TR&C

Pennsylvania Workers' Compensation Bulletin

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But I told him not to do that!!

Depending upon the circumstances, the above statement may or may not be sufficient to deny benefits to an injured employee. "Violation of a positive work order" may provide an affirmative defense to a workers' compensation claim. More often than not, however, it is not a defense.

The issue of whether "violation of positive orders" prevents compensation for injuries was first addressed by the Pennsylvania Supreme Court in 1929 in the case of Dickey v. Pittsburgh & Lake Erie Railroad Co., 297 Pa. 172, 146 A. 543 (1929). Mr. Dickey was employed as a watchman by the railroad at its yards at McKees Rocks. His assigned duties involved only the shops and buildings on the riverside of the main tracks. For safety reasons, he was instructed repeatedly to use a boardwalk to gain access to the riverside of the tracks from the station. One fateful morning, Mr. Dickey, in defiance of his orders, left the boardwalk, took a shortcut across the railroad tracks, and was struck by a train. His widow filed a claim.

In denying her claim, the Supreme Court found that the watchman was not acting in the course of his employment, nor were his actions mere negligence. Rather, he was akin to a trespasser. The key was not merely that the watchman had violated his employer's order to use the boardwalk, but that he violated an instruction "designed for the safety and protection of employees." Because he did so, the Court likened him to a trespasser or stranger to the employment relationship:

> "Where an employee violates a positive rule as to entering forbidden parts of the owner's premises about which he has no duty to perform, or disobeys instructions against starting machinery or other dangerous activities with which his work is not connected, and with which he has no business, and an injury results, he not only violates the orders of his employer, but is in the position of a trespasser, who without right, authority, or permission enters forbidden ground."

Following Mr. Dickey's demise, there were a number of other cases in the 1930s that involved similar circumstances.

For example, in Palla v. Glen Alden Coal Co., 105 Pa.Super. 96, 160 A. 157 (1932), due to safety concerns, the coal company forbade its employees to enter and exit the mine by using what was called Hoban's slope. Having finished his shift, Mr. Palla was leaving the mine by means of Hoban's slope when a rope hauling cars of coal and rock struck him. Because Mr. Palla had entered a forbidden part of the owner's premises, was found to be a trespasser and he was denied compensation for his fractured leg.

Likewise, in Kuzmick v. Hudson Coal Co., 135 Pa.Super. 281, 5 A.2d 453 (1939), the claimant was employed by the mine to unload and burn old ties and timbers. He had received positive orders to keep away from the trains of mine cars, and particularly was not to interfere if there were any cuts or breaks in the trains, inasmuch as there was an experienced brakeman provided whose duty it was to take care of such cuts. Mr. Kuzmick, however, noticed a coupling between two mine cars was dragging. He boarded the moving train and successfully replaced the coupling, but was fatally injured when he jumped from the car. Based upon the rationale of Dickey, the Court denied his widow benefits. Mr. Kuzmick's actions were not mere negligence, but a "voluntary exposure to needless danger as to a matter in no way related to his prescribed duties." The act he was performing at the time of his death was so far removed from the scope of his employment that he

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Inside This Issue...

Commonwealth Court Case Reviews

Kim Heath v. Workers' Compensation Appeal Board (Pennsylvania Board of Probation and Parole), No. 733 C.D. 2002, filed November 25, 2002.

(Psychic Injury - Sexual harassment of one employee by another falls under the personal animus exception of §301(c)(1) and is, therefore, not compensable.)

Claimant, a parole agent at Graterford Prison, was under the immediate supervision of James Newton. In October of 1997, Newton began a course of conduct subjecting claimant to attention she did not seek and sought to discourage. Newton invited claimant to numerous concerts, which she declined. He developed habits of standing behind her at her desk, making sucking sounds and staring at her. Following claimant's rebuffs of his overtures, Newton began to burden claimant with excess work, causing her to fall behind. Eventually, claimant filed a written complaint of sexual harassment against Newton. As a result, Newton was warned not to have any contact with claimant. Despite the warning, Newton continued to call claimant.

Claimant began to experience anxiety attacks, chest pains and heart palpitations. Claimant was referred to a psychologist by the State Employee Assistance Program, Dr. Baxter. Dr. Baxter put claimant out of work due to acute stress disorder caused by a feeling of a lack of support from her employer and failure to protect her from Newton's advances.

Employer refused claimant workers' compensation benefits, stating claimant did not sustain a work-related injury.

Following a series of hearings, the Workers' Compensation Judge found that claimant sustained a work injury as a result of abnormal working conditions. The Workers' Compensation Appeal Board reversed, reasoning that claimant presented no corroborative evidence that the incidents complained of were actual incidents of harassment.

The Commonwealth Court affirmed the decision of the WCAB, but for different reasons. The Court noted that, even if claimant's allegations of harassment were true, when a co-employee, like Newton, or a third party, sexually harasses an employee, any resulting mental injury is not compensable. Section 301(c)(1) of the Act provides that an "injury arising in the course of employment...shall not include an injury caused by an act of a third person intended to injure the employe because of reasons personal to him..." Thus, §301(c)(1) operates to remove any claim for injury caused by personal animus from the purview of the Workers' Compensation Act. Accordingly, the order of the WCAB was affirmed.

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Cytemp Specialty Steel v. Workers' Compensation Appeal Board (Servey), No. 1560 C.D. 2002, filed November 27, 2002.

(Partial Disability - Periods of suspension are not included in calculating the 500 weeks of partial disability provided for under §306(b) of the Act.)

In January of 1990, claimant sustained a compensable injury. He returned to work on July 23, 1990 and his benefits were suspended until August 30, 1993, a total of 161 2/7 weeks. On August 30, 1993, partial disability benefits were reinstated.

In July of 1998, employer filed a petition seeking clarification as to whether the period of suspension counted toward the maximum 500 weeks of partial disability payable to claimant under §306(b) of the Workers' Compensation Act.

