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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Absent a showing by the claimant that the employer deliberately subverted a third party suit brought by the employee, the employer's right to subrogation under §319 of the Act is virtually absolute.

Jason P. Glass v. WCAB (City of Philadelphia); 1274 C.D. 2012; filed 1/10/13; by Judge Cohn Jubelirer

The claimant sustained injuries in the course and scope of his employment as a police officer when he lost control of a motorcycle he was on while training and it fell on top of him. The claimant's injuries were acknowledged by the employer as work-related, and the claimant received benefits. The claimant then filed a third party tort action against the employer alleging that improper maintenance of the motorcycle caused him to lose control, resulting in his injuries. Ultimately, the claimant obtained an arbitration award in the amount of $490,000. The employer filed a petition seeking to recover its workers' compensation lien, which totaled $219,755.63. The claimant challenged the petition, alleging the employer acted in bad faith by allowing for the spoliation of evidence which affected the claimant's third party recovery. The claimant cited the case of *Thompson v. WCAB (USF&G)*, 566 Pa. 420, 781 A.2d 1146 (2001) in support of his position.

According to the evidence presented by the claimant, very shortly after the incident occurred, the employer was notified by claimant's counsel that he intended to perform an inspection of the motorcycle. The employer was asked to refrain from altering the motorcycle, particularly the clutch mechanism. Counsel for the employer responded by saying that inspection would not be permitted because the claimant did not comply with a directive requiring him to notify the police department of the law suit. Counsel further said that, once the claimant complied with this, access to the motorcycle would be given. Claimant's counsel then satisfied the employer's notice requirements. Counsel for the employer contacted officials from the police department to advise them that the motorcycle should be made available for inspection and to ensure that it had not been or would not be altered. Later, counsel for the employer learned that in September of 2006, a repair order for the motorcycle was issued, which indicated that the motorcycle's clutch lever had been replaced.

After considering the evidence, the Workers' Compensation Judge granted the employer's petition. The judge found that the claimant did not establish that the employer undertook in deliberate bad faith to subvert the third party suit brought by the claimant so as to extinguish the employer's right to subrogation. The Workers' Compensation Appeal Board (Board) affirmed on appeal, and the Commonwealth Court did as well. According to the Court, it was reasonable for the judge to conclude that there was not deliberate bad faith on the part of the employer, but rather, a series of miscommunications. II

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The Commonwealth Court's holding in this case reinforces that the employer's right to subrogation under Â319 of the Act is virtually absolute. This was also what the Supreme Court held in the *Thompson* case. At the same time, in that case, the court recognized there could be circumstances of deliberate bad faith on the part of the employer that may impact on the absolute right to subrogation.

A claimant seeking reinstatement after previously refusing a light-duty job in bad faith must show that the work injury has worsened as well as an inability to do the light-duty job. The claimant is not relieved of his burden simply because the prior job was a funded position.

Alfred Napierski v. WCAB (Scobell Co., Inc.& Cincinnati Insurance Co.); 330 C.D. 2012; filed 1/10/13; by Judge Leavitt

Following the claimant's work injury, the employer referred the claimant to an employer for a funded employment position. The position was a sedentary job that paid less than the claimant's pre-injury wage and was approved by the claimant's physician. The claimant began working the job but abruptly quit after the company moved him to a third office, concluding that the employer was "playing games" with him. The employer then filed a modification petition, which the judge granted, finding that the claimant refused in bad faith to work the funded employment job. After losing appeals at the Board and Commonwealth Court level, the claimant asked the employer to fund the job for him again so that he could return to work. The employer refused, and the claimant petitioned for reinstatement.

The judge denied the claimant's petition since he did not prove his medical condition had worsened to the point that he could no longer do the funded duty position. The Board affirmed. On appeal to the Commonwealth Court, the claimant argued that he should be excused from showing that his condition worsened since the job he left was a funded employment job. The Commonwealth Court rejected this argument. According to the court, once the claimant has refused an available job in bad faith, his employer's obligation to show job availability ends. There is no exception in the law for leaving a funded employment position. The claimant who seeks a reinstatement of benefits after refusing a light-duty job in bad faith, whether a funded employment job or not, must show a worsening of his condition and an inability to do the previous light-duty job. II

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The take away from this case and others is that the claimant's loss of earning power was not due to his disability but, rather, due to his lack of good faith in pursuing work made available to him that was within his physical limitations. There are no different rules where the job refused is a funded position.

In a petition to suspend the benefits of an unauthorized worker, the employer must show that the claimant is unauthorized and that the claimant is no longer totally disabled.

