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BUT I TOLD HIM NOT TO DO THAT!

Violation of Positive Work Orders Revisited

By Margaret M. Hock, Esquire

Depending upon the circumstances, a "violation of a positive work order" may provide an affirmative defense to a workers' compensation claim.[1] Three criteria must be met:

(1) The injury must be, in fact, caused by the violation of the order or rule;
(2) The employee must actually be aware of the order or rule prior to the injury; and,
(3) The order or rule must implicate an activity not connected with the employee's work duties.

The Commonwealth Court specifically addressed this defense in the case of Ryan Miller v. WCAB (Millard Refrigerated Services and Sentry Claims Service), 47 A.3d 206 (Pa. Cmwlth. 2012). In that case, Mr. Miller had been trained as a pallet jack driver. Nevertheless, he would sometimes "jump on a forklift," knowing that a forklift requires certification to operate and that he lacked that certification. He testified that he would drive the forklift because it was "fun to drive." On August 12, 2009 while driving the forklift, Mr. Miller crashed into a pole. His foot had been sticking out of the forklift and was crushed upon impact. The employer presented testimony establishing that Mr. Miller was hired to run the pallet jack and that Mr. Miller was told not to be on other equipment, including the forklift, unless certified.

The Workers' Compensation Judge found the employer's witness to be credible. The WCJ concluded that Mr. Miller violated several work rules of which he was aware, that the violations caused Mr. Miller's injuries, and that driving a forklift was an activity with no connection to Mr. Miller's work activities as a pallet jack driver. The Workers' Compensation Appeal Board and the Commonwealth Court agreed.

The analysis applied to Mr. Miller's case is the same analysis applied in 1929 by the Pennsylvania Supreme Court in the case of Dickey v. Pittsburgh & Lake Erie Railroad Co., 297 Pa. 172, 146 A. 543 (1929). Mr. Dickey, a watchman for the railroad, was repeatedly instructed to use a boardwalk to cross the railroad tracks. Failing to do so, he was struck by a train. In denying his widow's claim, the Supreme Court found that the watchman was not acting in the course of his employment, nor were his actions mere negligence; but 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.

Likewise, in driving the forklift, without the requisite training and certification, Mr. Miller violated a rule designed for his safety as well as the safety of his co-workers. Because he did so, he is akin to a trespasser or stranger to the employment relationship.

Another relatively recent example of the Court denying benefits due to the claimant's violation of a positive work order may be found in the

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COMMONWEALTH COURT CASE REVIEWS

Patricia Righter v. Workers' Compensation Appeal Board (Righter Parking), No. 1356 C.D. 2015, Filed June 14, 2016.

(Counsel Fees—Medical Bills—Claimant's counsel is not entitled to a percentage of medical bills paid relative to claim.)

On April 27, 2012, claimant filed a Claim Petition alleging that she suffered a work-related injury on April 13, 2012. Claimant sought indemnity and medical benefits, as well as unreasonable contest counsel fees and penalties.

The parties ultimately stipulated that claimant was injured in the scope of her employment when she was struck by a company truck while opening a parking lot gate. The parties stipulated as to the description of the claimant's work injury and to the fact that the claimant's counsel was entitled to 20% of the claimant's indemnity benefits. They also amicably resolved the penalty and unreasonable contest issues. The only issued left unresolved was the question of claimant's counsel's entitlement to an attorney fee of 20% of the claimant's medical bills.

The agreement between the claimant and her counsel provided that "if awarded any benefits, counsel is entitled to 20% of the benefits as an attorney fee." The Workers' Compensation Judge found that the fee agreement did not make any mention of medical expenses, but only referred to "all compensation payable to claimant." No evidence was offered to establish a contingent fee agreement between counsel and any of the medical providers. As such, the WCJ concluded that claimant did not establish counsel's entitlement to receive 20% of the medical bill payments in addition to his 20% fee on the indemnity benefits awarded.

Claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal to the Commonwealth Court, claimant argued that the Courts have consistently held that attorney fees are chargeable against both indemnity benefit and medical bill payments and that a 20% fee is reasonable per se. The Court did not agree.