The Workers' Compensation Judge concluded that the period of suspension was to be included within the 500 week period. The Workers' Compensation Appeal Board determined that periods of suspension are not included and reversed.

In reviewing the issue, the Commonwealth Court noted that Section 413 of the Act imposes a statute of repose, whereby a reinstatement petition for partial disability must be filed within the period for which partial disability benefits are payable in order to be "timely." In calculating the 500-week period for the statute of repose, periods of suspension are included with periods where partial disability benefits are paid. Hence, a claimant has 500 weeks, or 9.6 years from the date of the suspension of his total disability benefits to file a petition for reinstatement of partial disability benefits.

The Court noted further, however, that while periods of suspension are included for purposes of calculating the statute of repose, periods of suspension do not count against the maximum 500 weeks of partial disability payable under §306(b). There is no language in that section which suggests that 500 weeks of partial disability must be received in a consecutive 500 week period. The Court stated that such a conclusion is required given the remedial nature and humanitarian purposes of the Act.

From August 30, 1993 through the date that the petition was filed, claimant only exhausted 267 and 1/7 weeks of partial disability. Therefore, he is entitled to an additional 232 and 6/7 weeks of partial disability benefits. The order of the WCAB was affirmed.

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Sun Oil Company v. Workers' Compensation Appeal Board

(Carroll), No. 2922 C.D. 2000, filed December 10, 2002.

(Specific Loss Benefits - Healing Period - Claimant who retired before he filed his claim for hearing loss could not be entitled to a healing period since there was no wage loss associated with his claim.)

Claimant worked for employer from 1945 through the date of his retirement, March 5, 1985. In June of 1986, he filed a claim petition alleging that he suffered a loss of hearing due to exposure to noise hazards throughout his service with employer.

The Workers' Compensation Judge granted claimant' s petition, and ordered employer to pay claimant benefits for a period of 260 weeks plus a healing period of 10 weeks. The Workers' Compensation Appeal Board affirmed that decision.

On appeal to the Commonwealth Court, employer advanced a number of arguments, including that the WCAB erred by awarding a 10 week healing period to claimant. Section 306(c)(25) of the Act provides that, in addition to specific loss benefits, *any period of disability necessary and required as a healing period shall be compensated.* The Act further provides that the healing period shall end when the claimant returns to employment without impairment of earnings. Here, claimant had retired. He does not intend to return to work. Therefore, employer argued that claimant is not entitled to a 10 week healing period.

In reversing the order of the WCAB in this matter, the Court noted that entitlement to a healing period is not automatic, but rather, the claimant is entitled to a presumption that the specific loss entitles him or her to the healing period. That presumption is rebuttable. It is the employer's burden to present evidence to rebut the presumption of the claimant's entitlement to a healing period.

Here, employer offered claimant a special retirement package with increased benefits which he accepted. Because claimant was retired before his specific loss benefits began, he did not require a healing period. He will not return to work because he is retired, not because of his hearing loss. The Court concluded, therefore, that employer rebutted the presumption of claimant's entitlement to a healing period and reversed the WCAB in its holding to the contrary.

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Christopher Erb v. Workers' Compensation Appeal Board (Steris Corporation), No. 1595 C.D. 2002, filed December 13, 2002.

(Average Weekly Wage - Where employee who would have been expected to work overtime during a period when he was laid off, that overtime is to be included in the calculation of his average weekly wage.)

Claimant was laid off from September 13, 1996 through August 1, 1997. He returned to work on August 2, 1997 and suffered a work injury on September 8, 1997.

During subsequent litigation, the parties stipulated that, based upon the overtime records of an employee similarly positioned to claimant, had claimant worked during the period he was laid off, he would have been asked to work an average of 7.5 overtime hours per week.

The parties further agreed that claimant's average weekly wage should be calculated under §309(d.2) of the Act which provides that, where the employee has worked less than a complete period of 13 calendar weeks, the average weekly wage shall be the hourly wage rate multiplied by the number of hours per week the employee was expected to work.

The collective bargaining agreement provided that the normal work week was 40 hours.

The Workers' Compensation Judge calculated claimant's average weekly wage based only upon a 40-hour week. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that the WCJ should have calculated his average weekly wage by taking into account the overtime he would have been paid had he not been laid off since that overtime was part of his 'terms of employment."

The Court agreed, stating that the ultimate goal of the workers' compensation program is to make injured employees whole. Given the humanitarian purposes of the Act, the Court interpreted §309(d.2) in favor of the injured employee. Therefore, the decision of the WCAB was reversed and the matter was remanded for a recalculation of the claimant' s benefits to include the proposed overtime.

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Jerry Leibensperger v. Workers'

NEED HELP CALCULATING THE INTEREST DUE ON A CLAIM?

Check out the Bureau's web page at:: www.di.state.pa.us and click on the Workers' Compensation Quick Link. Then click on "Wage Interest Calculations for Workers' Compensation." Sample methods of calculating interest are available for use as a guide to determine the amount of interest due and payable on a claim.

Please note: By setting forth this information, the Bureau is not expressing a policy, nor is it making a determination, decision or adjudication. No statement as to the correct amount owing or the correct method of calculation should be inferred or implied. Further, the Bureau cannot advise the user as to which calculation to use in a particular instance.

Upon request, Thomson Rhodes & Cowie is pleased to provide seminars and training sessions on issues relevant to workers' compensation, as well as topics concerning other areas of employment and labor law, for your benefit, as well as that of your co-workers and employees.

If you would be interested in scheduling such an event, please contact: Margaret M. Hock, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, (412) 232-3400, mmh@trc-law.com.

Compensation Appeal Board (Thomas H. Lewis Builders, Inc.), No. 833 C.D. 2002, filed December 20, 2002.

