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JUNE 2017 CASE LAW UPDATE

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Protz v. Workers Compensation Appeal Board (Derry Area School District), _ A.3d _ (Pa. June 20, 2017)

Fundamentally impacting the Pennsylvania Workers' Compensation system, the Workers' Compensation Appeal Board in *Protz* ruled the IRE process was unconstitutional based upon an improper delegation of legislative authority. In lieu of reiterating the details that you likely have already heard, please see attached for a more detailed assessment of the implications. The main question that the case did not answer is the retroactivity. Hopefully, the Court will provide more clarity in the near future.

Holy Redeemer Health System v. Workers' Compensation Appeal Board (Lux), _ A.3d _ (Pa. Cmwlth June 6, 2017)

Issue: Whether an employer is responsible for the claimant's loss of earnings when the employer offers and the claimant voluntarily accepts a permanent position.

Answer: Yes.

Analysis: The claimant sustained a work related low back injury in October of 2011, accepted with a Medical Only NCP. The claimant worked in a light-duty capacity until February 2013. In February 2013, the claimant was offered and voluntarily accepted a different position with the employer. She was paid $30.00 per hour instead of a pre-injury rate of $38.00 per hour. She would also work a few less hours in the new position. The claimant's prior light duty job was still available at the time that she accepted the new position.

In September 2014, more than one year after voluntarily accepting the new position, the claimant desired to return to her previous light duty position where she earned $38.00 per hour. The light duty position was no longer available at that time so she continued to work earning $30.00 per hour.

The claimant filed a Claim Petition seeking indemnity benefits for the loss of earnings while in the permanent position she voluntarily accepted.

The WCJ determined that the claimant was entitled to partial indemnity benefits. The WCAB affirmed the WCJ's decision. On appeal to the Commonwealth Court, the Court determined that the claimant was in fact entitled to benefits for her loss of earnings. The Court distinguished the present case from *Shenango, Inc. v. Workmen's Compensation Appeal Board (Weber)* 166 Pa.Cmwlth. 348, 646 A.2d 669 (1994). In *Shenango*, the Court held that the claimant's loss of wages was not the result of his physical limitations from his work-related injury, but rather the claimant's voluntary decision to bid out of the pre-injury department where he had been working in a modified-duty position with no loss of earnings. Essentially, the Court looked to public policy. It did not want an employer to benefit from offering a modified duty position while someone has restrictions and benefit from the claimant's lost wages.

Conclusion and Practical Advice: The Commonwealth Court concluded that the claimant was entitled to benefits. This is a tough case in that the claimant clearly accepted this position while the other light duty position was still available to the claimant.

Roth v. Workers' Compensation Appeal Board (Pennsylvania State System of Higher Education), _A.3d _ (Pa. Cmwlth June 28, 2017)

Issue: Whether the WCJ appropriately suspended claimant's benefits based upon a LMS that did not include the specific qualifications of the positions.

Answer: Yes.

Analysis: The claimant worked as custodian for the employer for several years. The claimant sustained a work related injury to her low back. The claimant worked light duty for the employer for a period of time, but work was no longer available. Following receipt of a LMS, the employer filed a modification/suspension petition. The LMS contained four available positions. The claimant applied to three of the positions but did not apply to the fourth position because she did not trust entering her social security number on a public library computer. The claimant's vocational expert conceded that the vocational requirements of the position the claimant did not apply to required the least skill. The claimant's vocational expert, however, maintained that the claimant was not qualified for the position.

The WCJ credited the Employer's vocational expert and determined that the claimant's benefits should be modified based upon the one job included in the LMS that the claimant did not apply and vocationally requires the least skill.

The claimant appealed asserting that the letter instructing her to apply for the position did not include the relevant job qualifications. The Board rejected that argument and explained that nothing in the Act, regulations, or precedent requires that job qualifications be listed in a labor market survey. The Board also concluded that the WCJ's finding regarding Claimant's earning capacity was supported by substantial evidence. Accordingly, the Board affirmed the WCJ's decision.

On appeal, the Commonwealth Court affirmed the decision of the Board.

Conclusion and Practical Advice: Hopefully, this case shows a swinging back of the pendulum toward relaxing the specific requirements imposed on vocational experts. Following the *Protz* decision, the LMS will be exceedingly more important.

Harrison v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania), _ A.3d _ (Pa. Cmwlth June 28, 2017)

Issue: Whether the employer properly calculated the offset based upon the maximum amount the claimant could receive from his pension.

Answer: Yes.

Analysis: The claimant asserted that the WCJ erred when calculating the claimant's offset rate by using the maximum monthly pension payment where he opted for a lower monthly rate providing for spousal survivor's benefits in the event of his death. The WCAB affirmed the WCJ's decision. On appeal, the Commonwealth Court affirmed.

