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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Pennsylvania Supreme Court decides to hear appeal in *Patton v. Worthington Construction*

Patton v. Worthington Construction, 2012 Pa. Super 74 (3/27/12)

In an appeal handled by John J. Hare and Kimberly Boyer-Cohen of Marshall Dennehey's appellate practice group, the Pennsylvania Supreme Court has agreed to hear a general contractor's appeal in the case of *Patton v. Worthington Construction*.

The Supreme Court's decision is significant because the divided lower court in *Patton* essentially nullified Pennsylvania's long-standing statutory employer doctrine, which creates an employment relationship between a contractor and the employees of subcontractors, such that the employees are entitled to workers' compensation benefits from the contractor but, in exchange, the contractor receives the same workers' compensation immunity from tort liability that an actual employer receives. The doctrine operates primarily to immunize contractors on construction projects from tort lawsuits by the injured employees of subcontractors.

While the doctrine has been applied for more than 80 years based upon a straightforward application of a five-part test set forth by the Supreme Court in *McDonald v. Levinson Steel Co.*, 153 A. 424 (Pa. 1930), the lower court grafted an additional element onto the *McDonald* test that requires a fact-finder to determine whether the subcontractor's employee (the plaintiff) is also a common law employee or an independent contractor of the contractor. *(more)*

SIDE BAR

As John mentions, the leading case on the Statutory Employer Doctrine is the Pennsylvania Supreme Court's decision in *McDonald*, issued in 1930. According to the Court, to find the existence of a statutory employer under §302 (b) of the Act, five distinct elements must be confirmed. They are:

(1) Contract with owner of land or one in the position of an owner;
(2) Premises occupied or under the control of the contractor seeking statutory employer status;
(3) Subcontract made by contractor;
(4) Part of contractor's regular business must be entrusted to the subcontractor under the contract; and
(5) Employee of subcontractor is injured on the premises.

Pennsylvania's higher courts later held that *McDonald*'s five-part test for establishing statutory employer status could be considered guidelines rather than strict requirements. In 2012, the Supreme Court held in *Six L's Packing Company v. WCAB (Williamson)*, 44 A.3d 1148 (Pa. 2012) that an owner of personal property (in this case, a trailer) can be a statutory employer as to an entity with which it contracts for work that is a regular or recurrent part of the statutory employer's business. Control of premises is not necessarily required for finding of statutory employer.

However, this question can never be answered in a way that allows the statutory employer doctrine to apply, so it actually nullifies the doctrine. Specifically, if the fact-finder determines that the plaintiff is an actual employee of the contractor, the contractor is immunized as an actual employer and does not need statutory employer immunity. Likewise, if the plaintiff is an independent contractor, he by definition cannot be a statutory employee because the doctrine applies only to employees of subcontractors, not independent contractors. Consequently, although the lower court purported to apply the statutory employer doctrine, it actually nullified it.

Given that the Supreme Court grants only five percent of requests for appeal, its decision to review *Patton* is a major first step toward reviving the statutory employer doctrine. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

The exclusive remedy provision of the Workers' Compensation Act withstands yet another "intentional tort" challenge.

Lemus v. Caterpillar Corporation, Docket No. A-4069-11T2, 2013 N.J. Super. Unpub. LEXIS 1181 (App. Div., decided 5/16/13)

The plaintiff was employed as a laborer for the defendant, a company that recycles wooden pallets and other scrap wood products for use as mulch. The defendant employed the use of several wood grinding machines for this purpose. On May 21, 2007, the plaintiff was attempting to dislodge debris from the wood grinder he was operating when his jacket wrapped around the grinder's drive shaft and dragged him into the machine. He sustained significant injury.

The plaintiff brought an action in tort against the defendant alleging that, at the time of his injury, the defendant had removed a safety guard from the wood grinder, making it virtually certain that the plaintiff would be injured, thereby overcoming the exclusive remedy provision, N.J.S.A. 34:15-8, of the Workers' Compensation Act. Although the Act provides that the exclusive remedy is available to employees injured by accident during the scope of their employment, an employee may bring an action against his employer at common law for any act or omission which is an "intentional wrong." This is the so-called "intentional tort" exception.

At trial, the plaintiff's engineering expert testified that when the wood grinder in question was originally manufactured, the drive shaft was covered by a metal screen which, had it been in place, would have covered the entire length of the drive shaft and prevented the plaintiff's injury. The plaintiff's expert further opined that the defendant had an obligation to make reasonable safety inspections of the machine, which, had they been undertaken, would have revealed the missing screen. The plaintiff's testimony, and that of his co-worker, confirmed that there was no metal screen covering the drive shaft at the time of the injury, and that neither the plaintiff nor his co-worker had ever seen such a screen in place in the five or six years they had worked for the defendant.

Following the testimony of the plaintiff, his co-worker and his engineering expert, the defendant moved for summary judgment, arguing that, even assuming the screen was missing on the day of the accident, the plaintiff failed to prove that the defendant had removed the screen, either intentionally or otherwise. The court granted the defendant's motion, finding no evidence that the defendant had ever altered, or intentionally done anything, to the wood grinder. The plaintiff appealed.