(Statutory Employer - Contractor in the business of building residential homes that subcontracted all work, did not maintain a continuous supervisory presence at the worksite, and only directed removal of debris from worksite on occasion, was not a statutory employer under §302(b).

Claimant worked as a siding mechanic for Sebastian Lavalle. Mr. Lavalle did subcontracting work for Thomas H. Lewis, a contracting firm that builds residential homes. On February 27, 1997, claimant fell off some scaffolding, sustaining serious injuries. Mr. Lavalle had no workers' compensation insurance. Claimant filed a claim petition, alleging that Mr. Lewis was his statutory employer and thus liable for payment of benefits.

Claimant testified that Mr. Lewis visited the worksite each day, urging the workers to accelerate the pace of work. Although claimant witnessed Mr. Lewis speaking to several subcontractors working at the site, he never saw Mr. Lewis engage in any work. Claimant acknowledged that Mr. Lewis did not direct any work at the site. Mr. Lavalle, not Mr. Lewis, paid claimant his salary and supplied the tools and equipment used at the site.

Mr. Lewis testified that he acts only as the project manager, coordinating the subcontractor's work so that the project is completed in a timely fashion. He denied performing any labor, He also denied telling any subcontractor when or how to work. He did admit directing workers to remove debris from the worksite.

Based on this testimony, the Workers' Compensation Judge denied the claim petition, concluding that Mr. Lewis was not a statutory employer because he did not exercise actual control over the construction site. The Workers' Compensation Appeal Board affirmed.

In reviewing the case, the Commonwealth Court stated that, to qualify as a statutory employer under *McDonald v. Levinson Steel Co., 302 Pa. 287, 153 A.424 (1930)*, an employer must meet the following criteria: (1) the employer is working under a contract with the premises' owner; (2) the premises are occupied or under the control of the employer; (3) the employer 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 addition, §302(b) of the Act provides that a statutory employer is any employer who permits the entry of a laborer or assistant hired by a contractor upon premises occupied by him or under his control.

Here, the question was whether Mr. Lewis occupied or controlled the construction site. Because he did not occupy the site, claimant must demonstrate the he exercised *actual* control over the site. (It is insufficient to show that he had the *right* to control the site.)

The Court concluded that Mr. Lewis' minimal activities at the construction site did not rise to the level of actual control. Hence, the Court affirmed the order of the WCAB.

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Tina Sena v. Workers' Compensation Appeal Board (Maps, Inc.), No. 1478 C.D. 2002, filed December 23, 2002.

(Statute of Limitations - Three year time limit to reinstate benefits after a commutation reaffirmed.)

Claimant sustained a work-related injury in May of 1992. On March 14, 1996, claimant's benefits were commuted for a lump sum of $45,000. Four years later, on March 16, 2000, claimant filed a Reinstatement Petition, alleging that her condition had worsened. Employer filed an Answer disputing the claimant's right to benefits given the commutation.

The Workers' Compensation Judge concluded that claimant failed to file her Reinstatement Petition within three years of the most recent payment of compensation benefits as required by §413(a) of the Act. Thus, the petition was denied and dismissed. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal to the Commonwealth Court, claimant argued that the WCAB erroneously concluded that a commutation does not extend the period in which to petition for reinstatement of benefits given the Supreme Court's decision in *Stewart v. WCAB (PA Glass Sand)*, 562 Pa. 401, 756 A.2d 655 (2000). In *Stewart,* the claimant had received partial disability benefits for 500 weeks. The Court held that the expiration of the 500-week period for partial disability benefits did not

foreclose a subsequent claim for total disability benefits because the claimant filed his petition within three years of the final payment of benefits. In a footnote, the Court noted that "there are sound policy arguments against distinguishing between a claimant who has accepted a lump-sum payment of partial disability benefits from one who received such benefits in installments" over the 500-week period. The Court noted, however, that the plain meaning of §413(a) is that the three-year limitation period commences after the date of the most recent payment of compensation.

Based on that footnote, claimant here argued that, based on the "policy argument" referred to by the Supreme Court, a plain meaning of §413(a) should not be enforced when a claimant's benefits are commuted. Rather, the claimant should have the benefit of the full 500-week period, just as though the commutation had not taken place.

The Commonwealth Court disagreed. The statute of limitations in §413(a) is a "countdown timer." For a claimant who chooses not to commute benefits, there is no statute of limitations problem. However, when a claimant commutes his benefits and receives one lump sum payment, the timer begins to count down immediately after that payment and it is not reset again because there are no more payments of compensation.

Here, claimant's petition was not timely filed and is barred by the three-year statute of limitations set forth in §413(a). Therefore, the decision of the WCAB was affirmed.

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Thomas Scott v. Workers' Compensation Appeal Board (Crown Cork & Seal Company/Ace American Insurance Company), No. 995 C.D. 2002, filed January 3, 2002.

(Average Weekly Wage - Unexercised stock options are not to be included in calculation of average weekly wage.)

Claimant sustained a disabling work injury on May 7, 1997. He was to receive total disability benefits through January 9, 1999, after which time his benefits were suspended. The Workers' Compensation Judge concluded that claimant's average weekly wage did not include stock options issued to claimant.

Both parties filed cross-appeals to the Workers' Compensation Appeal Board. The WCAB affirmed all aspects of the WCJ's decision.

Claimant then petitioned for review by the Commonwealth Court, presenting only one issue: Whether the WCAB erred in ruling that the employer issued stock options were a fringe benefit properly excluded from the calculation of claimant's average weekly wage.

Section 309(e) of the Act defines average weekly wage to include board and lodging received from the employer, and gratuities reported to the IRS by or for the employee for federal income tax purposes. "Fringe benefits" such as employer contributions to a retirement pension, health and welfare, life insurance, social security or any other plan for the benefit of the employee or his dependents are excluded.