Following the claimant's work related injury and subsequent retirement, he did not elect to receive life annuity Option 1. Rather, the claimant opted for a lower monthly payout under Option 2, which also provided for a *full amount* spousal survivor's benefit should he predecease her. Claimant actually received, after deductions, $3,053.11 per month. This is approximately $700 per month less than the MSLA option. The claimant argues, therefore, that the employer should have been entitled to the lower monthly offset based upon what he actually receives.

The Commonwealth Court disagreed. Section 204(a) "focuses on the extent to which benefits are funded by the employer." SERS' actuary testified claimant selected the "joint and one hundred percent survivor benefit" option. Although claimant will receive a somewhat lower monthly benefit, the reduction takes into account the fact that this amount is payable to his wife, until her death, if he predeceases her. Therefore, in exchange for a reduction in the amount of pension payments made to claimant, he added his wife as a joint annuitant with a right of survivorship. Although Claimant himself receives a reduced annuity payout under Option 2, the remainder of his monthly MSLA will fund the spousal survivor's benefit. Thus, Claimant's pension benefit under Option 2 remains the actuarial equivalent to his MSLA.

Conclusion and Practical Advice: When taking a pension offset, the employer should utilize the maximum monthly amount available. There are other situations where this may be applicable, such as when a lump sum option exists.

Wilgro Services, Inc. v. Workers' Compensation Appeal Board (Mentusky), _A.3d _
(Pa. Cmwlth June 28, 2017)

Issue: Whether when a claimant jumps from a roof, this conduct is "wholly foreign" to the claimant's employment.

Answer: No.

Analysis: The claimant worked for the employer as an HVAC mechanic. Roofers were present on the worksite and the claimant used their ladder to ascend onto the roof of a customer of the employer. While on the roof, the roofers left, taking their ladder with them. The claimant sustained work related injuries when he jumped from the roof at the conclusion of his work day.

In awarding benefits to the claimant, the WCJ made the following dispositive findings of fact: (1) on June 27, 2014, claimant was a traveling employee furthering Employer's business, so that he was in the course of his employment when he jumped from the roof; (2) claimant did not intentionally and/or deliberately attempt to injure himself when he jumped; (3) "[t]his Judge recognizes that claimant's decision was misguided however such is **NOT** a bar from receiving compensation benefits under Pa. Workers Compensation Act, a no-fault system;" (4) claimant was not involved in horseplay when he jumped; (5) "[t]his Judge finds the claimant had **NOT** contemplated or considered jumping off the roof as the appropriate means of getting off the roof at the end of his work day as he had used the roofer's ladder at the end of each prior work day;" (6) claimant did not violate any positive work order because there was no "proper protocol established by the Employer if stuck on a roof;" and (7) claimant suffered the work injury "while in the course and scope of his employment on June 27, 2014" and his disability is ongoing.

Employer appealed to the Board, arguing that the WCJ erred as a matter of law in finding Claimant's injuries compensable because Claimant's actions in jumping from the roof were wholly foreign to his employment and so sufficient to remove him from the course and scope of his employment. The employer believed this Court's holding in *Penn State University v. Workers' Compensation Appeal Board (Smith)*, 15 A.3d 949 (Pa. Cmwlth. 2011) was dispositive. The Board disagreed, finding that "course of employment" is construed more broadly for a traveling employee such as Claimant and that the proscribed conduct in *Penn State* was distinguishable because it was done on a "whim."

The employer noted the similarities between *Penn State* and the present case: (1) both voluntarily jumped; (2) both actively considered whether they would be injured; (3) neither claimant tripped or fell; (4) neither employer encouraged either claimant to jump; (5) neither claimant was performing his job duties when jumping; and, (6) neither claimant was maintaining any job skill necessary to the performance of his respective job. The employer agues that is has rebutted the presumption that the claimant was furthering its business or affairs.

Claimant responds that reliance on *Penn State* is inappropriate because: (1) claimant was a traveling employee while the claimant in *Penn State* was not; (2) claimant was finishing his job

on the roof while the claimant in *Penn State* was on his lunch break; (3) claimant's decision was made because the ladder which had been there was gone, in contrast to the claimant in *Penn State* jumping on a "whim"; and (4) departing from a job site not on employer's premises was not so foreign to and removed from his usual employment as to constitute an abandonment of his employment.

The Commonwealth Court agreed with claimant asserting that while claimant's decision to jump was not advisable, may not have been a smart move, and may have been misguided, we cannot say that it was so unreasonable as to make the action so foreign to and removed from claimant's job as to constitute an abandonment of that job. Rather, claimant was a traveling employee who had reasonably used the ladder of other trades people at that job site to enter and exit the working area and who unexpectedly found his means of egress removed when his job was completed.

Conclusion and Practical Advice: This case is very fact specific case but it highlights the difficulty of asserting an action is outside the claimant's course and scope of employment.