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Weber Gallagher

Pennsylvania Workers' Compensation Update - 2nd Quarter '12

I. Supreme Court Cases

Lancaster General Hospital v. WCAB (Weber Brown), No. 69MAP 2010, (Decided May 29, 2012)

Issue: Whether the PA WC Act permits Claimant's average weekly wage to be calculated based on wages earned with an employer at the time when an injury became a specific loss rather than the wages earned with an employer at the time of the initial incident?

Answer: Yes.

Analysis: Claimant, was employed by Lancaster General Hospital (LGH) when, in either 1979 or 1980, sputum from a herpes (HSV) infected patient entered her left eye. Claimant developed an infection in her left eye which resolved with treatment. Claimant subsequently left her employment with LGH. While employed elsewhere Claimant experienced several recurrent left eye infections that also resolved with treatment. In October, 2006, over 25 years later, Claimant developed an infection which was not resolved with treatment, and by February, 2007, had lost vision in her left eye. Claimant filed a petition alleging loss of use of her left eye, due to contracting HSV while working for LGH. The Judge accepted Claimant's medical evidence, and found that she had suffered a specific loss as a result of the work incident, as of May 16, 2007, and calculated her AWW and compensation rate with her employer at the time of the specific loss rather than with LGH. Claimant wanted the AWW calculated based on her employment in 2007 because her wages were much higher than in 1979-1980. Both the Board and Commonwealth Court affirmed the Judge's Decision.

The Supreme Court analyzed the average weekly wage section of the Act (Section 309) to determine whether Claimant's wages could be calculated using her wages with a subsequent employer. The Court discussed that Section 309 addressed the calculation of Claimant's average weekly wage at the time of the specific loss, which could be long after the initial incident. As such, the Court held that the AWW was properly calculated using the Claimant's wages from the employer at the time of the specific loss, rather than from the employer at the time of the incident.

Conclusion: For the purpose of calculating a Claimant's average weekly wage for a specific loss, the employer is the employer at the time of the specific loss, which may differ from the employer at the time of the injury.

Note: The holding appears to be inconsistent with the traditional determination that the employer at the time of the initial incident is liable for compensation based on wages being earned at that time.

Six L's Packing Company, Inc. and Broadspire Services, Inc. v. WCAB (Williamson), No. 46 EAP 2011 (Decided May 29, 2012).

Issue: Whether the classic "McDonald test" for statutory employer, which excludes an owner from responsibility, is the only test for determining statutory employer status?

Answer: No.

Analysis: Six L's Packing Company, Inc. (Six L's) grows, harvests, processes and distributes tomatoes and other products. It owns and leases farms and distribution processing centers. Six L's contracted with Garcia to perform services, including transporting tomatoes between a warehouse and a processing facility. Claimant was employed by Garcia as a truck driver and suffered injuries in a motor vehicle accident while transporting Six L's tomatoes. Claimant filed Claim Petitions against Garcia and Six L's. Garcia did not have

workers' compensation insurance and Claimant asserted that Six L's was his statutory employer under Section 302 of the Act. Section 302 of the Act creates a statutory employer obligation for a contractor who subcontracts all or any part of a contract to a sub-contractor, who does not have workers' compensation insurance. Six L's argued that statutory employer liability could only be established under the traditional McDonald five element test: (1) Entity is under contract with an owner or one in position of an owner; (2) the entity occupies or is in control of the premises where the injury occurred;(3) the entity enters into a subcontract; (4) the entity entrusted of part of the business to the contractor; and (5) the injured party is an employee of such subcontractor. Six L's argued that it could not be a statutory employer since it owned the facilities involved. Claimant argued that the McDonald test did not apply to this situation and that the owner of the property could be deemed a statutory employer if the work that is being performed by the subcontractor is part of the regular business of the owner.

The Pennsylvania Supreme Court ultimately found that Six L's was a statutory employer even though the traditional McDonald test was not met. It found that the McDonald test only applied to Section 302 (b) of the Act and Section 302 (a) permitted owner liability as Claimant had argued above.

Conclusion: Statutory employer liability under Section 302(a) of the Act does not require a finding that the elements of the McDonald test have been met and does not exclude the owner of the property.

II. Commonwealth Court Cases

Rhonda Walker vs. WCAB (Health Consultants), 492 CD 2011, (filed May 3, 2012).

Issue: Whether the Board may completely reverse a finding of compensable disfigurement if the Board finds that the alleged disfigurement was not unsightly?

Answer: Yes.