A stock option is the grant by an employer to an employee of a legally enforceable right to purchase the employer's stock during a specified period in the future at a specified price. Stock options have no readily ascertainable value at the time they are granted. For both state and federal income tax purposes, the tax liability becomes effective when the option is exercised. Likewise, for purposes of determining a claimant's average weekly wage, a stock option cannot be valued until the option is exercised. Thus, stock options are excludable as income. Accordingly, the order of the WCAB was affirmed.

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Toal Associates v. Workers' Compensation Appeal Board (Sternick), No. 1545 C.D. 2002, filed January 7, 2003.

(Course and Scope - Traveling Employee - Employee who is provided with a car and frequently performs work one and one-half hours or more away from office at sites where he spends the night, even though the majority of his time is spent at the office, is a traveling employee.)

(Course and Scope - Traveling Employee - A traveling employee is within furtherance of company business when he checks into a motel to get cleaned up and rested for next day. Hence, an employee who dies in bathtub was not outside the course and scope of his employment.)

Employer is an engineering consulting firm with offices in Kennett Square, Pennsylvania. For twelve years, decedent worked there as an engineer, designing, installing and maintaining corrosion control systems for various construction projects. Decedent was an insulin dependent diabetic who had a history of hypoglycemic episodes.

On September 1, 1999, decedent left his home to arrive at a worksite at 6:30 AM. He worked at the site until 6:00 PM. He then checked into a motel. He did not arrive at the worksite the next day, and at 2:00 PM that day, the motel manager and a maid found him dead in the bathtub. The autopsy revealed that he suffered accidental death caused by hyperthermia, diabetes mellitus and focal myocardial fibrosis.

Decedent's widow filed a claim. Employer defended the petition on the basis that decedent was not acting within the course and scope of his employment, and that his death was not related to his work activities.

One of decedent's co-workers testified that, on the day in question, decedent did not appear well and his appearance deteriorated as the day progressed. He stated that much of their work that day required heavy physical labor, including drilling, digging and pulling cable. Claimant's medical experts

testified that decedent died from hyperthermia caused by prolonged exposure to hot bath water, after being incapacitated by a hypoglycemic episode.

Decedent's supervisor testified that decedent spent about one-third of his time each year traveling to and from worksites. He set his own hours and was provided with a company car, a per-diem expense account and payment for lodging. The supervisor said that if a worksite was one and one-half hours or more from the employer's office, the employee was authorized to remain overnight. Employer's medical experts testified that decedent's death was most likely caused by cardiac arrhythmia possibly caused by a hypoglycemic episode, and that decedent's death was not work-related because nothing in the records showed that he had any problems functioning prior to arriving at the motel. His ability to drive to the motel and prepare a bath indicated that his blood-sugar level was satisfactory at that time.

The Workers' Compensation Judge accepted the opinions of claimant's experts and found that claimant sustained her burden of showing that decedent died while in the course and scope of his employment due to a hypoglycemic episode brought on by the work activities of September 1, 1999.

The Workers' Compensation Appeal Board concluded that decedent was a 'traveling employee," and that the WCJ's findings were supported by unequivocal medical evidence.

The Commonwealth Court agreed. The decedent's job site on the day of his death was two and three-quarter hours from employer's office. Employer authorized decedent's travel and his overnight stay to complete the work. Decedent frequently made such trips on behalf of employer. Employer provided decedent with a company car and paid decedent's travel expenses. These facts are sufficient to establish that decedent was a traveling employee at the time of his death.

Employer argued that decedent was not within the scope of his employment at the time of his death because going into a motel and taking a bath was not in furtherance of employer's business. The Court rejected this argument. When a traveling employee is injured after setting out on the employer's business, it is presumed that at the time of the injury the employee was within the scope of employment. Decedent's actions here were not merely for personal comfort, but were activities necessary to prepare for additional work on the project.

Finally, the WCJ was free to accept or reject the medical evidence and his findings in that regard may not be disturbed on appeal. The Court, therefore, affirmed the order of the WCAB.

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Morris Painting, Inc. v. Workers' Compensation Appeal Board (Piotrowski), No. 1736 C.D. 2002, filed January 13, 2003.

(Job Availability - Illegal Alien - An illegal alien who is receiving benefits may be suspended solely upon a showing under Kachinski that he has physical ability to work. There is no need to show job availability since he cannot legally work; however, his right to medical benefits remains intact.)

Claimant, an illegal alien, worked for employer, an Ohio business, painting electric towers. Claimant obtained his job with fake identification papers and a false so-

COMPENSATION WORD SEARCH

H B F S U B R O G A T I O N C
P L U L A E P P A N N P K O L
Q E M P L N Q A A O E T K I A
F S N E U E T A N I M R E T I
K N O A D F B O S T R E L A M
I U T D L I I A W I I P P Z O
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ADJUSTER	ANSWER	APPEAL
BENEFITS	BUREAU	CARRIER
CAUSATION	CLAIM	COUNSEL
DISABILITY	EMPLOYEE	EMPLOYER
EXPERT	FRAUD	IMPAIRMENT
INJURY	JUDGE	MEDICAL
MODIFY	NOTICE	PENALTY
PETITION	PROVIDER	REPORT
REVIEW	SUBROGATION	SUSPEND
TERMINATE	UTILIZATION	WAGES

cial security number. On August 9, 1994, he fell off an electric tower while working in Honesdale, Pennsylvania. After exhausting the benefits available to him under Ohio law, claimant filed a claim under the Pennsylvania Workers' Compensation Act. Employer stipulated to claimant's eligibility under the Act.

Fours year later, employer filed a petition seeking to modify the claimant's benefits inasmuch as there was work available that the claimant was capable of performing.

In support of its petition, employer presented testimony from a vocational counselor who identified three suitable jobs for claimant given his physical restrictions. When she met with claimant to conduct the vocational interview, she learned that claimant did not have a valid visa and discontinued the interview.

