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**Update on Important Workers' Compensation Case Law News  
July 2006**

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**RECENT SIGNIFICANT COURT DECISIONS  
April - May 2006**

**Commonwealth Court Cases**

**EXPOSURE TO ASBESTOS FOR 21 HOURS  
DURING 10 YEARS OF EMPLOYMENT  
MAKES EMPLOYER LIABLE FOR  
DECEASED EMPLOYEE'S DEATH**

In *Young, Deceased, Arlene Young, Widow v. W.C.A.B. (Zinc Corporation of America)*, No. 1735 C.D. 2005, Mr. Young worked for ZCA from 1991 until February of 2001. Mr. Young died in June of 2001 from mesothelioma as a result of exposure to asbestos. Mr. Young filed a claim petition and after his death, his widow filed a fatal claim petition.

As for the exposure at ZCA, the evidence showed that in 10 years of employment, Mr. Young performed 21 hours of asbestos removal and was exposed to airborne asbestos when asbestos was stirred up by nearby construction activity at ZCA. It was agreed that the last exposure was in 1997. It was also agreed Mr. Young was exposed to asbestos throughout his entire 45-year career as a bricklayer.

The issue was whether the exposure at ZCA to asbestos as late as 1997 caused or contributed to Mr. Young's death. The medical experts agreed that mesothelioma develops after a typical latency period of 20 to 40 years. The widow's medical experts testified that the exposure at ZCA contributed to Mr. Young's disease. Meanwhile, ZCA's medical experts testified that due to the latency period, only exposure prior to 1991 caused Mr. Young's cancer.

The WCJ credited ZCA's medical experts and found that only the exposure to asbestos prior to 1991 caused Mr. Young's cancer so the fatal claim petition was denied. The WCJ also denied the lifetime claim on the

basis that Mr. Young did not experience a wage loss. This determination was made by the WCJ because Mr. Young acknowledged that he voluntarily retired prior to the time that he was diagnosed with mesothelioma. The WCAB affirmed the WCJ.

Commonwealth Court reversed, looking to the Act in so doing. Specifically, the Court looked to Section 301 (c)(2) of the Act, 77 P.S. §411(2), which places liability on an employer based on the period of latest exposure. The Court noted that this Section holds that the liable employer is the one where there was exposure of at least one year duration during the 300 weeks prior to the last date of employment in an occupation or industry to which the worker was exposed to the hazard. If there was no exposure for at least one year during the relevant 300 week period, then the liable employer is the one with the longest period of exposure during the 300 weeks prior to death or disability.

Commonwealth Court determined that ZCA was the only employer upon which liability could be placed because it was the only site of workplace exposure during the relevant 300 week period prior to death or disability. Using this "last injurious exposure rule," ZCA was found to be the liable employer. This was the Court's holding even though there was only 21 hours of documented exposure to asbestos and exposure to airborne asbestos.

As for the WCJ's denial of the lifetime claim, the Court held that the claim should be granted for payment of medical expenses, even though Mr. Young suffered no wage loss. In so doing, the Court indicated that the Act and relevant case law has held that a claimant suffering from an occupational disease is entitled to payment of reasonable and necessary medical expenses whether or not the disease has caused an earnings loss.

**IN TERMINATION PROCEEDING  
CLAIMANT HAD BURDEN OF PROOF  
WHEN NO OBVIOUS CAUSAL CONNECTION  
BETWEEN WORK INJURY AND SUBSEQUENTLY  
CLAIMED PHYSICAL CONDITION**

In *City of Philadelphia v. W.C.A.B. (Fluek)*, No. 1250 C.D. 2005, the City filed a suspension/modification petition on the basis that the claimant acted in bad faith in rejecting job referrals. Later, the City amended the petition to include a request for a termination as the claimant had recovered from the acknowledged left knee injury. The claimant then filed a review petition to amend the NCP to include a low back injury. The WCJ granted the termination petition, dismissed the modification/suspension petition as being moot and denied the claimant's review petition. In granting the termination, the WCJ found that the City only had to prove that the claimant had recovered from the accepted injury to the left knee and the City was not obligated to prove that the claimant had also recovered from the low back injury.