In determining whether medical bill payments should be included in a contingent fee agreement, the WCJ must assess: (1) whether the claimant and counsel intended for counsel to receive a percentage of the medical bill payments; and (2) whether the fee is reasonable. Raulston v. WCAB (Tri-State Motor Transit), 606 A.2d 668 (Pa.Cmwlth. 1992). Further, the factfinder must address the amount and degree of difficulty of the work performed by the attorney. The WCJ must make specific findings on the time and effort expended by counsel in his representation of claimant.

Here, the WCJ concluded that a 20% attorney fee based on claimant's medical bill payments was unreasonable. The fee agreement did not set forth any promise pertaining to medical bill payments in addition to indemnity benefits. Claimant's testimony did not establish that she understood the fee agreement to provide counsel with 20% of the medical bills paid. Moreover, the nature and difficulty of the work performed by counsel did not establish any particular work performed that specifically advanced the payment of medical bills so as to warrant a 20% fee of the medical bill payments.

Accordingly, the order of the WCAB was affirmed.

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Allegheny General Hospital v. Bureau of Workers' Compensation Fee Review Hearing Office (State Workers' Insurance Fund), No. 1945 C.D. 2015, Filed July 6, 2016.

(Medical Costs—Trauma—The cost of trauma care to an injured worker can be repriced to 100% the usual and customary charge, so long as the usual and customary charge is determined by relying upon charges by other accredited trauma care centers in the same geographic region.)

Claimant sustained several work related injuries when he was crushed under a mound of dirt. As a result of the injuries, claimant spent eight days in the hospital, amassing claimed medical expenses of $120,984. The hospital submitted a claim to the State Workers' Insurance Fund for this amount.

The Fund repriced the bill and issued a payment of $88,106 based on the 85th percentile of a medical data retrieval (MDR) database published by FAIR Health. The hospital filed an application for fee review and it was determined that an additional $34,861 was due.

The amount of the required payment was then appealed to a hearing officer, who determined

that:

> "Insurer has met its burden of proving that it properly utilized the definition of 'usual and customary charge' and that Provider was due reimbursement at the 85th percentile of the MDR database published by FAIR Health. Insurer has proven by a preponderance of the evidence that Provider is not due additional payment for the services rendered to Claimant."

This issue was then appealed to the Commonwealth Court.

The Commonwealth Court, in a unanimous three member panel decision, held that the Fund failed to meet its burden necessary to reduce the amount of the reimbursement as proposed.

The recent decision in Geisinger Health System and Geisinger Clinic v. Bureau of Workers' Compensation Fee Review Hearing Office, 138 A.3d 133 (Pa. Cmwlth. 2016) set the framework for the Court's analysis. Under §306(f.1)(10) of the Act:

> "If acute care is provided in an acute care facility to a patient with an immediately life threatening or urgent injury by a Level I or Level II trauma center… , the amount of payment shall be the usual and customary charge."

Relying on the Geisinger decision, the Court held that §306 (f.1)(10) of the Act permits a comparison of other providers' charges that may be made to reprice the cost of trauma care.

Distinguishing the present case from the Geisinger case, the Court noted that, unlike the situation in Geisinger, the hospital in this case challenged the sufficiency of the database used to reprice the cost of services. The Court held that in repricing trauma care charges, the charges can be compared to "*charges by other accredited trauma care centers in the same geographic region to arrive at the 'usual and customary charge' for trauma care*." Reimbursement is to be made at 100% of such charge.

In the present case, there was no evidence that the MDR database published by FAIR Health and used by the Fund to reprice the cost of the care at issue, was limited to other accredited trauma care centers in the same geographic region. As such, the Court rejected the proposed reprice and remanded the case to determine the "*usual and customary charge*" for the care provided by the hospital.

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Christopher Byfield v. Workers' Compensation Appeal Board (Philadelphia Housing Authority), No. 2002 C.D. 2015, Filed July 26, 2016.

(Attorney's Fees—An award of attorney's fees to a prevailing claimant under §440(a) of the Act is not automatic.)

Claimant sustained work-related injuries in the form of strains and sprains of the lumbar, cervical and thoracic spine, and a contusion of the right wrist in August of 2010.