Eleazar Ortiz v. WCAB (Raoul Rodriguez & Uninsured Employers Guaranty Fund); 446 C.D. 2012; filed 1/15/13; by Judge Leavitt

The claimant suffered an injury while working for the employer and brought a claim against the Pennsylvania Uninsured Guaranty Fund (Guaranty Fund). The Workers' Compensation Judge granted the claim brought against the Guaranty Fund, awarding the claimant total disability benefits from the date of injury through November of 2007. By that time, the claimant was working on a part-time basis, and the judge awarded the claimant partial disability benefits. The claimant presented no evidence that he was authorized to work in the United States, and the employer did not appeal. Later, the employer filed a suspension petition, alleging the claimant was not authorized to work in the United States and that the claimant had returned to work.

The judge dismissed the employer's petition, concluding that the employer did not prove a change in the claimant's medical condition. But, at the judge level, there was evidence that the claimant had been working since November of 2007 at approximately 18 to 20 hours per week, with his doctor's permission. The Board reversed the judge's decision on appeal, concluding that the employer showed a change in the claimant's medical condition by virtue of the work the claimant was performing since November of 2007. The Board held that this established that the claimant was no longer totally disabled. The claimant appealed to the Commonwealth Court, arguing that benefits cannot be suspended solely on the basis that he is not authorized to work in the United States and that there must be proof of a change in condition.

The Commonwealth Court affirmed the Board's decision. In the court's view, the employer proved that the claimant's loss of earning power was caused by his immigration status once his medical condition improved enough to allow him to work part-time, which happened in November of 2007. The court concluded that in the case of an unauthorized worker, an employer need only demonstrate that a claimant's medical condition has improved enough to work at some job, even one with restrictions. II

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The seminal case on the issue of benefits payable to an unauthorized worker is the Supreme Court's decision in *Reinforced Earth Company v. WCAB (Astudillo)*, 570 Pa. 464, 810 A.2d 99 (2002), and the Commonwealth Court was guided by it here. In *Reinforced Earth*, the Supreme Court held that an undocumented worker is not precluded from receiving total disability benefits and held that an employer seeking to suspend the benefits of a claimant who is an unauthorized worker is not required to show job availability. The only thing the employer needs to show is that the claimant is an unauthorized alien and is no longer totally disabled. This can be accomplished by showing that the claimant has returned to work. Even if the claimant has returned to work at reduced wages, the employer is entitled to a suspension of benefits since the claimant's loss of earning power is caused by the claimant's immigration status.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The "travel time" exception to the "going and coming rule."

Terebush v. Creative Safety Products, Docket No. A-3179-11T2, 2012 N.J. Super. Unpub. LEXIS 2771 (App. Div., decided 12/19/12)

The petitioner was employed by the respondent as a magician and puppeteer who conducted school assembly programs where he taught children about safety and was paid an annual salary. He visited the respondent's offices approximately six times per year and received his work assignments and paychecks by mail. He drove a station wagon owned by the respondent from his home to the various schools where he was assigned to perform. The respondent insured the vehicle and paid for fuel, tolls and parking expenses incurred by the petitioner. However, the petitioner received no specific payment for mileage or travel time above his annual salary. The petitioner did not use the vehicle for his own personal use.

On October 2, 2001, the petitioner performed at three different elementary schools, which were located approximately forty miles from his home. He was involved in a motor vehicle accident on his way home that day.

The petitioner filed a claim seeking benefits for injuries sustained as a result of his motor vehicle accident. At the conclusion of a bifurcated trial as to the issue of compensability, the Judge of Compensation found that the petitioner's motor vehicle accident did not arise out of and in the course of his employment. He accordingly dismissed the petitioner's claim.

In affirming the judge's ruling, the Appellate Division relied on the Supreme Court's interpretation of N.J.S.A. 34:15-36, the so-called "going and coming rule." Under N.J.S.A. 34:15-36:

> Employment [is] deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employee's place of employment, excluding areas not under the control of the employer; but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer.

In *Zelasko v. Refrigerated Food Express*, 128 N.J. 329 (1992), the Court interpreted N.J.S.A. 34:15-36 as generally not allowing compensation for accidents occurring in the areas outside of the employer's control, as when the employee is going to and coming from work. However, the Court did interpret the statute to include a "travel time" exception, which allows portal-to-portal coverage for employees paid for travel time to and from a distant job site or while using an employer-authorized vehicle for travel to and from a distant job site.

