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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

Rehabilitating properties for resale with construction work was a regular part of the employer's business; therefore, they are claimant's statutory employer under §302 (a) of the Act.

Zwick v. WCAB (Popchocoj); 428 C.D. 2014 and 429 C.D. 2014; filed December 11, 2014; Senior Judge Friedman

The claimant filed a claim petition alleging he injured his right hand while doing construction work for Defendant A. As a result of the injuries, the claimant underwent amputations of his right pinky finger and right thumb. Later, the claimant filed a claim petition for benefits from the Uninsured Employers Guarantee Fund (Fund). The Fund then filed a petition to join Defendant B as an additional defendant. The Workers' Compensation Judge (Judge) granted the claim petitions, concluding that Defendant A was primarily liable and the Fund secondarily liable for payment of the claimant's benefits. The joinder petition was dismissed.

At the Judge level, Defendant A testified that he was self-employed and working for Defendant B at the time of the work accident. The claimant was hired to perform construction work. Defendant B would tell Defendant A what to do, and Defendant A would then tell the claimant what to do. Defendant B would also provide money to Defendant A, who would pay the claimant. Defendant B testified that he was a licensed realtor and investor who did construction rehabilitation work on residential properties. Defendant B did not own the property in question, but was fixing it up for resale.

On appeal, the Workers' Compensation Appeal Board (WCAB) affirmed and reversed in part. The WCAB affirmed the award of benefits, but disagreed with the Judge's finding that Defendant B was not a statutory employer. The WCAB concluded that Defendant A remained primarily liable for payment of workers' compensation benefits, but Defendant B was secondarily liable as a statutory employer and, in the event of a default, the Fund would remain secondarily liable.

Defendant B appealed to the Commonwealth Court, but the court affirmed the WCAB. Defendant B argued on appeal that the WCAB should have applied §302 (b) of the Act, not §302 (a), because under §302 (b), Defendant B would not be a statutory employer since he neither occupied nor controlled the property at the time of the claimant's injury. The court rejected this argument, noting that a workers' compensation claimant must satisfy criteria set forth in either §302 (a) or §302 (b) of the Act in order to hold an entity liable as a statutory employer. The court found that §302 (a) did apply, holding that the work the claimant performed at the time of injury was a regular part of Defendant B's business since Defendant B testified that constructional rehabilitation work was a part of his business. Defendant B additionally testified that he was "essentially" the general contractor on the job. II

Commonwealth Court reverses a prior decision and holds that the robbery of a liquor store clerk at gunpoint was an abnormal working condition and, therefore, a compensable psychiatric injury.

PA Liquor Control Board v. WCAB (Kochanowicz); 760 C.D. 2010; filed December 30, 2014; Judge Cohn Jubelirer

The claimant was working as the general manager of a liquor store when an armed robbery occurred. With a gun held to his head, the claimant was instructed to remove money from a safe and place it in a backpack. At the direction of the gunman, the claimant opened the back emergency exit door while the gunman checked for bystanders. The claimant and a co-worker were tied to a chair with duct tape. After the gunman left, the claimant was able to extricate himself and call the police. The claimant filed a claim petition for psychiatric injuries and testified that, in over 30 years with the employer, he was never a victim of an armed robbery by a masked gunman who put a gun to his head. The employer presented evidence that the claimant and other employees received training on work place violence, including robberies. Evidence was also presented on the number of robberies that had occurred at surrounding liquor stores.

The Workers' Compensation Judge granted the claim petition, concluding that the claimant met his burden of proving that he was subjected to abnormal working conditions. The Workers' Compensation Appeal Board

affirmed. However, the Commonwealth Court reversed (*See*, *PA Liquor Control v. WCAB (Kochanowicz)*, 29 A.3rd 105 (Pa. Cmwlth. 2011). In doing so, the court noted that the employer provided the claimant with training specifically related to robberies and theft, and that there was evidence of the frequency of robberies in the employer's stores. The court concluded that the claimant could have anticipated being robbed at gunpoint at work and, therefore, that this was a normal condition of his employment.