The WCAB reversed on the basis that the WCJ applied the wrong burden of proof. Specifically, the WCAB held that the burden was on the City to prove that there was no causal connection between any averred injury and the work-related incident. The WCAB concluded that the City had to prove that the claimant did not suffer from the low back injury, or in the alternative, that claimant had fully recovered from the injury to the low back. The WCAB held that the claimant did not even have to file a review petition in order for the back injury to be considered a work-related injury. Based on these determinations, the WCAB remanded to the WCJ so that the record could be reopened to allow the City to present medical testimony to support its burden as to the back injury and to allow the claimant to rebut any evidence presented by the City.

Upon remand, neither party presented any additional evidence. The WCJ granted the review petition and amended the NCP to include the low back injury and denied the termination and modification/suspension petitions. The City appealed and the WCAB affirmed in all respects.

Commonwealth Court reversed on the basis that the WCJ improperly placed the burden of proof on the City to prove that the back injury was not work-related. In so holding, the Court noted that the injury as alleged by the claimant, a back injury, was outside the scope

of liability which was listed in the NCP—a left knee injury. The Court concluded that the claimant's left knee injury and the alleged back injury were not so obviously connected or of the same body part or system, so that the burden of proof should have rested on the City. Instead, the Court placed the burden on the claimant to establish that the back injury was work related before the City was required to address any continuing disability related to the back injury.

However, the Court did state that employers would not be insulated from liability based on the injury description of an NCP. Instead, the Court indicated that where no reasonable nexus or obvious relationship exists between the injury listed on the NCP and a subsequently claimed physical condition, the claimant must bear the burden of establishing the work-relatedness of the condition before an employer must disprove any continuing disability related to the subsequently alleged condition.

**IN TERMINATION PROCEEDING  
BURDEN ALWAYS ON EMPLOYER TO PROVE  
THAT CLAIMANT RECOVERED FROM ALL WORK  
INJURIES AND EMPLOYER HAD TO PROVE  
THAT THERE IS NO OBJECTIVE  
MEDICAL FINDINGS TO SUBSTANTIATE  
CONTINUED COMPLAINTS**

In the case of *Marks v. W.C.A.B. (Dana Corporation)*, No. 1863 C.D. 2005, Commonwealth Court again addressed an employer's burden of proof when it files a termination petition and the claimant files a review petition to expand the nature of the injury.

The nature of the work injury was described in an Agreement for Compensation as a lumbosacral strain/sprain. The employer filed a termination petition which was granted by the WCJ because the claimant failed to appear at the first hearing. The claimant did not receive notice of the first hearing so the claimant appealed. The WCAB remanded so that the WCJ could address the claimant's lack of notice of the first hearing.

Upon remand, the WCJ found that the claimant had a sufficient excuse for not appearing at the first hearing so the WCJ allowed the claimant to defend against the termination petition. While the termination petition was pending, the claimant filed a review petition to add a herniated disc at L5-S1 and L3-4 as well as grade

1 spondylolisthesis at L3-4 and L4-5. The review petition was later amended to a claim petition.

With the second decision, the WCJ denied the review petition and granted the termination petition. In so doing, the WCJ found that the claimant failed to prove that his work injury included anything other than a lumbar strain/sprain.

The claimant appealed and the WCAB affirmed. In its decision, the WCAB found that the WCJ's decision was supported by the evidence and the WCAB found that the WCJ did not err in placing the burden on the claimant to prove the disc problems were work-related as the claimant signed an Agreement for Compensation that was a more "formal" document than an NCP and this Agreement only listed a lumbar strain/sprain.

Before Commonwealth Court, the claimant argued that the WCJ erred by not placing the burden on the employer to prove a lack of objective medical findings to substantiate his complaints and to prove that the continued disability was not causally related to the work injury. Meanwhile, the employer argued that the Agreement for Compensation signed by the parties was indeed a more a "formal" document so it created a rebuttable presumption that the injury as described was correct and it should have been the claimant's burden to prove that the injury description of a lumbar strain/sprain was incorrect.

Commonwealth Court agreed with the claimant that the WCJ and the WCAB erred in placing the burden of proof on him. The Court stated that the law is well settled that in termination proceedings the employer must establish that the claimant recovered from the work injury and the employer must prove that no objective medical findings substantiated the claimant's continued complaints. The Court also determined that the WCJ failed to make any credibility findings with respect to the claimant's testimony. In light of the Court's determination that the WCJ erred in placing the burden of proof on the claimant and in light of the fact that there were no credibility determinations regarding the claimant's testimony, the case was remanded to the WCJ.