In February of 2011, employer filed a Suspension Petition under §306(f.1)(8), alleging that claimant refused reasonable medical treatment and was ineligible for benefits effective January 31, 2011. In support of the petition, employer presented testimony from Dr. Epstein, who conducted an IME on December 16, 2010. Dr. Epstein found that the claimant had not fully recovered. He recommended bilateral lumbar facet injections, which had minimal risks and a high likelihood of success. Dr. Epstein acknowledged that he had no information that claimant ever refused lumbar facet injections.

Claimant presented testimony from his treating physician, Dr. McCoy, who stated that he treated the claimant with trigger point injections, as well as physical therapy and pain medications. He noted that trigger point injections are usually ordered first and, if they do not work, only then are lumbar facet injections recommended.

Claimant testified that, if Dr. McCoy advised him to undergo lumbar facet injections, he would do so.

The Workers' Compensation Judge found that lumbar facet injections constituted a reasonable and necessary medical treatment for claimant's work injury and granted employer's petition.

Claimant appealed, arguing that he never refused lumbar facet injections. Claimant sought reversal of the WCJ's decision and specifically requested interest and unreasonable contest counsel fees.

The Workers' Compensation Appeal Board concluded that employer failed to meet its burden of proving that claimant refused reasonable and necessary medical treatment and reversed the WCJ's decision. The WCAB did not address claimant's request for counsel fees. Neither claimant nor employer appealed from the WCAB's decision.

In September of 2013,

claimant filed a Review Petition, seeking litigation costs and counsel fees incurred during litigation of the Suspension Petition. The WCJ concluded that claimant's proper recourse would have been to appeal the WCAB's decision or request a rehearing. Because he did neither, the WCJ held that claimant was barred from recovering those costs and fees through a separate petition. The WCAB affirmed the WCJ's order.

Claimant then sought review by the Commonwealth Court, arguing that the WCAB's failure to award litigation costs and unreasonable contest counsel fees in the suspension proceeding was a mechanical error properly addressed by a Review Petition under §413(a) of the Act. The Court disagreed.

Under §440 of the Act, a prevailing claimant is entitled to recover litigation costs and an award of reasonable attorneys' fees unless the record establishes that the employer had a reasonable basis for contesting liability. Here, claimant was never awarded the costs and attorneys' fees that he was seeking. An award of attorneys' fees to a claimant is not automatic. Even if the WCAB inadvertently failed to award counsel fees, the mistake goes to the merits of the case, not to the satisfaction of the award, and it cannot be corrected by way of a Review Petition under §413 of the Act.

Claimant had standing to appeal the WCAB's order because, although he prevailed before the WCAB in his appeal of the suspension order, he only prevailed in part. The WCAB did not address his request for counsel fees and costs. As a result, and because an award of counsel fees is not automatic, claimant was adversely affected by the WCAB's decision and, thus, he was aggrieved and had standing to appeal. Claimant's proper remedy was to request reconsideration by the WCAB or file an appeal to the Commonwealth Court. He failed to do either. As such, the WCAB's order is final and cannot be collaterally attacked by a subsequently filed Review Petition.

The WCAB's order, affirming the WCJ's denial of the claimant's Review Petition, was affirmed.

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City of Philadelphia Fire Department v. Workers' Compensation Appeal Board (Sladek), No. 579 C.D. 2015, Filed August 12, 2016.

(Occupational Disease—The presumption found in §301(e) does not apply until the claimant proves that his cancer is a type of cancer *caused by* the Group I carcinogens to which he was exposed.)

The City of Philadelphia hired claimant as a firefighter in 1994.

In 2006, claimant developed a skin lesion on the back of his right thigh, which was diagnosed as malignant melanoma and removed surgically. His dermatologist told claimant that sun exposure probably caused his malignant melanoma and advised him to use sunscreen. Claimant described himself as an outdoor person, but denied spending prolonged periods of time outside wearing shorts. Claimant never had any sunburn on his legs that required medical care. He always wore long pants while at work and there was never a time on the job when the back of his thigh would have been exposed to sunlight. Prior to his malignant melanoma, claimant had never been diagnosed with any form of cancer. His family does not have a history of melanoma.

In June of 2012, claimant filed a Claim Petition alleging that his malignant melanoma was caused by his workplace exposure to carcinogens categorized by the International Agency for Research on Cancer (IARC) as Group I carcinogens. In support of his petition, claimant offered a report from Virginia Weaver, M.D., M.P.H., who has studied the occupational diseases of firefighters. She found that smoke typically contains the following IARC Group I carcinogens: arsenic, asbestos, benzene, benzoapyrene, butadiene, formaldehyde and soot. These carcinogens cause cancer in humans, as does diesel engine exhaust.