Employer also presented testimony from its administrator. She testified that she had no idea claimant was an unauthorized alien. She stated further that she would not have hired him had she known and would have fired him had she found out while he was working.

The Workers' Compensation Judge found that employer failed to demonstrate work available to claimant and, thus, denied employer's petition. Employer appealed, but the Workers' Compensation Appeal Board affirmed the WCJ's decision.

Based upon the Supreme Court's decision in The Reinforced Earth Company v. Workers' Compensation Appeal Board (Astudillo), TR&C Bulletin Vol. VI, No. 4, p. 5 (2002), the Commonwealth Court stated that here, with regard to claimant's right to indemnity benefits, employer established that claimant's loss of earning power was caused by his immigration status, not his work injury. Because an unauthorized alien may not legally work, an employer is not obligated to show job availability in order to suspend benefits.

The Court further noted, however, again based upon the decision in Reinforced Earth, that there is a distinction to be made between medical and wage loss benefits. Although an illegal alien is not entitled to indemnity or wage loss benefits, he or she is entitled to medical benefits. Here, the WCJ made no determination as to whether the claimant required further medical care.

Therefore, the Court reversed the denial of the modification petition in part and suspended claimant's wage benefits. The Court vacated the denial of the modification as to claimant's medical benefits and remanded the matter to the WCAB to remand to the WCJ for an adjudication of record on that matter.

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Sun Home Health Visiting Nurses v. Workers' Compensation Appeal Board (Noguchi), No. 1561 C.D. 2002, filed January 30, 2003.

(Occupational Disease - Hepatitis "C" was an enumerated disease under 108(m) even before the 2001 amendment such that the 301(e) presumption of causation exists.)

Claimant was employed as a visiting nurse. On February 11, 1999, she filed a claim alleging that she was disabled due to hepatitis C with progressive liver failure contracted from multiple needle sticks sustained in the course of her employment.

The 1972 amendments to the Workers' Compensation Act listed serum hepatitis (hepatitis B) and infectious hepatitis (hepatitis A) as compensable diseases. The Act was not amended to include hepatitis C until December 20, 2001. In fact, hepatitis C was not known until 1989.

Employer defended the claim petition on the basis that hepatitis C was not an occupational disease under Section 108(m) of the Act and that, therefore, claimant was not entitled to a rebuttable presumption as to the causal relationship between her hepatitis C and her employment under Section 301(e) of the Act.

That section provides that, if an employee is employed in any industry or occupation in which the occupational disease is a hazard, it shall be presumed that the employee's disease arose out of and in the course of his employment. Here, employer conceded that nurses are exposed to a high risk of needle sticks.

The Workers' Compensation

Bureau Announces New Forms!

The Bureau of Workers' Compensation recently announced revisions to the following forms:

LIBC-362 Claim Petition
LIBC-375 Claim for Subsequent Injury
LIBC-686 Petition for Penalties
LIBC-601 Utilization Review Request

The first three forms may be found at the Bureau's website at www.dli.state.pa.us. Click on "Downloadable Forms" and then click on "Workers' Compensation." This will bring you to the forms matrix screen.

The Utilization Review Request form is not yet available, nor has it been bar coded. A copy of the revised form and instructions, however, may be downloaded from our website at www.trc-law.com.

Please note that all Utilization Reviews filed on or after March 1, 2003 must be filed using the revised form. Any Utilization Reviews filed on or after March 1, 2003 using any previous version of the form will be returned.

Judge rejected employer's argument that hepatitis C was not an infectious disease under Section 108(m) of the Act. The WCJ further concluded that claimant was entitled to the rebuttable presumption under Section 301(e). Therefore, because employer failed to rebut the presumption, the claim petition was granted. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Employer appealed to the Commonwealth Court asserting that the Legislature did not intend to include hepatitis C as an occupational disease when it amended the Act in 1972 and that, therefore, hepatitis C was not a compensable occupational disease at the time claimant contracted the disease. Employer argued that the Legislature's subsequent amendment of the Act in 2001 to add hepatitis C in Section 108(m) demonstrates that the Legislature did not intend to include it as an occupational disease prior to that time.

The Court, however, had interpreted Section 108(m) to include hepatitis C in 1995 in the case of Jeannette District Memorial Hospital v. Workmen's Compensation Appeal Board (Mesich), 668 A.2d 249 (Pa.Cmwlth. 1995). Because the Legislature did not amend Section 108(m) of the Act to exclude hepatitis C as an occupational disease following the Court's interpretation in Jeannette, as of 1995, the Legislature obviously intended to include hepatitis C as an occupational disease.

Contrary to employer's argument, the Court here stated that the Legislature's 2001 amendment of the Act indicates the Legislature's agreement with the Court's interpretation in Jeannette. Therefore, hepatitis C constitutes an occupational disease under Section 108(m) before the Act was amended to include it.

The order of the WCAB was affirmed.

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George Henry v. Workers' Compensation Appeal Board (Keystone Foundry), No. 1998 C.D. 2002, filed February 4, 2003.

(Vocational Expert Interview - Claimant who voluntarily attends vocational interview waives his right to challenge the interview under Caso and Walker.)

Claimant sustained a head injury on August 17, 1993. As a result, he was totally disabled.

Claimant subsequently submitted to an IME with Dr. Bookwalter, who opined that claimant is capable of light duty. Employer then retained a vocational case manager, who located a light duty position for the claimant - a funded position of a "maintenance assistant" with the YMCA. The YMCA was willing to accommodate claimant's restrictions. Further, though funded, the position was available for an indefinite period in the future. Claimant refused the position.

On February 23, 2000, employer filed a petition to modify claimant's benefits alleging that he was offered work within his medical restrictions. The Workers' Compensation Judge found Dr. Bookwalter more credible than claimant's physician. Accordingly, the WCJ modified claimant's benefits as of the date that the YMCA position was made available to claimant.

