CASE LAW UPDATES
January, 2008

M & B Inn Partners v. WCAB(Petriga) No. 1201 C.D. 2007, Commonwealth Court of Pennsylvania, 2008 Pa. Commw. Lexis 22,

Is a claimant precluded from receiving benefits under the "personal animus" exception of the Act if alleged injury is the result of unintentional sexual harassment?

For personal animus exception to apply there must be intention on part of assailant to inflict injury for personal reasons.

Claimant alleged that she was violated by a hotel guest while working on March 5, 2003. Claimant filed a Claim Petition on May 12, 2003 asserting that she sustained psychological injuries. Claimant was diagnosed with chronic PTSD. Claimant rendered disabled as a result of claimant's panic attacks and state of mind. Defendant argued against compensability of claim under "personal animus" exception of §301(c)(1) of Act. Case of Heath v. WCAB found that claimant's psychological injuries as a result of sexual harassment aren't compensable under the Act.

Motivation of assailant when dealing with raised affirmative defense of "personal animus" is a question of fact for WCJ to determine. Comes down to a question of assailant's intentions. If "attack" is incidental resulting in injury and disability, the incident will be considered work related. *Remember, affirmative defenses must be raised by Defendant during course of proceedings before WCJ.

Francis Ropoch, Petitioner v. Workers' Compensation Appeal Board (Commonwealth of PA/DPW) No. 1638 C.D. 2007 Commonwealth Court of Pennsylvania 2008 Pa. Commw. Lexis 12

Did employer inappropriately take an offset of Social Security benefits received by claimant if claimant's Social Security benefits converted to old age benefits as a matter of law?

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§204(a) of Act doesn't distinguish between whether or not a claimant applied for old age Social Security benefits versus those that are automatically transferred from Social Security disability to old age benefits. Regardless, an employer is entitled to a credit if old age benefits are received after work injury.

Claimant sustained an injury on July 3, 1997 which was accepted via a Notice of Compensation Payable. On May 6, 2003, a Notice of Workers' Compensation benefit offset was filed as a result of claimant's receipt of Social Security benefits on April 3, 2006. On April 3, 2006 claimant's Social Security disability benefits converted automatically to Social Security old age benefits by operation of law. Claimant argued that employer was not entitled to offset because claimant didn't apply for old age benefits and voluntarily remove himself from workforce.

This is important case for us regarding offset and Court's interpretation of pure language of statute.

Bennett Miller v. WCAB (Electrolux), No. 552 C.D. 2007, Commonwealth Court of Pennsylvania 2008 Pa. Commw. Lexis 25

Is a widow permitted to execute a C & R Agreement on behalf of her deceased husband to request enforcement of the C & R Agreement by the Court?

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§449 of Act outlines requirements for a valid C & R Agreement. The Court reinforced the notion that an agreement must be finalized by both parties and approved by the WCJ in order to be enforceable.

In this case, the widow argued that employer delayed in filing the C & R Petition thus claimant was not offered the right to comply with the requisites of §449 of Act before he died for non-work related reasons. The C & R Agreement was never executed as the parties were attempting to determine whether Medicare's interests needed to be considered as a condition of settlement. Regardless, there was no executed C & R Agreement for the WCJ to approve under §449 of the Act thus no liability on behalf of Defendant to pay any settlement proceeds to the widow.

Harry Riddle v. WCAB (Allegheny City Electric, Inc.), No. 1390 C.D. 2007 Commonwealth Court of Pennsylvania 2008 Pa. Commw. Lexis 4

Did employer meet its burden under §306(b) (2) of Act to obtain a modification or suspension of claimant's benefits by proving job availability within claimant's geographic area?

Nothing in the Act precludes an employer from performing a LMS in area of claimant's residence rather than location of injury.

Claimant argued Board erred in affirming Decision of Judge because jobs located, which were subject of Modification/Suspension Petition, weren't available in claimant's labor market. Claimant didn't reside in Pittsburgh, PA where the injury took place, but rather lived in West Virginia. The LMS was done in West Virginia at request of claimant's counsel. Claimant contended before the Board that employer should be precluded from showing job availability in area claimant lives rather than where injury occurred. Claimant also argued that vocational expert failed to consider his age when completing the LMS. The Board and Commonwealth Court rejected claimant's arguments and upheld the WCJ decision re: credibility of Defendant's vocational expert and findings of ECA.

This case suggests an alternative for a vocational expert to consider if claimant resides in more viable labor market than where injury occurred.

Sysco Food Services of Philadelphia v. WCAB (Sebastiano), No. 817 C. D. 2007, Commonwealth Court of Pennsylvania 2008 Pa. Commw. Lexis 28

Is an employee entitled to workers' compensation benefits if injury is a result of a violation of a company positive work order prohibiting horseplay?

There is a rebuttable presumption employees held by prior case law of General Electric Co. v. WCAB, that injury to an employee by act of co-worker is covered by the Act. To deny benefits based on alleged violation of positive work order is a rare exception to general principle that injuries sustained by an employee arising in course of employment and causally related thereto are compensable and not found to exist in this case of employee horseplay.

