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Weber Gallagher

Pennsylvania Workers' Compensation Update - 1st Quarter '11

COMMONWEALTH COURT CASES

Rodney Washington v. W.C.A.B. (Commonwealth of Pa State Police), No. 476 C.D. 2010 (Filed January 5, 2011)

Issue: Whether state police forensic examiner's activities related to his investigation into the death of an infant rose to the level of abnormal working conditions such that he was entitled to benefits?

Answer: No.

Analysis: Claimant was employed as a member of the Forensic Services Unit (FSU) of the Pennsylvania State Police. His duties included providing forensic and photographic services to criminal investigations. On December 31, 2003, Claimant was called to investigate a gruesome homicide involving an infant, the Baby Jane Doe case. Claimant stopped working for the State Police on November 24, 2005.

On October 26, 2006, Claimant filed a Claim Petition in which he alleged that he suffered work related post-traumatic stress disorder.

Both the Claimant and other members of the FSU testified that responding to and photographing homicide scenes, including those involving children, were routine elements of the job of an FSU member. The FSU members noted that it was not unusual to participate in a homicide investigation and that there was a support system in place that was available to Claimant.

Claimant argued that he provided substantial evidence to prove either that his work performance relating to the Baby Jane Doe investigation was unusually stressful for his type of job, or that the exposure to this unusual event made his job more stressful than it had been. The Commonwealth Court rejected this argument noting that in cases of this nature (mental-mental), the claimant must establish by objective evidence that he suffered a psychological injury and that the injury was more than a subjective reaction to normal working conditions. Davis v. W.C.A.B. (Swarthmore Borough), 561 Pa. 462, 751 A.2d 168 (2000). The Court noted that the WCJ found as a fact that Claimant's activities with respect to the Baby Jane Doe investigation were normal and routine activities relating to his job as an FSU member. Thus, although such activities may have been unusual for Claimant to endure as a member of the FSU, they do not constitute the requisite abnormal working conditions to support an award for compensation.

Conclusion: In order to prevail on a mental-mental claim, Claimant must establish by objective evidence that he suffered a psychological injury and that the injury was more than a subjective reaction to normal working conditions. Whether an event constitutes an abnormal working condition must be determined by reviewing the nature of Claimant's employment and what may be considered an abnormal working condition for the general public may be a normal aspect of a particular type of employment.

City of Pittsburgh and UPMC Benefits Management Services, Inc. v. W.C.A.B. (Wilson), No. 235 C.D. 2010 (Filed January 20, 2011)

Issue: Whether a medical report that is later recanted by the authoring physician may be relied upon by the WCJ as unequivocal medical evidence to support a factual finding?

Answer: No.

Analysis: On December 22, 2005 Claimant suffered a work injury identified as a thoracic strain on a Notice of Temporary Compensation Payable issued by Employer. Employer subsequently filed a Petition to

Terminate and claimant filed a Petition to Review to expand the work injury to include cervical and bilateral rotator cuff injuries.

The IME report contained a sentence that read: "I do feel that this work injury caused an aggravation of the preexisting degenerative condition." The IME physician testified that this sentence was erroneous because the word "not" should have appeared between "do" and "feel." He produced a corrected report with a cover letter explaining the correction of the typographical error in the earlier report. The IME physician testified that his amendment had not been requested or influenced by defense counsel and that his true opinion was contained in the corrected report which was admitted into the record. The original, uncorrected report, was not made a part of the record. The WCJ, relying upon the original uncorrected report, granted the Review Petition as to the alleged aggravation. Employer appealed. The Board affirmed. Employer appealed.

The Commonwealth Court reversed. The Court agreed with Employer's argument that there was no competent evidence to support the WCJ's finding that Claimant suffered an aggravation. The Court pointed out that the IME physician, under oath, stated clearly and repeatedly that Claimant's work injury did not include an aggravation. Even if the sentence in the original report was deemed to represent the actual opinion, that opinion was recanted. Where a medical expert recants his opinion, then his testimony is equivocal and cannot support a finding. See Moore v. W.C.A.B. (American Sintered Technologies, Inc.), 759 A.2d 945, 949 (Pa. Cmwlth. 2000). Because the IME physician corrected and recanted that portion of his original medical report which would support a finding of an aggravation the WCJ erred in relying upon that original medical opinion.

Conclusion: If a medical expert recants an earlier opinion, the earlier opinion is equivocal and cannot support a finding by the WCJ.

Pizza Hut, Inc. v. W.C.A.B. (Mahalick), No. 996 C.D. 2010 (Filed January 20, 2011)

Issue: Whether a WCJ may amend the injury description during a Termination Petition when the consolidated Review Petition seeking the injury description expansion was not filed within the three year period?