Claimant filed an appeal contending, among other arguments, that the WCJ's decision cannot stand inasmuch as employer's vocational expert was not approved by the Department of Labor and Industry as required by the Court's decision in Caso v. Workers' Compensation Appeal Board (School District of Philadelphia), TR&C Bulletin Vol. VI, No. 10, pp. 1-2. In that case, the Court determined that, pursuant to Section 306(2) of the Act, the Department must approve vocational counselors before an employee can be required to submit to an earning power assessment interview. That decision was reiterated in Walker v. Workers' Compensation Appeal Board (Temple Univ. Hosp.), TR&C Bulletin Vol. VIII, No. 1, p. 9.

In both cases, however, the claimants had objected to the vocational interviews. In both cases, the claimants failed to appear for the vocational interview and the employers sought to compel their attendance via the WCJ. Here, claimant did not object to the vocational interview prior to or during the interview. Caso and Walker hold that a claimant may not be compelled to attend an expert interview unless the Department has approved the expert. Here, claimant voluntarily attended the interview and failed to challenge it before the WCJ. Therefore, claimant's challenge on appeal based on Caso or Walker had no merit. That challenge had been waived.

The decision of the WCJ was affirmed.

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Donald Douglas v. Workers' Compensation Appeal Board (Harmony Castings, Inc.), No. 1770 C.D. 2002, filed February 18, 2003.

(Reinstatement - Burden of Proof - Where claimant refuses light work in bad faith and is suspended therefore, but returns to work for employer before the bad faith order is issued, and then is laid off after suspension order, all he has to prove is that reason for suspension no longer exists under Pieper. No need to show worsening as in Spinabelli.)

Claimant sustained a work injury and a Notice of Compensation Payable was issued in 1996. Subsequently, employer filed a petition seeking to suspend claimant's benefits as of December 15, 1997 because it offered claimant light duty work at wage equal to his pre-injury wage, but claimant refused the position. On August 18, 1998, claimant returned to work, accepting employer's previous offer of light duty. On July 20, 1999, the Worker's Compensation Judge granted employer's petition and suspended benefits as of February 5, 1998, the date he found claimant

to be capable of performing the light duty position. No appeals were taken from that order.

Claimant continued to work at light duty until August 6, 1999, when he was laid off. Claimant filed a reinstatement petition seeking reinstatement of his total disability benefits as well as attorneys' fees based upon an unreasonable contest by employer.

The WCJ credited claimant's testimony that he remained ready, willing and able to perform his light duty job, but that his supervisor told him that light duty was no longer available. Employer did not dispute claimant's testimony in this regard.

Based on claimant's testimony, the WCJ found that claimant met his burden of proof and granted the petition. Additionally, the WCJ found that employer did not have a reasonable basis to contest the petition and, thus, awarded counsel fees. The Workers' Compensation Appeal Board reversed, stating that the WCJ applied the wrong burden of proof.

The matter was then appealed to the Commonwealth Court. The Court noted that the threshold question was the claimant's burden of proof to establish his entitlement to reinstatement of benefits. Under Pieper v. Ametek-Thermox Instruments Division, TR&C Bulletin Vol. 1, No. 1, p. 13, a claimant seeking reinstatement of suspended benefits must establish that, through no fault of his own, his earning power is once again adversely affected by his disability and that the disability which gave rise to the original claim continues. However, under Spinabelli v. WCAB (Massey Buick, Inc.), TR&C Bulletin, Vol. I, No. 3, p. 27, in cases where the suspension of benefits is based on a finding that the claimant failed to pursue jobs in good faith, the claimant's burden of proof in a reinstatement petition is different. Specifically, the claimant must prove that he can no longer perform the job offered to him which served as the basis for the earlier suspension.

Here, the WCJ applied the burden of proof set forth in Pieper, whereas the WCAB relied on Spinabelli. The Commonwealth Court, however, noted the unique circumstances of this case. Unlike the claimant in Spinabelli, the claimant here was still receiving total disability benefits when he accepted employer's offer of employment. Therefore, claimant is akin to those claimants who have accepted and performed a job other than his time of injury job. Accordingly, the WCJ applied the correct burden of proof and, to have his benefits reinstated, claimant bore the burden of establishing that, through no fault of his own, his earning power is again adversely affected by his disability and that the disability which gave rise to the original claim continues. *See* Pieper.

The Court disagreed, however, with the WCJ's assessment of unreasonable contest attorneys' fees. The Court noted that, given the state of the law, it was not unreasonable for employer to have challenged claimant's Reinstatement Petition.

Accordingly, the Court reversed the WCJ's imposition of attorneys' fees, but affirmed the reinstatement of the claimant's total disability benefits.

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Acme Markets, Inc. v. Workers' Compensation Appeal Board (Purcell), No. 2244 C.D. 2002, filed February 20, 2003.

(Course and Scope of Employment - Claimant who was actually injured at home while engaged in personal activity, but presented evidence that his 20 years of work contributed to the injury, was not injured in the course and scope of his employment such that benefits were denied.)

Claimant worked for employer for 20 years, engaged in heavy lifting and twisting. He suffered low back injuries in 1984, 1988 and 1993, all resulting in 4-6 weeks of disability.

On July 16, 1999, claimant filed a petition alleging that he suffered a work-related low back injury which manifested itself in severe physical symptoms while he was at home on June 15, 1998. He sought total disability benefits from June 17, 1998 through March 28, 1999, at which time he returned to work. Employer denied that a work-related injury occurred.

At hearings before the Workers' Compensation Judge, claimant testified that while at home on June 15, 1998, he felt a sharp pain in his low back when he got up from the floor where he had been sitting for 2 hours while assembling a filing cabinet for his wife. Claimant also presented medical testimony from Dr. Sugarman, who indicated that claimant had a disc herniation at L4-5 which required surgery. Dr. Sugarman opined that the type of work claimant performed over the substantial length of time he performed it caused deterioration in his low back, resulting in the June 15, 1998 injury.