It appears that the difference in the outcomes between *Fluek* and *Marks* was that the alleged injury in *Fluek* was to a part of the body (low back) that was different and distant from the accepted injury (left knee) while in *Marks*, the claimant was trying to redefine the

nature of the work injury, (from low back sprain/strain to disc problem) for the same part of the body that was acknowledged on the relevant Bureau document.

**EMPLOYER NOT OBLIGATED TO PAY AWARD WHILE REQUEST FOR SUPERSEDEAS PENDING IN ACCORDANCE WITH TIME LIMITS SET FORTH IN THE ACT AND APPELLATE RULES**

In *Patric Gibson c/o Kathy Gibson v. W.C.A.B. (Armco Stainless & Alloy Products)*, No. 1485 C.D.2005, Commonwealth Court addressed the issue of an employer's obligation to pay an award while the employer's request for supersedeas is pending.

The WCJ granted a fatal claim petition. The employer appealed and the WCAB reversed. On May 8, 2003 Commonwealth Court reversed the WCAB which meant that the WCJ's granting of the fatal claim petition was reinstated and the employer again became responsible for benefits.

After Commonwealth Court issued its Opinion, the employer filed a Petition for Allowance of Appeal with the Supreme Court. Furthermore, in accordance with the Pennsylvania Appellate Rules, the employer filed an Application for Stay/Supersedeas with Commonwealth Court. On June 20, 2003 Commonwealth Court denied the Application for Stay/Supersedeas. The employer then filed an Application for Stay/Supersedeas with the Pennsylvania Supreme Court.

On August 8, 2003 Claimant filed a penalty petition with a WCJ on the basis that the employer failed to pay the fatal claim award after the Application for Stay/Supersedeas to Commonwealth Court was denied on June 30, 2003.

On October 9, 2003 the Supreme Court granted the employer's Application for Stay/Supersedeas.

On December 4, 2003 the WCJ granted the penalty petition on the basis that the employer violated the Act by not paying within 30 days of June 30, 2003—the date that Commonwealth Court denied the employer's Application for Stay/Supersedeas. In granting the penalty, the WCJ ignored the fact that the employer had filed an Application for Stay/Supersedeas with the Supreme Court and that the Supreme Court had actually granted the Application for Supersedeas while the penalty petition was still pending.

The employer appealed and the WCAB reversed. The claimant appealed to Commonwealth Court on the basis that the employer had an obligation to pay within 30 days of the Court's denial of the Application for Supersedeas/Stay on June 30, 2003. Commonwealth Court affirmed the WCAB's holding that an employer is not subject to penalties when an employer does not pay a compensation award while its Petition for Supersedeas is pending, filed in accordance with the Act and filed pursuant to the WCAB's regulations and/or the Appellate Rules.

**EMPLOYER STILL LIABLE FOR MEDICAL EXPENSES  
AFTER CLAIMANT HAS EXHAUSTED 500 WEEKS  
OF PARTIAL DISABILITY BENEFITS**

In *Keystone Coal Mining Corporation v. W.C.A.B. (Fink)*, No. 1487 C.D. 2005, the question was whether an employer is responsible for ongoing medical expenses after the employer's liability for payment of partial disability benefits has ceased because the claimant has exhausted his 500 weeks under the Act.

The claimant was injured on January 8, 1987 and as of February 20, 1989 the claimant's benefits were modified because he had returned to work with a wage loss with a new employer. The claimant exhausted 500 weeks of partial benefits on September 28, 1998.

On September 15, 1998 the claimant filed a petition to review alleging an increase in his disability as of September 8, 1998. The claimant later amended the petition to include a reinstatement of total disability benefits. The WCJ denied the petition. The WCAB affirmed as did Commonwealth Court on the basis that the claimant failed to prove a loss of earning capacity as of September 8, 1998.