The Pennsylvania Supreme Court, however, granted the claimant's appeal of the Commonwealth Court's decision and vacated their order. On remand, the Commonwealth Court held that the findings in the Judge's decision described a singular, extraordinary event occurring during the claimant's work shift that caused his Post-Traumatic Stress Disorder which, therefore, supported the Judge's legal conclusion that the specific armed robbery was **not** a normal working condition. In reversing themselves, the court was guided by the Supreme Court's decision in *Payes v. WCAB (Commonwealth of Pennsylvania State Police)*, 79 A.3d 543 (PA 2013), wherein the Supreme Court held that psychiatric injury cases are "highly fact sensitive" and that the abnormal working conditions analysis does not end when it is established that a claimant generically belongs to a profession that involves a certain level of stress. In that case, the Supreme Court also held that an extraordinarily unusual and distressing single work event experienced by the claimant constitutes an abnormal working condition as a matter of law. II

A former counsel is not entitled to an equitable apportionment of attorney's fees awarded to current counsel in a compromise and release agreement.

Anthony Mayo v. WCAB (Goodman Distribution, Inc.); 683 C.D. 2014; filed January 8, 2015; Judge Simpson

This case involves a fee dispute between a claimant's former attorney and the attorney who represented him in a settlement and earned a 20% fee from a C&R approved by a Workers' Compensation Judge. The claimant's former counsel represented the claimant in a claim petition that was granted. In February 2012, about a year and a half after the decision granting the claim petition, the employer filed a petition for approval of a compromise and release agreement. Prior to the C&R hearing before the Judge, the claimant discharged his former counsel and entered into a fee agreement with his current counsel. In April of 2012, the Judge issued an interlocutory order approving the C&R agreement but declining to address former counsel's challenge concerning the attorney's fee. Former counsel was seeking an equitable apportion of the C&R attorney's fee and took the position that the attorney's fee for the claimant's C&R attorney should be based on *quantum meruit*.

The Judge issued a decision upholding as valid the claimant's fee agreement with his C&R attorney. The claimant's prior attorney appealed to the Workers' Compensation Appeal Board, which affirmed.

The Commonwealth Court affirmed the WCAB and dismissed the appeal of the claimant's prior counsel. The court noted that the Judge has authority to determine what constitutes a reasonable attorney's fee. It additionally noted that former counsel received a 20% fee from the date of the February 2009 injury through the date of the March 2012 C&R hearing. In fact, former counsel continued to receive his 20% fee even though the claimant discharged him two to four months prior to the C&R hearing. Former counsel additionally acknowledged that his law firm did not obtain a settlement offer from the employer while representing the claimant. II

A finding of maximum medical improvement by an IRE physician, even with the possibility of future surgery, does not render the IRE invalid.

Nicole Neff v. WCAB (Pennsylvania Game Commission); 130 C.D. 2014; filed January 8, 2015; Judge Brobson

The claimant sustained an injury in February of 2004. The injury was originally acknowledged as a right wrist carpal tunnel syndrome. Later, by petition to review, the injury was expanded to include a chronic lateral epicondylitis of the right elbow. Subsequently, the parties entered into a compromise and release agreement settling all benefits payable to the claimant for the right carpal tunnel injury, but continuing the employer's liability for the right elbow injury. The employer later filed a modification petition based on the results of an IRE performed, which resulted in a determination that the claimant has reached maximum medical improvement (MMI) and suffered a whole person impairment rating of 1%. The Workers' Compensation Judge granted the petition. The claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

The claimant then appealed to the Commonwealth Court and argued that the employer's modification petition was based on an invalid IRE. According to the claimant, the IRE was premature and not valid as a matter of law because there was a reasonable potential for the claimant to undergo future surgery that could cause a change in her condition. The Commonwealth Court, however, rejected this argument and dismissed the claimant's appeal. The court held that the IRE physician unequivocally and repeatedly opined that the claimant had reached MMI, regardless of whether surgery was going to be performed in the future. According to the court, the IRE physician's testimony as a whole established that the claimant was at MMI and this testimony was accepted by the Judge in granting the employer's modification petition. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division reverses a Judge of Compensation's order for home remediation due to lack of competent medical evidence as required by the Supreme Court's holding in *Squeo*.