Answer: Yes.

Analysis: Claimant sustained a work injury on January 31, 2003 accepted via Notice of Compensation Payable (NCP). On July 23, 2003, the parties executed a supplemental agreement, which suspended Claimant's benefits as of March 26, 2003. On September 15, 2005, Employer filed a Petition to Terminate Claimant's benefits. On December 16, 2006, more than three years after the suspension, Claimant filed a Petition to Review to amend the description of her work injury. The WCJ denied the Termination Petition and expanded the injury description as sought by claimant.

Employer appealed the expansion of Claimant's work injury alleging the Review Petition filed by Claimant was time-barred under Fitzgibbons v. W.C.A.B. (City of Philadelphia), 999 A.2d 659 (Pa. Cmwlth. 2010), because she failed to file it within three years of the last payment of compensation. The Board affirmed. Employer appealed.

The Commonwealth Court affirmed. The Court noted that Section 413 of the Act provides the WCJ may, at any time, review and modify or set aside a NCP in the course of the proceedings under any petition, if it is established that the NCP was incorrect. Pursuant to Fitzgibbons, a petition must be filed within three years of the most recent payment of compensation. Id. at 663-64. Here, Claimant did not file her petition to expand the description of the work injury until December 16, 2006, outside of the three year window. However, Employer filed its Petition to Terminate Claimant's benefits on September 15, 2005,

within the three-year period. WCJ may correct an NCP during a Termination proceeding under section 413 of the Act without the claimant filing a separate Petition to Support a Corrective Amendment. Cinram Manufacturing, Inc. v. W.C.A.B. (Hill), 601 Pa. 524, 975 A.2d 577 (2009). Because it was not necessary for Claimant to file a separate petition and because Employer filed its Termination Petition within three years of the last payment of benefits, the Board did not err in affirming the WCJ's expansion of the description of injury.

Conclusion: A WCJ may amend an injury description to correct material mistakes in the NCP under any petition filed within three years of the last payment of benefits even if the actual Review Petition filed by Claimant is filed more than three years from the last payment of benefits.

Penn State University v. WCAB (Smith), 630 C.D. 2010 (Filed February 22, 2011)

Issue: Whether intentionally jumping down a flight of stairs while walking to a dining facility on Employer's property is a sufficient deviation from employment to take the Claimant outside of the course and scope of his employment as a cook and maintenance person?

Answer: Yes.

Analysis: Claimant was employed by Pennsylvania State University as a cook but also served in the maintenance department.

On July 7, 2010, Claimant was walking to lunch at an on-campus restaurant when he jumped down a flight of twelve stairs. Claimant had previously thought of jumping down the stairs and had even discussed it with a co-worker. He landed hard on his feet, resulting in injuries to both legs, which later required surgery.

Claimant filed a Claim Petition. Employer maintained Claimant's injury was outside the course and scope of his employment. Employer raised the affirmative defense that Claimant was engaged in horseplay, in violation of a positive work order.

The WCJ determined Claimant was in the course and scope of his employment at the time the injury and granted the Claim Petition. The WCAB affirmed.

The Commonwealth Court reversed. The Court noted that, typically, a claimant who is at lunch and sustains an injury off the employer's premises is not acting in furtherance of the employer's business. Employees who remain on an employer's premises for lunch and sustain an injury are generally considered to be in furtherance of the employer's business, unless the activity they are engaged in was so wholly foreign to their employment.

Certain factors are to be considered when determining whether an employee is furthering an employer's business or affairs when injured while engaging in social or personal activity during a work break or non-work hours. Such factors include whether the employer encouraged the activity, whether the activity furthered a specific interest of the Employer or whether the activity was necessary to maintain employment skills.

Commonwealth Court found Claimant voluntarily jumped down the stairs. The activity was not encouraged by the Employer, performed in furtherance of a specific interest of the Employer or necessary to maintain the Claimant's employment skills. Claimant's actions were wholly foreign to his employment, as they were premeditated, deliberate, extreme, and inherently high-risk. Accordingly, such actions remove Claimant from the course and scope of his employment.

Conclusion: While there is no definite rule in horseplay cases and each should be looked at on a case by case basis; the Court's use of the words "premeditated, deliberate, extreme and high risk" does provide

some guidance in horseplay cases and this may be the new standard.

Editor
David G. Greene, Esq.

Co-Editor
Renee M. Porada, Esq.

Contributing Authors
Michael Boone, Esq./James Curry, Esquire