In July of 2004, the claimant filed a petition to review medical treatment and/or billing averring that the employer refused to pay reasonable and necessary medical expenses related to the work injury. The claimant sought penalties and an award of attorney's fees. The employer defended on the basis that the expiration of the 500 weeks and the denial of the earlier request for reinstatement, was tantamount to a termination of benefits so the employer was not responsible for payment of medical bills.

The WCJ held that the Act indicates that an employer shall pay medical benefits as and when needed and that there were no time limits in the Act as to an

employer's obligation to pay medical benefits. Thus, the WCJ directed the employer to pay the medical bills plus 10% interest. The claimant was awarded attorney's fees for an unreasonable contest, but the WCJ did not award penalties. The employer filed an appeal and the WCAB affirmed the WCJ in all respects except for the WCJ's granting of attorney's fees for an unreasonable contest. The WCAB determined that the employer's contest was reasonable, as there was scarce case law addressing the issue that was before the WCJ.

Commonwealth Court affirmed and in so doing, the Court rejected the employer's argument that the exhaustion of the 500 week period along with the denial of the reinstatement petition was the equivalent to a termination of benefits. Thus, even though the claimant was no longer entitled to indemnity benefits because he had exhausted his 500 weeks of partial disability benefits, he was still entitled to payment of his ongoing medical benefits until such time that the employer proved that all disability had ceased.

**EVIDENCE OFFERED FOR PETITION TO REVIEW  
UR DETERMINATION MUST ADDRESS SPECIFIC  
TREATMENT UNDER REVIEW**

In *Brookside Family Practice v. W.C.A.B. (Heacock)*, No. 1943 C.D. 2005, the Court addressed the employer's burden with respect to a petition to review a UR determination. In the case, the accepted work injury was described as a right foot, sesmoid fracture. The claimant filed a review petition which was granted by the WCJ, and the injury was expanded to include RSD of the right foot, right upper extremity pain and low back pain.

On November 10, 2003 the claimant's treating doctor implanted a spinal cord stimulator. The employer filed a retrospective UR request to address the reasonableness and necessity of the procedure. The URO issued a report wherein it was determined that the implantation of the spinal cord stimulator was indeed reasonable and necessary.

The employer filed a petition for review of the UR determination and in support of the petition, the employer submitted the deposition testimony from two doctors who had testified in the proceeding with respect to the aforementioned review petition. One of the doctors had testified in December of 2002 that the implantation of a trial spinal cord stimulator in April of 2002 did not alleviate the claimant's pain and was not

helpful. The other doctor testified in January of 2003 and also noted that implantation of the trial spinal cord stimulator was not helpful and this doctor even testified that no further medical treatment was needed.

As for the petition to review the UR determination, the WCJ granted the employer's petition based on the testimony of the two doctors who had previously testified with respect to the claimant's review petition. The WCAB reversed on the basis that the testimony of the two medical witnesses did not constitute substantial competent evidence as the doctors did not address the procedure that was performed in November of 2003 as these doctors only addressed the trial spinal cord stimulator that was implanted in April of 2002.

Commonwealth Court affirmed, agreeing with the WCAB that the evidence submitted by the employer did not address the reasonableness or necessity of the November 10, 2003 procedure but instead only addressed the trial procedure that was performed in April of 2002. Therefore, the Court determined that the employer's evidence was not sufficient to support the WCJ's finding that the cord stimulator implanted in November of 2003 was not reasonable or necessary.

#### **COST OF A VOCATIONAL COUNSELOR NOT A REIMBURSABLE MEDICAL EXPENSE**

In *Taylor v. W.C.A.B. (Bethlehem Area School District)*, No. 1651 C.D. 2005, the claimant sought reimbursement from the School District for the cost of a vocational counselor.

The claimant suffered a severe injury to his neck that resulted in partial paralysis. After the employer made an offer to return to work, the claimant hired a vocational counselor. Shortly thereafter, the claimant's treating doctor prescribed a vocational counselor with the prescription being issued merely to aid in the claimant's reimbursement efforts. It should be noted that at this same time, the claimant was also working with a counselor from OVR.

In support of his position, the claimant argued that because a medical doctor prescribed the vocational counselor this meant that vocational counseling was part of his medical treatments. The claimant also argued that the Act requires payment for services incidental to a claimant's medical treatment and the

claimant argued that vocational services were incidental to his medical treatment.