Loeber v. Fair Lawn Board of Education, Docket No. A-1990-13T1, 2014 N.J. Super. Unpub. LEXIS 2814 (App. Div., decided December 5, 2014)

As a result of a work-related accident in November of 2009, the petitioner was left partially paralyzed and confined to a wheelchair. The respondent admitted compensability and provided the petitioner with medical treatment, as well as certain modifications to his home and vehicle. In October of 2011, the petitioner sought additional modification to his home in the form of an interior elevator to take him from the main floor to both the basement, which housed his woodworking shop, and the second floor, on which his preadolescent son's bedroom was located. The Board denied the petitioner's application for installation of an elevator in his home as unnecessary.

(*more*)

At trial, the petitioner proffered the testimony of "an expert in home modification for disabled people" who supported the petitioner's position and who testified that the petitioner would benefit psychologically from access to his woodworking shop and his child's room. The respondent's expert, who was qualified as a licensed occupational therapy assistant, testified that an elevator was unnecessary and that the petitioner's workshop could be moved to the garage and his child's bedroom to the home's main floor. No medical or psychiatric reports or testimony were proffered by either the petitioner or the respondent.

The Judge of Compensation delivered an oral opinion in which she found the testimony of the petitioner's expert to be more credible than that of the respondent's expert, and she determined that the petitioner's "long-term mental health would be enhanced by having the ability to live in a barrier free home with his wife and preadolescent son." Accordingly, the Judge determined that the petitioner was entitled to receive the modifications sought, with the respondent having a lien to recover expenses upon sale of the petitioner's home. On appeal, the respondent argued that the Judge failed to follow the appropriate procedure in deciding the petitioner's application by not requiring the submission of one or more medical reports, or medical expert testimony, supporting the relief requested.

In reversing the Judge of Compensation's holding, the Appellate Division relied on *Squeo v. Comfort Control Corp.*, 99 N.J. 588 (1985), in which the Supreme Court affirmed a Judge of Compensation's order requiring the employer to build a self-contained apartment, to be attached to his parents' home, for a quadriplegic who had developed severe depression and had become suicidal after several years in a nursing home. The *Squeo* court acknowledged that *N.J.S.A.* 34:15-15 does not specifically mention home remediation as an available remedy but, rather, speaks in terms of payment or reimbursement for "medical, surgical and other treatment." That notwithstanding, the *Squeo* court interpreted that language as permitting a Judge to order home modification, but only in limited circumstances. As the *Squeo* court concluded:

> [U]nder certain unique circumstances, where there is sufficient and competent medical evidence to establish that the requested "other treatment" or "appliance" is reasonable and necessary to relieve the injured worker of the effect of his injuries, the construction of an apartment addition may be within the ambit of *N.J.S.A.* 34:15-15. We caution however that it is only the unusual case that may warrant such extraordinary relief.

The Appellate Division found that the Judge's ruling was based largely on her stated belief that the petitioner's long-term mental health would benefit from installation of an elevator in his home. While the Appellate Division commented that the Judge's beliefs were likely true, they were not based on any medical or psychological evidence because none had been offered at trial. As the Appellate Division concluded:

> The award of the elevator, although understandable, appears related primarily to the judge's concerns about what is desirable in terms of Loeber's mental health. We are not convinced that the judge's decision with respect to the elevator comported with the strictures of *Squeo*, and infer from her oral opinion that the decision was primarily informed by her concerns about Loeber's "long-term mental health," as understandable as those concerns may be. **II**

Side Bar

The *Squeo* case has been relied on by the Division of Workers' Compensation in ordering wide-raging types of relief in catastrophic claims, from handicap accessible vehicles to home remediation to in vitro fertilization. However, as the Supreme Court in *Squeo* stressed, and as this Appellate Division decision illustrates, in determining what is reasonable and necessary, "the touchstone is not the injured worker's desires or what he thinks to be most beneficial. Rather, it is what is shown by sufficient competent evidence to be reasonable and necessary to cure and relieve him."