Claimant also offered the deposition testimony of Barry Singer, M.D., an oncologist who was contacted by claimant's counsel to evaluate the claimant's medical history, treatment records, job history and so forth, to determine if claimant's cancer was work-related. Dr. Singer used a "differential diagnosis" methodology to prepare his report. He explained that the IARC Group I carcinogens are commonly found in smoke. He also identified three studies that he received from claimant's counsel that associate skin cancer with firefighting. Dr. Singer then opined that claimant's exposure to Group I carcinogens while working for the City was a "substantial contributing factor in the development of his skin cancer malignant melanoma."

In opposition to the petition, the City submitted deposition

testimony of Tee Guidotti, M.D., M.P.H., D.A.B.T., who has been investigating the relationship between environmental exposures associated with firefighting and cancer for 20 years. He testified that specific carcinogens cause specific cancers. The IARC Group I carcinogens to not cause all types of cancer. Squamous and basal cell types of skin cancer are associated with sunlight exposure in adulthood as well as chemical exposure. In contrast, the typical profile for malignant melanoma is sunburn early in life, and it has the unusual characteristic of "appearing sporadically without association with ultraviolet in certain parts of the body." Inhalation of any substance does not cause malignant melanoma.

The Workers' Compensation Judge accepted as credible the testimony of claimant and Dr. Singer. The Claim Petition was granted and the City appealed to the Workers' Compensation Appeal Board. The WCAB affirmed, reasoning that, because claimant was exposed to IARC Group I carcinogens at work, his malignant melanoma met the definition of occupational disease set forth in §108 (r) of the Act. The WCAB held that claimant did not need to show that the carcinogens to which he was exposed caused his particular cancer. Once claimant proved exposure to Group I carcinogens at work, the burden shifted to the City to show that claimant's cancer was not caused by firefighting. Dr. Guidotti's testimony did not meet that burden. Although Dr. Guidotti opined that the only known cause of malignant melanoma is ultraviolet radiation, he did not opine that this is what caused claimant's melanoma. The City appealed the WCAB's decision.

The Commonwealth Court noted that §108 of the Act lists a number of occupational diseases. The Legislature added cancer to the list of occupational diseases for individuals employed as firefighters by adding §108(r), which states:

> Cancer suffered by a firefighter *which is caused by exposure to a known carcinogen* which is recognized as a Group I carcinogen by the International Agency for Research on Cancer.

Section 301(e) of the Act establishes a "presumption regarding occupational disease" that applies to any occupational disease.

Here, the WCAB erroneously reasoned that, because claimant established that he was diagnosed with cancer and had been exposed to Group I carcinogens, he had met his initial burden; however, the presumption found in §301(e) does not come into play until the claimant proves that his malignant melanoma is a type of cancer *caused by* the Group I carcinogens to which he was exposed.

Dr. Singer merely testified that claimant's exposures to certain carcinogens was a *substantial contributing factor* in the development of malignant melanoma, not that the exposure caused the cancer. Moreover, the WCJ and WCAB erred in not considering Dr. Guidotti's testimony that melanoma is not an occupational disease of firefighters.

The case was remanded to the WCAB for further proceedings in accordance with the Court's opinion.

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Christopher Savoy v. Workers' Compensation Appeal Board (Global Associates), No. 2613 C.D. 2015, Filed August 25, 2016.

(Longshore Act – Maritime employees who are injured over navigable waters while performing traditional maritime functions remain exclusively in the jurisdiction of the Longshore Act.)

This appeal involved an electrician employed by Global Associates to work on United States Navy vessels at the Philadelphia Navy Yard. Claimant was walking along a passageway on the USS Stephen Groves when he tripped and twisted his knee. Thereafter, claimant filed a Claim Petition seeking temporary total disability benefits stating that he had sustained a torn right lateral meniscus.

At a hearing before the Workers' Compensation Judge, the parties stipulated that claimant had been receiving benefits for his injury under the Longshore Act. As such, the matter was bifurcated to address whether claimant was entitled to concurrent compensation under both the Workers' Compensation Act and the Longshore Act. Claimant argued that he was entitled to compensation under both.