Analysis: On May 8, 2007 Claimant suffered a nasal fracture. She was paid wage loss benefits, returned to work, resigned, and ultimately alleged disfigurement for the nose. The Judge awarded benefits for disfigurement based upon review of photographs. Both parties appealed. The Board, after personally viewing the Claimant's appearance, reversed the award of disfigurement benefits, finding that the Claimant's disfigurement was not unsightly. Claimant appealed.

The Commonwealth Court affirmed. The Court first cautioned judges against making disfigurement determinations based upon photographs which can be manipulated. The Court then explained that the Board had independent review power in disfigurement cases and that the Board has the power to reverse or amend such awards. The Court explained that every change to a face does not warrant compensable disfigurement. The Court found that because the Board felt the disfigurement was not unsightly, disfigurement benefits were properly denied.

Conclusion: The Board may reverse or alter an award of disfigurement benefits based upon its personal viewing of the Claimant. Most judges in PA award some degree of disfigurement benefits, as the judge did here, and the question will be whether it makes sense, on a case by case basis, to attempt to obtain a reversal on appeal.

B. J. Wholesale Club vs. WCAB (Pearson), No. 2010 CD 2011 (filed May 10, 2012)

Issue: Whether a Claimant who suffers a work injury, returns to light duty without wage loss, and is terminated for cause, is entitled to total disability benefits, because she is unable to return to her time of injury job?

Answer: No.

Analysis: On June 20, 2008, Claimant sustained a work related injury, underwent treatment and returned to work with restrictions without wage loss. When Claimant appeared for her scheduled shift, it was suspected that she was intoxicated and she was sent for a blood alcohol test which showed a blood alcohol level of .108. Claimant was terminated per B.J. Wholesale Club's substance abuse policy. Claimant then sought total disability benefits from the date of her termination onward. The Judge found Claimant was under the influence of alcohol at the time of her return to work but nevertheless awarded benefits. The Board affirmed.

The Commonwealth Court reversed. The Court explained that if an employer has provided work within a Claimant's physical limitations at no loss of pay and has shown that the Claimant was terminated for bad faith conduct following her return to work, then disability benefits must be denied. In this case, Claimant was terminated for violation of employer's substance abuse policy which constituted bad faith conduct and required a denial of benefits.

Conclusion: An employee who returns to work and who is terminated for conduct evidencing bad faith, such as violation of a substance abuse policy, is not entitled to TTD benefits.

Susan Miller v. WCAB (Walmart), No. 1741 CD 2011 (filed May 25, 2012)

Issue: Whether specific loss of an arm must include the loss of use of the hand and the forearm?

Answer: No.

Analysis: Claimant sustained a work related injury to her left arm, and a fracture of her left clavicle on December, 2005. Claimant filed a petition alleging specific loss of her left arm. The Judge denied the Claim Petition finding neither Claimant nor her medical expert credible. In rendering his opinion, the Judge also held that to succeed on a claim for loss of use of the arm the Claimant would have to show loss of use of the forearm and hand as well as the shoulder. Claimant appealed. The Board affirmed the denial of benefits.

The Commonwealth Court held that the Claimant was not obligated to show loss of use of the forearm and hand to support a claim for loss of use of the arm. However, because the Judge found both Claimant and her medical expert incredible and the credible evidence of record demonstrated that Claimant had greater range of motion and could use her arm in a manner inconsistent with her claim; the Court affirmed the denial of the Claim Petition.

Conclusion: In order to establish a claim for specific loss for loss of use of the arm, the Claimant need not establish loss of use of each part of the arm, just that the arm as a whole is useless, for all practical intents and purposes.

Wagner, v. WCAB (Anthony Wagner Auto Repairs & Sales, Inc.), No. 1527 C.D. 2011, (filed June 4, 2012)

Issue: Whether it is mandatory that an executive exclusion endorsement be part of the insurance contract for the exclusion from coverage under the company's workers' compensation policy to be effective?

Answer: No.

Analysis: Claimant's business, originally a sole proprietorship, was incorporated as a Subchapter S Corporation. The Claimant (owner) had executed an LIBC-509 Form which excluded him from coverage under the company's Workers' Compensation policy. Subsequently, Claimant filed a claim petition alleging a work injury. Claimant alleged that he had not read any of the insurance forms presented to him for signature

and that the exclusion was not effective because the policy did not include the executive exclusion endorsement. The Judge rejected Claimant's testimony that he did not read the insurance documents and found that the lack of the executive exclusion endorsement did not confer coverage onto the Claimant. Claimant appealed.