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board denies the claimant's petition to determine additional compensation seeking payment for medical expenses related to the claimant's RSD condition with the treatment at issue including Ketamine infusion treatments.

Cindy Commisso v. I-Chem Co., (IAB No. 1058953 – Decided December 1, 2014)

The claimant sustained a compensable work injury on June 2, 1995, when the chair she was sitting on broke and she fell forward, jamming her left foot on the floor. She experienced immediate pain in her left leg as well as low back pain. The claimant had surgery on her low back and, as a result of the left knee injury, she developed bilateral lower extremity Reflex Sympathetic Dystrophy (RSD). The claimant had received compensation for temporary total disability, but a review petition challenging those benefits was resolved shortly before the pending litigation. The petition at issue was the claimant's petition to determine additional compensation seeking payment for medical expenses related to treatment of RSD and for pre-approval of treatment for an RSD-related gastrointestinal problem.

The Board gives a detailed discussion of the condition RSD, which is now more commonly known by the term Complex Regional Pain Syndrome (CRPS). RSD is characterized by severe and constant pain following an injury to a body part. The signs of this condition include the presence of allodynia, hyperalgesia, dystrophic or color changes to the skin, abnormal nail and hair growth, and temperature changes comparing one side to the other. There had at one time been significant over-diagnoses of RSD, and in 2010 a conference of worldwide experts took place in Budapest which established a stricter set of criteria for diagnosing RSD.

The evidence before the Board included the claimant's testimony that she benefited from her treatment for this condition, which included Ketamine treatments, since they allowed her to reduce her need for pain medication. The claimant's medical expert testified that Ketamine was originally developed as an operating room anesthetic. He indicated that he currently uses it to treat RSD patients in a sub-anesthetic way, meaning that it is similar to a sleeping pill. Rather than directly treating the pain, Ketamine treats the site in the brain that controls and generates the pain in RSD. The claimant was receiving Ketamine infusions every three weeks from her treating physician.

(*more*)

The employer's medical expert testified that, as of the date of his exam, the claimant did not have any objective evidence of RSD. He further testified that he was familiar with Ketamine treatment. As an anesthesiologist, he had previously used it to treat his RSD patients but had stopped doing so since it was not effective. The employer's expert further testified that the medical evidence did not show any functional improvement to the claimant from the Ketamine treatment and that he did not believe it was necessary and reasonable.

The Board concluded that the claimant had failed to meet her burden of showing that the ongoing Ketamine infusion treatment and the proposed gastrointestinal treatment were necessary and reasonable for the work injury. The Board accepted the testimony of the employer's medical expert as being more credible in establishing that the necessary criteria for a diagnosis of RSD were absent here and that there was no convincing evidence that the claimant was actually benefiting from the treatments. The decision also criticized the treatment from the claimant's medical expert, describing it as an unending series of invasive treatments with very little follow up to determine the level of improvement if any. ||

Side Bar

Ketamine infusion treatments fall into the category of experimental, or unconventional, type treatments. In line with that, one of my Pennsylvania colleagues in a recent *Law Alert* discussed a decision by the New Mexico Court of Appeals finding medical marijuana to be necessary and reasonable medical care. That article mentioned that, currently, medical marijuana is legal in 23 states with bills pending in many others. To date, Delaware has not authorized medical marijuana for treatment in workers' compensation cases, and it is not on the Preferred Drug List. However, during the last week of January, House Bill 39 was introduced in the Delaware House of Representatives, and this proposed law would provide that persons caught with one ounce or less of marijuana would only be subject to civil fines but not to any criminal charges. This effort throughout the country to decriminalize the use of marijuana makes it likely that efforts to have medical marijuana introduced into the Healthcare Practice Guidelines will occur at some point in the not too distant future.