During his deposition, claimant testified that the ship was located inside the basin of the Navy Yard, on the water, at the time of his injury. The WCJ found this testimony credible so as to establish that the ship was on navigable waters of the Unites States at the time of his work injury. On this basis, the WCJ found that claimant's claim fell exclusively within the juris-

diction of the federal Longshore Act, thereby precluding him from receiving benefits under the Workers' Compensation Act. Claimant then appealed the decision of the WCJ. The Workers' Compensation Appeal Board, however, affirmed the WCJ's decision, finding that the claimant's testimony established that the ship was on the water at the time of the injury.

On appeal to the Commonwealth Court, claimant argued that there was insufficient evidence to establish that the ship was "on navigable waters of the United States" at the time of injury, which is a prerequisite for exclusive jurisdiction under the Longshore Act. Employer responded that the record supported the WCJ's finding that the ship was, in fact, on the water at the time of the injury. Employer further argued that claimant was not entitled to a remand for the purpose of presenting evidence that he should have produced at the first hearing. The Court agreed.

The Court found that the only evidence relative to the location of the ship was claimant's deposition testimony, where he stated that the ship was "on the water." The Court then addressed the legal question of whether claimant was entitled to benefits under both the Workers' Compensation Act and the Longshore Act. In reviewing the law relevant to concurrent jurisdiction under the Longshore Act and a state worker's compensation act, the Court found that the United States Supreme Court addressed the confusion by creating what is now commonly referred to as a "twilight zone" exception. Under this exception, concurrent jurisdiction between the Longshore Act and a state workers' compensation act will exist if the injury occurs where the employee is neither strictly maritime nor strictly land-based. However, in 1972, Congress amended the Longshore Act to extend jurisdiction to include certain land areas. The United States Supreme Court construed this landward extension as not preempting state workers' compensation laws that applied to land-based injuries, but rather so as to allow claimants to seek relief under either act.

Ultimately, the Court found that maritime employees who are injured over navigable waters while performing traditional maritime functions remain exclusively in the jurisdiction of the Longshore Act. The Court found that claimant neither fit within the "twilight zone" exception, nor did he fit within a landward extension of the Longshore Act. Accordingly, the Court affirmed the decision below, concluding that Longshore Act jurisdiction was exclusive in this case.

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Earl Hutz v. Workers' Compensation Appeal Board (City of Philadelphia), No. 2140 C.D. 2015, Filed September 7, 2016.

(Occupational Disease – Claimant seeking compensation under §108(r) must establish that his disease is a type of cancer caused by exposure to a carcinogen recognized as a Group 1 carcinogen by the IARC.)

This workers' compensation appeal involved a Philadelphia firefighter who contracted prostate cancer which he argued was caused by exposure to carcinogens during his occupation. Earl Hutz, claimant, petitioned for review of an order of the Workers' Compensation Appeal Board affirming a decision of the Workers' Compensation Judge. The WCJ denied claimant's petition seeking total disability benefits under §108(r) of the Workers' Compensation Act.

Claimant began working for the City of Philadelphia as a firefighter in 1974. In 2006, he was diagnosed with prostate cancer and underwent a radical prostatectomy. In October of 2012, claimant filed a Claim Petition alleging that his prostate cancer resulted from direct exposure to IARC (International Agency for Research on Cancer) Group I carcinogens while working as a firefighter for employer. Employer filed a timely answer denying such claims.

In reviewing the evidence presented, the WCJ found claimant's testimony credible as to his work history. The WCJ further found that the testimony of claimant's experts and the reports submitted were credible to the extent they established claimant was exposed to IARC Group I carcinogens during his career. However, the WCJ found that claimant's expert's testimony failed to credibly or persuasively establish that exposure to Group I carcinogens was a significant contributing factor to the cause of claimant's prostate cancer.

The WCJ noted that claimant filed his occupational disease claim pursuant to §108(r), which provides for a rebuttable presumption of compensability specifically for firefighters who have been exposed to IARC Group I carcinogens. Ultimately, the WCJ determined that the credible evidence did not

establish that claimant's employment caused his prostate cancer and accordingly that claimant did not prove disability for the dates alleged. Therefore, in the WCJ's opinion, even assuming the presumption of compensability applied, employer rebutted it with substantial evidence. The WCJ, as such, denied claimant's claim petition.