Employer presented testimony from Dr. Rosenfeld, who stated that claimant's 20 years of work did not contribute to his low back injury, but instead, the single incident of getting up from the floor was the sole cause of his condition.

The WCJ credited Dr. Sugarman's opinion and granted the claimant's petition. The Workers' Compensation Appeal Board affirmed that decision. Employer then appealed to the Commonwealth Court.

The Court noted that no evidence was presented to show that claimant was injured in the course and scope of his employment. He was not doing anything to further employer's business when he was injured. Simply because he offered medical evidence linking his home injury to his work activities, he has not established that he should be compensated. An employee cannot allege a work-related injury suf-

fered at home while pursuing personal activities simply because he previously suffered a similar work injury. That is not what the legislature intended when it required that an employee actually be engaged in the furtherance of the employer's business or on the employer's premises when injured in order to be compensated.

Because claimant here was not engaged in the furtherance of employer's business, he was not injured in the course and scope of his employment. Consequently, he is not entitled to benefits. The order of the WCAB was reversed.

Supreme Court Case Reviews

McIlvaine Trucking, Inc. v. Workers' Compensation Appeal board (States), No. 63 WAP 2000, decided November 25, 2002.

(Jurisdiction - Under §3056.2(d)(5) the parties may not divest Pennsylvania of jurisdiction, by agreement, over an in-state injury.)

Claimant was employed as an interstate truck driver by employer, a liquid bulk carrier headquartered in Ohio and doing business in Ohio, Pennsylvania, Virginia and West Virginia. At the time of hire, as a condition of his employment, claimant signed an agreement to be bound by West Virginia law should he suffer a work injury.

In June of 1992, claimant did suffer an injury while performing duties at employer's facility in Pennsylvania. He filed a claim petition under the Pennsylvania Workers' Compensation Act, as well as a penalty petition. In response, employer asserted that the Workers' Compensation Judge lacked jurisdiction in light of claimant's agreement. Employer argued that §305.2(d)(5) of the Act allows such agreements where an employee travels regularly in the service of his employer in one or more states.

The WCJ concluded that, because claimant was injured in Pennsylvania, he was entitled to compensation under the Act despite the terms of the employment agreement. The Workers' Compensation Appeal Board affirmed, reasoning that under §305.2(d)(5) the parties may not agree to confer jurisdiction outside of Pennsylvania where jurisdiction would otherwise lie in Pennsylvania.

The Commonwealth Court, however, reversed that decision, agreeing with employer that §305.2(d)(5) sanctions such employment agreements by certain traveling employees.

On appeal to the Supreme Court, claimant argued that §305.2(d)(5) in no way sanctions an agreement to avoid Pennsylvania jurisdiction over an in-state injury. Further, claimant argued that such an agreement is void as it is in violation of the Act's overriding public policy to afford compensation for in-state, work-related injuries. The Court agreed, holding that §305.2(d)(5) does not permit parties by agreement to overcome the Act's coverage pertaining to a subsequent, in-state injury. Although the Court noted that it does not lightly override private contractual undertakings, the agreement here is void inasmuch as it offends public policy as reflected in the express legislative provisions that the Act applies to in-state injuries. Thus, the WCJ and the WCAB did not err in refusing to give effect to the choice-of-law provisions in the employment contract. The decision of the Commonwealth Court was, therefore, reversed.

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Andrew M. Mitchell v. Workers' Compensation Appeal Board (Steve's Prince of Steaks), No. 43 MA.P 2000, decided January 21, 2003.

(Modification - Incarceration - Under Kachinski, an incarcerated claimant is not required to pursue jobs while incarcerated. It is bad faith for the employer to refer jobs to the claimant in this situation; therefore, there is no obligation to pursue the jobs.)

In the case of Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 532 A.2d 374 (Pa. 1987), the Supreme Court announced a four part test to determine if an employer is entitled to modification of a claimant's benefits based upon the claimant's capacity to work:

1. The employer must produce medical evidence of a change in the claimant's physical condition;
2. The employer must produce evidence of a referral (or referrals) to a then open job (or jobs) which fits the occupational category for which the claimant has been given medical clearance;
3. The claimant must demonstrate that he has, in good faith, followed through on the job referral(s);
4. If the referral fails to result in a job, then claimant's benefits should continue.

Here, employer sent claimant's counsel three job referrals, all of which fit within claimant's physical capabilities. Claimant failed to respond to the job referrals because he was incarcerated. He conceded that employer was entitled to a suspension of benefits for the period during which he was incarcerated; however, he argued that he was entitled to a reinstatement of his benefits upon his release from prison.

The Workers' Compensation Judge found not only that the employer was entitled to a suspension during claimant's incarceration, but also found that employer was entitled to an outright suspension as of the date employer forwarded the job referrals to claimant. The WCJ reasoned that incarceration is not a valid justification for failing to respond to job notices and, thus,

claimant acted in bad faith for purposes of Kachinski. The Workers' Compensation Appeal Board affirmed the decision of the WCJ.

The Commonwealth Court also held that his failure to pursue job referrals while incarcerated was bad faith under Kachinski.

Claimant petitioned the Supreme Court for review, arguing that an incarcerated person simply cannot make a "good faith effort" to pursue job referrals and, further, that an employer acts in "bad faith" by forwarding job referrals when it knows the claimant is incarcerated and cannot respond.

The Court agreed. An employer is not acting in "good faith" under Kachinski when it seeks to "reintroduce" an injured worker to the work force by forwarding job referrals while the claimant is incarcerated and then to seek a permanent suspension when the claimant fails to pursue the referrals. By the same token, it is hardly Kachinski "bad faith" for the claimant to fail to engage in the futile act of pursuing the referrals while in prison. Under Kachinski, the obligation of the employer in an instance such as this remains "a good faith attempt to return the injured employee to productive employment, rather than a mere attempt to avoid paying compensation."