News from Marshall Dennehey

On March 19, 2015, **Niki Ingram** and **Tony Natale** (Philadelphia, PA) are speaking at the *UC/WC 101 Benefits Roundtable* hosted by the Pennsylvania Chamber of Business and Industry. Covering the key basics of workers' compensation and unemployment compensation, the program will help attendees improve program management by providing answers to commonly asked questions, updates on the latest changes to the law, explanations as to how and when benefits apply, and suggestions on how to eliminate mistakes and potentially save money. Niki and Tony are presenting "Worker's Compensation Benefits 101: the Flow of a Claim, and WC Fraud." Tony is also presenting "Unemployment Compensation Benefits 101: Relief from Charges, Separation Eligibility including Voluntary Quit and Willful Misconduct, UC Fraud." For more information and to register, visit http://www.pachamber.org/events/details.php?id=1507#d1.

Michele Punturi (Philadelphia, PA) will be a speaker at *The Claims and Litigation Management (CLM) Alliance Annual Conference* on March 26, 2015. Michele's topic will be "The Dream Team Approach to Workers' Compensation Case and Litigation Management." She will be joining other insurance industry professionals to discuss how to achieve successful case and litigation management in workers' compensation by balancing the interests of the employer, broker, claims adjuster and defense counsel. For more information, visit https://www.theclm.org/Event/ShowEventDescription/2860.

On Monday, April 27, 2015, **Angela DeMary** (Cherry Hill, NJ) will be a presenter at the *Advanced Workers' Compensation* seminar hosted by the National Business Institute. The seminar will provide current, definitive information on all aspects of workers' compensation law and procedure. Angela will be discussing issues in workers' compensation law, such as permanent total and partial disability, managed health care provisions, computation of benefits, fraud, settlement and average weekly wage considerations. She will also address litigation techniques for handling difficult cases, including preparation of the injured employee's case, preparation of the employer's case, presenting evidence, settlement strategies, and ADA and FMLA implications. For more information and to register, vist http://www.nbi-sems.com/Details.aspx/Advanced-Workers-Compensation/Seminar/R-68767ER%7C?NavigationDataSource1=Rpp:20,Nra:pEventDate%2bpEventStartTime%2bCredit+Hours%2bpCreditRecordCreditHours%2bCredit_C2%2bpStandardPrice%2bSeminar+Location%2bScope+of+Content%2bpLocationCity%2bpDescription%2bpDivision%2bpProductId%2bpProductDescription%2bProductCode+%28HIDDEN%29%2bpAdditionalFormats%2bpEventId%2bpAltSpaceDesc%2bpEventIndicator%2bpEventEndDate%2bpMultiDayEvent,N:63943-59.

Frank Wickersham (King of Prussia, PA) is speaking at the 35th annual *SEAK National Workers' Compensation and Occupational Medicine Conference* on June 9, 2015. Frank's session, "High Anxiety: Medical Marijuana, Workers' Comp, and Occupational Medicine," will review the latest developments in the rapidly evolving interplay between the spreading legalization of marijuana and the workers' compensation and occupational medicine arena. He will discuss discovery and HIPAA issues that may emerge in the handling of these claims; reimbursement issues that may be seen in the absence of a medical marijuana national drug code; liabilities for employers and insurance companies who do not pay for medical marijuana, including additional injuries caused by drug intoxication; and the safety implications for employers. Frank will also offer practical suggestions for when employers, insurers, and self-insurers can and need to pay for medical marijuana. For more, please visit http://workerscompensationconference.com/conference/. ||