The Commonwealth Court rejected the claimant's arguments on the basis that the vocational counselor was not a medical provider as defined by that Act nor were the vocational efforts "medical services" that would be reimbursable under the Act. The Court agreed with the WCJ's finding that the claimant did not have to incur any expenses for vocational rehabilitation efforts since he was getting free services through OVR.

#### **WCJ DID NOT ERR IN REJECTING EMPLOYER'S EVIDENCE THAT NO HAZARDOUS NOISE EXPOSURE AT WORK BUT WCJ DID ERR IN NOT INCLUDING PERIODS OF LAY OFF IN AWW CALCULATION**

Commonwealth Court addressed the issues of a work-related hearing loss and AWW calculation in *Elliott Turbomachinery Company and ITT Specialty Risk Services v. W.C.A.B. (Sandy)*, No. 2215 C.D. 2005. As for the hearing loss, the WCJ found that the claimant suffered a 15.625% binaural work-related hearing loss.

In front of the WCJ, the employer presented testimony from a total of 17 witnesses, including the testimony from William Thornton, Ph.D. who has a doctorate in acoustics, vibration and noise. Dr. Thornton performed a four month study at the employer's plant and Dr. Thornton opined that the employees were not exposed to long-term hazardous noise as defined under the Act. Furthermore, the employer's medical expert opined that the claimant's hearing loss was not related to his employment. The WCJ rejected the testimony of all of the employer's witnesses. In so doing, the WCJ credited the claimant's testimony about the noise level at the plant and also credited the testimony of the claimant's medical expert. The WCAB affirmed in all respects.

Before Commonwealth Court, the employer argued that the WCJ's finding of a work-related hearing loss was not supported by substantial evidence. Commonwealth Court reviewed the WCJ's decision and found that it was supported by substantial evidence. The Court noted that the WCJ specifically rejected the testimony of Dr. Thornton that hazardous noise was not present at the work place. In rejecting this testimony, the WCJ found that Dr. Thornton's study did not reflect the level of noise to which the claimant was exposed because it did not take into account such noisy events as steam leaks or powerhouse boilers operating as

credibly testified to by the claimant. The Court upheld the WCJ's right to reject the employer's evidence and determined that the employer failed to prove that the claimant's hearing loss was due to something other than his employment.

Finally, the Court did overturn the WCJ's findings as to the claimant's AWW. In this case, the WCJ determined that the claimant did not maintain an employment relationship so Section 309(d.1) of the Act, 77 P.S. §582(d.1) was used to calculate the AWW. This Section indicates that if the employee has not been employed for a least 3 consecutive periods of 13 calendar weeks in the 52 weeks immediately preceding the injury, then the AWW is calculated by dividing by 13 the total wages earned in the employ of the employer for any completed period of 13 calendar weeks immediately preceding the injury and by averaging the total amounts earned.

However, Commonwealth Court determined that any time that the claimant was not working for the employer was due to voluntary lay offs. Therefore, the Court found a continuing relationship so the wages should have been calculated pursuant to Section 309(d) of the Act, 77 P.S. §582(d), which indicates that for long-term employees the AWW is calculated by dividing by 13, the total wages earned in each of the highest 3 of the last 4 consecutive periods of 13 calendar weeks in the 52 weeks before the injury. This resulted in a lower AWW for the claimant.

#### **NO PENALTY FOR NON PAYMENT OF BILLS WHEN BUREAU INCORRECTLY ADVISES EMPLOYER NOT TO PAY THE BILLS**

Commonwealth Court, in the case of *Carroll v. W.C.A.B. (US Airways)*, No. 2279 C.D. 2005, upheld a WCJ's denial of a penalty petition.

The employer attempted to file a UR request regarding massage therapy that was provided by a massage therapist and had been prescribed by the claimant's treating doctor. However, the Bureau returned the UR request on the basis that a massage therapist was not a "health care provider" and the Bureau advised the employer that it did not have to pay for those treatments. Based on the advice from the Bureau, the employer denied the bills for the massage therapy.

The claimant filed a penalty petition alleging that the employer violated the Act by refusing to pay the bills.