In affirming the lower court's granting of summary judgment, the Appellate Division relied on *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985) and it's progeny. In *Millison*, the Supreme Court adopted a "substantial certainty" standard to be utilized in evaluating employer intentional tort actions. Quoting *W. Prosser & W. Keeton, The Law of Torts*, §8 (5th Ed., 1984), the Court explained:

> The mere knowledge and appreciation of a risk–something short of substantial certainty–is not intent. A defendant who acts in the belief or consciousness that an act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

The Appellate Division concluded that there was nothing in the record to support the plaintiff's claims that the defendant removed the metal screen, evidencing a deliberate intention to injure the plaintiff or a substantial certainty that such injury would occur. "While it might be said that defendant ignored various safety precautions and regulations, and in doing so created a greater risk of injury to plaintiff," the Appellate Division reasoned, "we are convinced that it does not amount to an intentional wrong that allows plaintiff to avoid the workers' compensation bar." II

Side Bar

The recent New Jersey Supreme Court case of *Van Dunk v. Reckson Associates Realty Corp.*, 210 N.J. 449 (2012), demonstrates just how narrowly the courts will construe the intentional tort exception of the Act's exclusive remedy provision. In *Van Dunk*, the Court held that an employer's willful violation of OSHA safety requirements does not, in and of itself, constitute an "intentional wrong" sufficient to overcome the exclusivity provision of the Workers' Compensation Act. The Court distinguished the facts in the *Van Dunk* case from others that involved the employer's affirmative action to remove a safety device from a machine, prior OSHA citations, deliberate deceit regarding the conditions of the workplace, machine, etc., knowledge of prior injury or accidents and previous complaints from employees. It appears that, absent a showing of such egregious conduct on the part of the employer, an employee will be limited to the workers' compensation remedy.

Delaware Workers' Compensation

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

Paul V. Tatlow

Dismissal of Petition to Determine Compensation Due overturned. Board erred in not finding that claimant's medical expert's testimony established the work activities were a substantial cause of claimant's low back injury.

Ryan Tibbits v. United Parcel Service, (DE Superior Ct. C.A. No. N12A-03-006 WCC, decided 3/28/13)

This case involved a claimant's Petition to Determine Compensation Due in which he alleged that he injured his low back on October 29, 2009, while working as a delivery driver. The employer denied that the injury arose out of the claimant's employment. The evidence showed that on the day in question, the claimant had made about ten to fifteen deliveries of packages weighing from one-half pound to eleven pounds. Thereafter, the claimant was driving to Middletown when he experienced lower back pain that was described as being "out of nowhere." Both parties presented medical evidence in support of their positions. The Board found that the claimant had failed to prove that his work activities were a substantial cause in the onset of his low back pain and dismissed the petition.

In order to be compensable, an injury must both occur in the course of the claimant's employment and arise out of the employment. In order for an injury to arise out of one's employment, there must be a connection established between the employment and the injury by which the employment was a substantial contributing, but not necessarily the sole, cause of the injury. The court reviewed the medical evidence in great detail and concluded that the Board rejected the testimony of claimant's medical expert because he did not use the precise words "substantial factor" in giving his opinion on causation. The court commented that this was a gross distortion of the expert's testimony. Any reasonable reading of that testimony would, according to the opinion, suggest that not only was the claimant's employment a substantial factor in causing his injury, but it was also, in the medical expert's opinion, the only factor to cause the injury. Therefore, the court concluded that the testimony of claimant's expert clearly met the substantial factor requirement, despite his failure to use the precise words. The court further commented that it was not making this decision lightly. It recognized the long line of cases establishing that appellate courts should give great deference to the credibility findings made by the Board, but found that here the record did not support the Board's analysis of the medical evidence. II

Side Bar

The Superior Court judge who wrote this decision also commented that, in cases before the Board, the expert testimony is almost always provided in a written deposition, which is then summarized by counsel for the respective parties at the hearing. The judge indicated that, while it would be costly to bring the medical experts in for live testimony, a simple alternative would be to videotape the depositions and present them in that format to the Board. The judge went so far as to suggest that, given current technology, the Board should demand counsel to provide more than merely a written transcript of the medical experts' deposition testimony. It remains to be seen how the Board will respond to this suggestion. There is no question that a live or videotaped deposition would give the Board a better opportunity to make credibility determinations. On the flip side, the cost of doing so would clearly be much more than the current format of submitting written depositions. An additional factor would be that the length of the Board hearings would substantially increase from the current timeframe, which is generally limited to three hours or less.

News from Marshall Dennehey

On August 27, 2013, **Jay Habas** (Erie, PA) will take part in a Lorman Education Services' seminar *Best Practices in ADA, FMLA and Workers' Compensation* in Erie, PA. For details and to register, visit Lorman at www.lorman.com/seminars/390801?discount_code=B5962492&p=1338.

Andrea Cicero Rock (Philadelphia, PA) successfully defeated a Claim Petition that was bifurcated for jurisdictional purposes. The claimant alleged that Pennsylvania was the correct venue because his contract of hire was "accepted" in Pennsylvania and because he had no fixed place of employment. The claimant had been injured in the course and scope of his employment while working for the employer, and the claim had already been accepted in West Virginia. The claimant was working for a customer of the employer at the customer's worksite in West Virginia, while the employer's main office was in Pennsylvania. Andrea successfully demonstrated to the judge through fact witness testimony and aggressive cross examination of the claimant that his fixed place of employment was in West Virginia and that his contract of hire was actually made in West Virginia. II