The Appellate Division concurred with the judge's determination that the travel time exception was not applicable to the facts of this case. As the judge found, the schools, some forty miles from the petitioner's home, did not constitute a distant job site within the meaning of the statute, nor was the petitioner specifically compensated for mileage or travel time to and from these locations. As such, the Appellate Division affirmed the judge's finding that the petitioner's motor vehicle accident was not compensable as it did not arise out of and in the course of his employment. II

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As N.J.S.A 34:15-36 suggests, a finding that an employee is specifically compensated for mileage or travel time by an employer for time spent traveling to and from a job site will often be sufficient to trigger the "travel time exception" to the going and coming rule. For example, in *Brown v. American Red Cross*, 272 N.J. Super. 173 (App. Div. 1994), the Appellate Division held that a phlebotomist who traveled in her own car to and from the homes of her clients was covered for injuries sustained during one of these trips as she was specifically compensated for her travel time. Conversely, the absence of specific compensation for mileage or travel time, as we see in the *Terebush* case, will often result in a finding that injuries sustained during an employee's travels to and from work are not compensable.

News from Marshall Dennehey

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.

Jeff Watson (Harrisburg, PA) successfully defended an occupational disease claim in which a welder alleged mixed-dust pneumoconiosis. Jeff worked with the employer, who provided testimony and demonstrative evidence in the nature of a forced-air welding hood, to demonstrate that the claimant was not adversely exposed to welding fumes and grinding dust. The employer's medical expert testimony was accepted as convincing by the judge that the claimant's symptoms were more consistent with extrinsic asthma than a work exposure. The decision was not appealed.

Jeff Watson (Harrisburg, PA) also received a fully favorable decision dismissing a claim petition on behalf of a long-standing staffing client. The claimant alleged a work-related back injury. Although the medical records indicated that the claimant sought emergency care, citing lifting problems at work, Jeff highlighted the fact that the claimant quit without reporting a work injury. Specifically, the employer's fact witness testimony highlighting a resignation letter was instrumental in the dismissal. The claimant admitted that he typed up a resignation letter the day before he walked off the job. He admitted that he did not report the injury as work-related until after leaving and without requesting any work modifications. The decision was not appealed. II

Delaware Workers' Compensation

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Paul V. Tatlow

The Supreme Court affirms the granting of a termination petition by the Board, concluding that the employer did not need to show a change in the claimant's physical condition to meet its burden of proof.

Vaudie Puckett III v. Matrix Services, (DE Supreme Court No. 435, 20120 – decided 1/7/13)

This case involved an appeal on the issue of what exactly is the employer's burden of proof in a termination petition. The claimant was a boiler maker who had a physical injury involving a syrinx, which is a rare abnormal cyst inside the spine. In 2004, a petition was litigated before the Board which found that the claimant had sustained a work injury by repeatedly hitting his head while inside an oil tank as he was welding and carrying pipe, thereby aggravating this condition, and was entitled to compensation for total disability because he was unable to work due to his current symptoms as well as the risk of further aggravating the syrinx condition. Later in 2011, the employer filed a petition to terminate the claimant's total disability benefits. The medical evidence presented on behalf of the employer showed that the claimant was able to return to work at a sedentary level with the ability to change positions as needed and that, based on the stability of the claimant's condition, the sedentary activity would not aggravate the syrinx condition. The employer also presented a Labor Market Survey showing eleven jobs that were physically suited to the claimant's condition. The claimant's treating physician testified that the claimant's condition had not improved and that he was concerned about the claimant's ability to perform tasks repeatedly in a work setting. The Board concluded that the claimant's total disability had terminated and that the sedentary work would not risk aggravating his condition. The Superior Court affirmed.

The claimant's appeal to the Supreme Court asserted that the doctrines of res judicata and collateral estoppel barred the Board from finding that the claimant was not totally disabled, which was determined in the Board's prior decision, and the employer had presented no new evidence that the claimant's physical condition had changed. The Court rejected that argument and found that neither of these legal doctrines barred the Board from finding as it did. The Court analyzed Section 2347 of the Act, which allows the parties to file a petition to change benefits where there has been a change in status. The Court emphasized that Section 2347 allows the employer to petition the Board to review previous total disability awards so long as there has been a change in condition or circumstances. That is different from requiring the employer to prove that the physical injury has changed. In this case, the Court found that the Board was not invalidating or even revisiting the prior Board decision, which had awarded the claimant benefits, but, rather, was examining whether the claimant's current condition permitted him to return to work. Accordingly, the Court affirmed the granting of the termination petition as having been legally correct and supported by substantial evidence. II

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This case illustrates a misconception in that the claimant argued to the Supreme Court that the employer's proof on a termination petition requires showing a change in the claimant's physical condition. It is important to keep in mind that in preparing any such petition for litigation, updated medical evidence will be needed to show that the claimant is currently capable of performing gainful employment. However, a change in the actual physical condition of the claimant is not required. The Court in *Matrix Services* found that the employer's medical expert indicated that the claimant's condition had proven to be stable and it was that stability that allowed a return to work and would not increase the risk of the claimant aggravating his work-related condition.