Therefore, the Commonwealth Court erred in holding that claimant was not entitled to a reinstatement of his benefits upon his release from prison. The matter was remanded to the WCJ for proceedings consistent with the Supreme Court's opinion.

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WELCOME SPRINGTIME!

(Continued from page 1)

was, again, a trespasser. Consequently, compensation was not awarded.

Numerous cases from that era could be cited here. Beginning in the 1940s, however, the defense of "violation of positive orders" was somewhat forgotten – at least, that is, until recently. A few cases have resurrected the defense as a viable means to deny compensation. Dickey is still, however, the seminal case on this issue.

In the 1980s, the employer raised the defense in the case of City of New Castle v. WCAB (Sallie), 118 Pa.Cmwlth. 51, 546 A.2d 132 (1988). Mr. Sallie contracted a fatal disease by kissing one of his co-employees on the cheek prior to her leaving for maternity leave. The City argued that his actions were not condoned or encouraged by the City and that, therefore, he was acting outside the scope of his employment. The Court disagreed, finding the kiss to be an "innocent or inconsequential departure from his line of duty." In the words of the Dickey Court, Mr. Sallie may have been negligent, but he was not a trespasser. Benefits were, therefore, appropriately awarded.

Benefits were denied, however, in the case of Nevin Trucking v. WCAB (Murdock), 667 A.2d 262 (Pa.Cmwlth. 1995). Mr. Murdock was employed as a truck driver. His employer provided him with "road money" to effectuate any necessary repairs while on the road. Mr. Murdock, however, spent his road money in a tavern. Unfortunately, one of his truck tires then needed repairs. He called Mr. Nevin and explained his predicament. Mr. Nevin determined that the tire was not unsafe and instructed Mr. Murdock to deliver his load to Trenton where the employer would take care of the tire. Despite being told to do so, Mr. Murdock elected to try to repair the tire himself and, as a result, suffered injuries to his head when the tire suddenly came off. Based upon the age-old rationale in Dickey, the Court denied Mr. Murdock benefits, stating:

> "[T]he changing of tires was not part of claimant's work duties nor connected thereto because performing repairs on such instrumentality was expressly prohibited by the employer. Therefore, claimant had no duty to change the tire, especially when employer was made aware that claimant had a problem tire with no money to fix it and still directed claimant to have it changed by a professional."

Like the workers of the 1930s, Mr. Murdock had engaged in an act so far removed from his regular duties as a truck driver so as to be a trespasser. His attempt to change the tire was not merely "a violation of a positive order intimately connected with his work duties," which would be deemed to be negligence. Rather, by changing the tire he violated a positive order which implicated an activity clearly *not* connected with his work duties as a truck driver. (*Query*: *Would the Court have come to the same conclusion had Mr. Murdock not expended his funds at a tavern?*)

Another example of a case in which benefits were denied is Johnson v. WCAB (Union Camp Corp.), 749 A.2d 1048 (Pa.Cmwlth. 2000). Mr. Johnson sustained severe injuries from being pinned between two forklifts. At the time, he was not in his proper work area. Also, he was injured after he climbed on one forklift in anger and intentionally jumped or lunged at one of his co-employees who was backing up the other forklift. He then slipped between the two forklifts and sustained injuries. Mr. Johnson's actions were not only reckless, but were in violation of numerous safety and workplace rules. The employer had a written policy against fighting and horseplay, which was posted on the premises. Additionally, employees were to stay in their assigned work areas. Here, Mr. Johnson is the epitome of a trespasser under the Dickey line of reasoning.

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He acted "in direct hostility to, and in defiance of, positive orders of the employer concerning instrumentalities, places or things about or on which the employee has no duty to perform, and with which his employment does not connect him…" Consequently, Mr. Johnson was acting outside the scope of his employment and was denied benefits.

Most recently, in the case of Camino v. WCAB (City Mission and MCRA, Inc.), 796 A.2d 412 (Pa.Cmwlth. 2002), the Commonwealth Court again applied the logic of Dickey. Mr. Camino sustained an injury to his hand while working for General Electric. He was subsequently placed in a funded position at City Mission to perform the duties of a launderer. When he was first placed there, he was given a written list of duties, which included mopping. He was verbally instructed, however, not to do any mopping, although he was also told to "keep the place clean." While mopping behind a commode in the men's room, he injured his lower back when the mop handle hit the wall. The employer denied benefits, stating that Mr. Camino had violated a positive work order not to mop. The Court disagreed. The janitorial act of mopping is not so foreign or disconnected from his duties as a launderer so as to render him a trespasser. Further, the Court noted that "claimant, unlike the employees in Dickey, Nevin Trucking and Johnson, was not injured while engaged in a matter of personal convenience or interest."

Overall, the Court's reasoning in Dickey has essentially evolved into a three-prong test:

1) Was the injury, in fact, caused by the violation of the order or rule?;

2) Was the employee actually aware of the order or rule?; and,

3) Did the order or rule implicate an activity not connected with the employee's work duties?

The first two prongs are usually easily met. Therefore, it is the last element that determines if the "violation of positive orders doctrine" is applicable. Arguably, that element is subjective. While the early cases reflect that it was clearly the employer's interest in safety that was to be protected, that no longer appears to be the case. The focus is no longer on the employer's right to enforce safety requirements, but rather is on the character and activity of the claimant. The claimant whose activities the Court deems to be unsavory, or a "bad" person, such as Mr. Murdock or Mr. Johnson, will be deemed to be engaged in activities foreign to his or employment and denied benefits. A likeable or "good" person who violates an employer's positive orders, such as Mr. Camino, will be deemed to have engaged in "innocent and inconsequential" conduct or negligent conduct. Under those circumstances, the violation is not a defense and benefits are payable under the Act.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

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