Claimant alleged an injury of April 1, 2004 to left ankle, leg, low back and RSD that was the result of him being a victim of horseplay that he didn't want to participate in with the other employee. Other employee testified that he didn't intend to harm claimant but that he and claimant were simply "joking around". WCJ found claimant to be a victim of horseplay not an active participant therefore entitled to workers' compensation benefits. The Commonwealth Court noted that injuries that arise out of horseplay can be found compensable, even if employer raises affirmative defense that claimant's actions violated a positive work order, therefore injuries sustained are outside course and scope of employment. Defendant has to show that claimant involved in an activity at time of injury was "so disconnected with regular work duties that could be constituted a 'trespasser'".

Defendant had burden of proving that claimant's injuries are a result of a violation of a positive work order. To do so, Defendant must show (1) injury was caused by violation of work order; (2) employee knew of rules; and (3) the rule implicated an activity not connected with employee's work duties. Defendant case cites language of Torrey and Greenberg. Cases involving affirmative defense of violation of work order are very fact specific and we should closely review line of cases re: same when raising this defense.

Westmoreland County v. WCAB (Fuller) No. 1277 C.D. 2007 Commonwealth Court of Pennsylvania 2008 Pa. Commw. Lexis 33

Is a WCJ's denial of a Termination Petition proper if the WCJ finds Defendant's medical expert incompetent for failure to consider the entire nature of claimant's work injury (which was previously expanded via decision of WCJ) in rendering claimant fully recovered?

A WCJ can modify a description of injury if the additional injuries existed at time Notice of Compensation Payable was issued via Decision without formally amending the Notice of Compensation Payable. A medical expert during a subsequent round of litigation must address all injuries in order for testimony to be competent to support an opinion of full recovery.

Claimant sustained a work injury in nature originally accepted as lumbar strain. During first round of litigation, WCJ expanded the description of injury to include herniated disc at L4-5 and post-traumatic lumbar radiculopathy at L5; the Judge didn't formally amend Notice of Compensation Payable but made a finding regarding description of injury as stated above. Defendant's medical expert failed to acknowledge that claimant's work injury included herniated disc at L4-5 or lumbar radiculopathy. Defendant asserted on appeal that a WCJ's "comments" about an injury doesn't serve to formally expand a recognized work injury. Moreover, Defendant argued that medical expert testimony was sufficient as expert stated claimant had fully recovered from "any low back injury" sustained at work.

This case upholds general principle that to be sufficient to support a termination of benefits, a medical expert must recognize the work-relatedness of an injury. Please note that a medical expert can say that he doesn't agree with diagnosis as long as acknowledges the exact nature of injury (can use words of "based on assumption that claimant suffered an injury of X") in regard to claimant. For example, the doctor can testify that claimant's examination "no longer exhibiting findings consistent with….".

Chris Gumm v. WCAB (J. Allan Steel) No. 599 C.D. 2007, No. 703 C.D. 2007 Commonwealth Court of Pennsylvania 2008 Pa. Commw. Lexis 36

Can a Defendant properly issue a Notice of Compensation Denial, acknowledging the occurrence of the injury, versus a medical only Notice of Compensation Payable after initially filing a Notice of Temporary Compensation Payable?

Imposition of unreasonable contest attorney's fees are not warranted when a Defendant files a Notice of Compensation Denial acknowledging the occurrence of the injury and not a medical only Notice of Compensation Payable, when a genuine issue of dispute exists and regardless of form used claimant would have needed to have an attorney to litigate issues surrounding description of injury and disability.

Injury date of 2/3/03 to claimant's right ankle. Claimant referred to a panel physician and was diagnosed with "right ankle sprain". 2/17/03, NTCP issued. Claimant released to full duty work on 4/21/03 thus Defendant properly filed a NSTCP and a NCD checking #4. Defendant also stated under #6 that "claimant has been released to full-duty as of 4/21/03. Insured is downsizing due to economic factors; thus no job for claimant to return to. TTD benefits are being discontinued based on full-duty release".

Claim Petition filed. Penalty Petition filed one year later alleging a violation of Section 406.1 for improper use of NCD versus NCP. WCJ granted Claim and determined employer failed to present reasonable contest and also granted Penalty Petition. Specifically, Judge held that Defendant did not present a reasonable contest as to the occurrence of the injury. Both parties appealed. Claimant argued that Judge should have awarded additional penalties for Defendant's stopping of temporary compensation. WCAB upheld grant of Claim but reversed award of Penalty and unreasonable contest fees. Defendant also raised typical appeal issues of reasoned decision and substantial evidence.

The Court utilized the rationale in the Brutico case. Brutico held that Defendant engaged in a reasonable contest even though it acknowledged that claimant sustained a work injury and yet failed to issue a "med only" NCP. The Court in Brutico found that claimant needed to hire counsel as genuine issues of dispute (i.e. extent of injuries) existed. The Court in this case found that genuine issues of dispute existed because even if Defendant would have filed a med only NCP accepting "right ankle sprain" claimant would have needed to hire an attorney to litigate the extent of the injury and disability. Fortunately, the Court also found that a penalty was not warranted because the Defendant did not violate the Act. In other words, the Defendant in stopping the NTCP complied with the requirements of Section 406.1 of the Act.

These issues arise a lot and should be examined on a case to case basis. It appears that use of the NCD, #4, with a clear cut description of the injury continues to be upheld as appropriate in medical only situations when genuine issues of dispute exist. Unfortunately, we have many clients that don't issue any Bureau document in these situations which do lead to the imposition of penalties. The use of the NCD with #6 or "other good cause" appears to be grounds for a penalty and finding of unreasonable contest.