The WCJ denied the penalty petition because the Bureau had returned the employer's UR request. The WCJ reasoned that because the UR request was returned by the Bureau this meant that the employer could never challenge the massage therapy bills. Thus, the WCJ determined that there was no violation of the Act. The claimant appealed to the WCAB and the WCAB reversed on the basis that the employer could not cease paying for the massage therapy until such time that there was a valid Order from a WCJ indicating that no payment was due. The case was remanded to the WCJ to see if penalties were warranted.

Upon remand, the WCJ again denied penalties because the employer had been advised by the Bureau that massage therapy was not a covered treatment and therefore, the employer did not have to pay the bills. The claimant appealed and the WCAB affirmed the WCJ denial of penalties.

Commonwealth Court affirmed the WCJ and the WCAB because the employer tried to relieve its liability to pay for massage therapy and the employer was thwarted by the Bureau and the employer then relied upon the Bureau's advice that it could stop paying for the massage therapy bills. Under these circumstances, the Court determined that the decision to deny penalties was not an abuse of the WCJ's discretion.

#### **CITY NOT CLAIMANT'S STATUTORY EMPLOYER SO AS TO BE LIABLE FOR PAYMENT OF BENEFITS**

In *Vandervort v. W.C.A.B. (City of Philadelphia)*, No. 1143 C.D. 2005, Commonwealth Court was asked to address whether or not the City was the claimant's statutory employer.

The claimant was employed by East Coast Demolition and the claimant was injured doing demolition work in South Philadelphia. The claimant argued that the City was his statutory employer so the City was responsible for payment of his workers' compensation benefits.

When reviewing the issue, Commonwealth Court indicated that there are two cases that address the statutory employer question. In *McDonald v. Levinson Steel*, 302 Pa. 287, 295, 153 A. 424, 426 (1930) the Pennsylvania Supreme Court set forth the standard to be applied when determining if an entity is a statutory employer. The standard is: 1) the employer (general contractor) must be working under a contract with the premises owner; 2) the premises must be occupied or

under the control of the employer (general contractor); 3) the employer (general contractor) has contracted with a subcontractor to do work; 4) part of the employer's regular work is entrusted to the subcontractor; and 5) the injured person is the subcontractor's employee. In *McDonald*, the issue was whether or not the employer (Levinson Steel) was a statutory employer so that it would be entitled to immunity from a civil suit under section 203 of the Act, 77 P.S. §52.

The Court determined that the other relevant case is *McGrail v. W.C.A.B. (County of Lackawanna)*, 604 A.2d 1109 (Pa. Cmwlth. 1992), wherein the issue was whether or not the County was the statutory employer so as to be responsible for payment of the claimant's workers' compensation benefits as required by Section 302(b) of the Act, 77 P.S. §462. The Court held that Section 302(b) of the Act, which protects injured workers by attempting to find a responsible employer to pay workers' compensation benefits, has a more vital mission than Section 203 of the Act which protects a statutory employer from a civil lawsuit. In light of this difference between the two Sections, the *McGrail* court indicated that the criteria set forth in *McDonald* should be applied to implement the humanitarian purposes of the Act. With this in mind, the Court in *McGrail* found that the County was the statutory employer so the County was required to make workers' compensation payment to the claimant.

Applying these two standards, the WCJ in *Vandervort*, found that the City entered into a subcontract with East Coast, the premises were either occupied or under the control of the City, the claimant was injured while employed by East Coast in its capacity as a subcontractor for the City and East Coast did not maintain workers' compensation insurance. In light of these findings, the WCJ determined that the City was the statutory employer and the City was ordered to pay benefits. The WCAB reversed and in so doing, the WCAB overturned the WCJ's finding that East Coast was the subcontractor on the demolition project but instead determined that East Coast was the general contractor.

Ultimately, Commonwealth Court supported the WCAB's determination that the claimant failed to prove that the City was his statutory employer. The Court noted that the claimant failed to introduce the contract between the City and East Coast Demolition so there was no way to determine the relationship

between the City and East Coast. The Court found that there was no evidence as to why the City hired East Coast Demolition and there was no evidence that the demolition project was a regular occurrence. Also, the Court noted that there was no evidence that the City maintained any control over the property where the claimant was injured. Therefore, the City was not the statutory employer so it was not responsible for payment of workers' compensation benefits. Because East Coast Demolition did not maintain workers' compensation insurance, it appears that the claimant did not receive workers' compensation benefits from any entity.