The Commonwealth Court ultimately determined that the executive exclusion endorsement was not mandatory per the PA Compensation Rating Bureau and the Rating Manual it publishes. The Rating Manual does require an executive officer to execute the exclusion form (LIBC-509) for the exclusion from coverage to be effective. In this case, because the Claimant executed the LIBC-509 form, the exclusion was effective. The Court also noted that when the policy was read in conjunction with the attached endorsements, it was clear that only one employee was covered, the Claimant's mechanic, and the Claimant was therefore not covered. The Court also stated that although the WCJ has authority to determine if an LIBC form was effective, the WCJ does not have authority to interpret contracts and breaches of contracts. Claims of this nature must be filed in the Court of Common Pleas.

Interestingly, the Commonwealth Court has previously determined that a WCJ has the right to determine if insurance coverage is present which appears to be odds this discussion above. See SWIF, v. WCAB (Hering), 833 A.2d 343 (Pa. Cmwlth. 2003).

Conclusion: In the context of a claim for workers' compensation benefits, the execution of LIBC-509, an executive exclusion endorsement, is sufficient to establish the exclusion of an executive officer from workers' compensation coverage.

Marnie, v. WCAB (Commonwealth of PA/Dept. of Attorney General, No. 1583 C.D. 2011, (filed June 7, 2012)

Issue: Whether an employer can take an offset for an investment return credit an employer receives on retained funds from employees who leave before their retirement benefits have vested?

Answer: Yes.

Analysis: Claimant was receiving workers' compensation benefits when he began to receive a disability pension from his time of injury employer. Employer issued a notice of benefits offset and Claimant filed a Petition to Review the Workers' Compensation Offset, specifically challenging the formula that credited the Employer for an investment return on retained funds from employees who left before their retirement benefits had vested.

Both parties presented actuarial expert testimony, and the Judge credited the testimony presented by the Employer. The Commonwealth Court ultimately affirmed and determined that the Employer's actuarial formula, which utilized the retained investment returns of non vested employees, was proper.

Conclusion: An employer is entitled to an offset for the return on investment it obtains from employees who have left that plan before their retirement benefits have vested.

Miller v. WCAB (Millard Refrigerated Services and Sentry Claims Service), No. 2306 C.D. 2011, Filed June 22, 2012

Issue: Whether an employer can successfully assert the violation of a positive work order defense if an employee acknowledges that he was aware of a rule that only allowed employees to operate equipment on which they had been trained and certified and if an employee was injured while operating equipment for which he had not been certified?

Answer: Yes.

Analysis: Claimant filed a claim petition alleging a work injury. Employer asserted that Claimant was precluded from receiving benefits because his work injury resulted from a violation of a positive work order. Claimant, who was only certified to operate a pallet jack, was injured when he crashed a forklift into a wall. Claimant acknowledged that he was not certified to operate the forklift but asserted that his manager was aware that he was operating the forklift and had done so previously. The manager testified that he had not seen Claimant drive the forklift and that Claimant had not asked for supervised practice runs. Claimant further acknowledged that Employer had a rule that prohibited persons from operating equipment for which they were not certified and that he had been aware of this rule. The Judge rejected Claimant's testimony that his manager was aware of his operation of the forklift and denied his petition. Claimant appealed and the Board affirmed. The Commonwealth Court also affirmed, finding that the Employer had established the three elements necessary to succeed on an affirmative defense of the violation of a positive work order defense: (1) the particular conduct was prohibited; (2) the Claimant knew of the rule prohibiting the conduct; and (3) that the particular conduct was not part of the Claimant's job duties.

Conclusion: In order for an employer to successfully assert the affirmative defense of violation of a positive work, the employer must prove that (1) the particular conduct was prohibited; (2) the Claimant knew of the rule prohibiting the conduct; and (3) that the particular conduct was not part of the Claimant's job duties.

III. Medicare Update

The Medicare Secondary Payer Recovery Portal (MSPRP) has gone live! The MSPRP is a web-based tool to allow beneficiaries, attorneys, carriers and TPA's to obtain case specific information about conditional payments.

You will need to register for the portal and can access the portal through the MSPRC website: http://www.msprc.info/ . The registration process is self-explanatory.

The MSPRP will allow users to electronically perform the following activities:
Submit Proof of Representation or Consent to Release documentation;
Request conditional payment information;
Dispute claims included in a conditional payment letter; and
Submit case settlement information

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