensation for medical treatment, provide the keys to establishing liability and coverage for injuries in today's mobile workforce, review the most effective ways to handle dual jurisdiction and employees who live far away, and offer a judge's perspective including how-to's, do's and don'ts, tips and insights. Robin Romano will discuss fee reviews—what they are and why you should care. To register, visit the Institute at http://www.legalspan.com/pbi/calendar.asp?UGUID=&ItemID=20120831-229194-94950#ItemDescription.

Michele Punturi (Philadelphia, PA) received a favorable decision on a psychiatric claim where the claimant alleged she is suffering from post traumatic stress disorder and a major depressive disorder with an anxiety and adjustment disorder as a result of abnormal working conditions. The claimant alleged that her supervisors created a hostile work environment by changing her job duties, harassing, intimidating and discriminating against her. The claimant presented her testimony, as well as four fact witnesses and a medical expert. In opposition, Michele presented five fact witnesses directly involved in the claimant's supervision and discipline. Critical to Michele's defense was the presentation of an extraordinary amount of documentation supporting the employer's fact witnesses' testimony. The judge found that the claimant failed to meet her burden of proof to establish that a mental condition existed which was caused by objective abnormal working conditions. The judge's decision was quite lengthy in rejecting the claimant's testimony as credible where it conflicted with the testimony of the witnesses and the voluminous documents. The judge also rejected the claimant's fact witnesses where they conflicted with the employer's witnesses and evidence. This case demonstrates the importance of timely and accurate documentation in the personnel file and preparation of witnesses for testimony—the judge found the employer's witnesses credible based on their comportment and demeanor at the hearings. II