#### **BUS DRIVER WHO WITNESSED PLANE FLY INTO WTC ON SEPTEMBER 11, 2001 NOT IN COURSE OF EMPLOYMENT**

In *Taylor v. W.C.A.B. (Greyhound, Inc.)*, No. 2182 C.D. 2005, Commonwealth Court denied a claim petition for a work injury in the nature of PTSD.

The claimant was bus driver who drove into New York City the morning of September 11, 2001. After he had discharged his passengers, he drove his bus to a designated location in the City so that the bus could be parked. After his arrival at this location, the claimant was advised by other drivers that a plane had hit one of the World Trade Center towers. Shortly thereafter, the claimant looked up and saw another plane hit the second tower. The claimant became upset and went numb.

Thereafter, the drivers were put up in a dorm that did not have windows so the claimant did not see what was going on. He remained in the dorm for 2 ½ to 3 days and during that time he went outside but he did not go to the area where the towers once stood. After the City was deemed safe, the claimant was told to drive to Mt. Laurel, New Jersey to pick up passengers. Instead, the claimant drove to Philadelphia and told his supervisor that he could not continue driving.

The evidence showed that the claimant was a Vietnam War veteran and he has had and continued to have flashbacks from Vietnam. In fact, the claimant was hospitalized in 1998 for PTSD. Prior to September 11, 2001 the claimant suggested that he was doing okay, but not great. The claimant indicated that since September 11, the flashbacks were "war-type" images with a lot of fighting and bombs. Finally, the claimant

reported having flashbacks of the plane flying into the second tower.

The experts agreed that the claimant was suffering from PTSD. The claimant's treating psychologist opined that it was caused by his witnessing of the second plane flying into the tower. Meanwhile, the employer's psychiatric expert opined that the PTSD was due to the claimant's Vietnam War experience and was no worse than when he was hospitalized in 1998.

The WCJ credited the claimant's testimony as to the events on September 11, 2001. However, the WCJ credited the opinion of the employer's psychiatric expert that the PTSD predated September 11 and his symptoms and complaints had not changed except for an inability to drive to New York City. Finally, the WCJ found that there was no connection between the claimant's employment and his observing the plane hit the second tower and the WCJ found that there was no employment nexus between the WTC and his job as a bus driver.

Interestingly, the employer also raised a defense under Section 301(a) of the Act, 77 P.S. §431. This Section suggests that no compensation is payable if, during hostile attacks on the U.S., injury or death results solely from military activities of the armed forces of the U.S. or from military activities or enemy sabotage of a foreign power. The WCJ concluded that the events of September 11 were an act of war by a terrorist and fell within Section 301(a). The claimant had argued that the employer did not raise this defense in a timely manner as it waited over three months after the filing of the answer to the claim petition to raise the defense. However, the WCJ found that the defense was timely raised. The WCAB affirmed the WCJ.

Before Commonwealth Court, the claimant argued that his observing the plane hit the second tower constituted an abnormal working condition. The Court rejected this argument on the basis that the claimant failed to prove he was working when he observed the plane hit the second tower because he had already discharged his passengers and he had already parked his bus. The Court determined that the claimant failed to prove that when he observed the second plane he was furthering his employer's business affairs. The Court did not address the timeliness of the act of war defense in light of the fact that the Court determined that the claimant failed to prove that his PTSD was connected to his employment.

## FOOD DELIVERY DRIVER SUBJECTED TO ABNORMAL WORKING CONDITIONS DUE TO REPEATED ROBBERIES

The claimant in *Kennelty v. W.C.A.B. (Schwan's Home Service, Inc.)*, No. 2357 C.D. 2005, filed a claim petition for depression, anxiety, PTSD and mental disabilities as a result of being involved in a total of 5 or 6 robbery incidents while delivering food in the course of his employment.

The claimant offered evidence from his treating psychologist and treating psychiatrist as well as his family doctor all who opined that claimant's psychological problems were due to the cumulative effect of the stress of working in a constantly dangerous environment where he was robbed on a number of occasions and attacked on one occasion. Meanwhile, the employer presented testimony from the claimant's supervisor and several co-workers who testified that the drivers are instructed not to fight back when robbed and they also testified to the frequency of robberies and attempted robberies involving drivers.

The WCJ credited the claimant's testimony but found that the claimant failed to establish that he was exposed to stress due to an abnormal working condition. In making this latter finding, the WCJ noted that all drivers were at risk for robbery and theft. The WCJ also noted that the claimant admitted that he had been prescribed medication for depression prior to the last robbery and the treating psychologist and treating psychiatrist did not mention this medication.

The WCAB affirmed the WCJ without addressing whether being robbed is an abnormal working condition. Instead, the Board determined that the claimant's medical evidence was not based on a proper foundation because none of the experts addressed the claimant's pre-existing psychological complaints.

On appeal, Commonwealth Court overturned the WCAB's holding that the medical evidence was not sufficient to support the claim. Instead, the Court held that the medical evidence submitted by the claimant constituted substantial evidence that would support a finding that the claimant had suffered a work-related mental injury.

The Court also overturned the WCJ's finding that being robbed at gunpoint was not an abnormal working condition. In so doing, the Court stated, we are

“unprepared to accept that our society has deteriorated to the point where a holdup at gunpoint does not constitute an abnormal working condition for a food delivery person.” The case was remanded for the entry of an appropriate award.

#### HOME BASED EMPLOYEE IN COURSE OF EMPLOYMENT WHEN INJURED WALKING DOWN STEPS AT HOME

The claimant in *Verizon Pennsylvania, Inc. v. W.C.A.B. (Alston)* No. 1804 C.D. 2005, worked out of her home 2 days per week and was injured in her home when she fell down the stairs after getting a glass of water. The claimant was off work for a year but received her full pay and medical benefits from her employer. However, the claimant filed a claim petition seeking official recognition of the injury and also seeking compensation for disfigurement resulting from neck surgery.

The evidence demonstrated that the claimant worked 3 days per week in the employer’s office and 2 days per week she worked at home in her basement office. On the date of the injury, the claimant was upstairs getting a drink of water when she received a telephone call from her supervisor. The claimant thought the issue being discussed over the phone would need immediate attention so she started down the stairs to her basement office. While descending the stairs, she fell, hitting her head and injuring her neck.

The WCJ granted the claim petition recognizing the injury and the WCJ awarded 85 weeks for disfigurement. The WCAB affirmed in all respects. Before Commonwealth Court, the employer argued that the claimant was not in the course and scope of employment at the time of the injury. The Court noted that there were no cases directly on point but decided to analyze general workers’ compensation case law to determine how to treat employees who conduct business at a home office. In reviewing these cases, the Court noted that a claimant must prove that an injury arose in the course of employment to be entitled to an award.

The Court went on to note that when an injury occurs off the employer’s premises, the claimant must prove that he/she was furthering the interests of the employer at the time of the incident. In addressing this question, the Court indicated that a distinction is made between stationary and traveling employees. For

traveling employees, temporary departures from the work routine for reasons of personal comfort do not interrupt the employee’s course of employment. However, when a stationary employee leaves the premises, such as to get lunch, the employee is not within the course of employment.

The Court determined that Alston was not a traveling employee but instead was at a fixed location approved by her employer as a secondary work premises. The Court noted that the claimant had not left the “premises” when she fell down the steps at home. Commonwealth Court also pointed out that the well established “personal comfort” doctrine indicates that an inconsequential departure from work during regular business hours, such as going to the bathroom, is still considered in furtherance of the employer’s business.

Using all of these factors, the Court held that the claimant was furthering the interests of her employer in that at the time of the incident as she was talking on the telephone with her supervisor. The Court did note that the claimant was descending the stairs because she had gone upstairs to get a drink but the Court refused to conclude that this meant that the claimant had abandoned her employment. Therefore, the Court upheld the WCJ’s granting of benefits.

The information contained in this update is intended for general information purposes only, and does not constitute legal advice or options on any specific facts or circumstances. No action should be taken without consultation with legal counsel.

If you have any questions or comments, or would like further information, please contact an attorney in the Workers Compensation Practice Group at Thomas, Thomas & Hafer LLP. Visit us at [www.tthlaw.com](http://www.tthlaw.com) for more information on our Workers’ Compensation Practice Group.

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