The WCAB affirmed the WCJ's decision on different grounds. It found that under §301(f) of the Act, claims may be filed under §108(r) within 600 weeks after the last date of employment with exposure to the hazard. It further found that the presumption of compensability afforded firefighters with work-related cancers applies only to claims made within 300 weeks of the last date of employment with exposure to the hazard. Claimant filed his petition 318 weeks after his last date of exposure, so the WCAB determined that the presumption did not apply.

On appeal, the Commonwealth Court noted that the pivotal issue was one of causation. A claimant seeking compensation for cancer under §108(r) must establish that his disease is a type of cancer caused by exposure to a carcinogen recognized as a Group 1 carcinogen by the IARC. The Court found that in light of the WCJ's adverse credibility determinations, claimant failed to establish a causal relationship between his cancer and his occupational exposure. Therefore, regardless of when claimant filed, he was not entitled to the presumption of compensability in §301(f). Moreover, the Court found that any discussion of whether the discovery rule applies to the 300-week filing limitation period is unnecessary in this case, as claimant failed to establish the causal relationship between his cancer and his occupational exposure. Further, although claimant argued that employer's expert's opinion did not rebut the presumption of compensability, the Court found that such a claim lacked merit. The Court, therefore, affirmed the decision below.

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case of Habit v. WCAB (John Roth Paving Pave masters), 29 A.3d 409 (Pa.Cmwlth. 2011). Mr. Habit was a member of a work crew waiting for a delivery of asphalt when a bowling ball was discovered. A challenge arose between the men to see if anyone could break the bowling ball with a hammer. Mr. Habit managed to crack the ball and then struck it a second time, causing a piece of the bowling ball to break off and strike him in the eye He ultimately lost the eye and filed a Claim Petition. The foreman testified before the WCJ that, between Mr. Habib's striking of the ball, he told him to "knock it off or stop." He also told Mr. Habit that he would not take him to the hospital if he sustained an injury.

The WCJ granted the Claim Petition, concluding that, although his foreman issued a direct warning to Mr. Habit, the warning was not made sufficiently in advance to render it a "positive work order." Moreover, the WCJ concluded that Mr. Habit did not deliberately put himself at risk of injury, but was merely careless. The WCAB reversed, noting that (1) Mr. Habib's conduct was not without consequence; (2) He was given a supervisory directive to "knock it off;" and (3) the conduct giving rise to the injury was clearly not connected to Mr. Habib's work duties. As such, the WCAB found that the employer had established all of the elements necessary to defeat the claim on the basis that Mr. Habit had violated a positive work order. The Commonwealth Court agreed. The denial of the claim was upheld.

Again, like Mr. Dickey in 1929 and like Mr. Miller as set forth above, Mr. Habit violated a directive designed for his safety and the safety of his co-workers, rendering him a trespasser or stranger to the employment relationship.

Cases involving this defense, however, are extremely fact specific. The positive work order or rule must relate to an activity not connected with the claimant's work duties. For example, in Asplundh Tree Expert Company v. WCAB (Humphrey), 852 A.2d 459 (Pa.Cmwlth. 2004), Mr. Humphrey, a tree trimmer, went through safety training with his employer and was aware of the employer's "ground to sky" policy which provided that an employee is not to climb off a ladder before first putting his safety line into the tree. The employee was to find a crotch in the tree, put the line in and then tie himself in. Mr. Humphrey proceeded halfway up a ladder when his supervisor told him that he was going back to the truck to get a pole to crotch Mr. Humphrey's safety line. Mr. Humphrey, however, did not wait in violation of his training and his supervisor's directive. Instead, he proceeded to climb the tree, his lanyard snapped and he fell

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on his back, breaking his arm. The Court noted that Mr. Humphrey's job duties required him to climb trees and found Mr. Humphrey's violation of the employer's policy that he be tied into a tree at all times to be mere negligence. His violation was not so disconnected from his duties so as to render him a stranger or a trespasser at the workplace.

As noted above, 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. The activity in which the claimant has engaged must be so foreign to his or her job duties so as to render the claimant a trespasser or stranger at the work place. If this element is not present, the defense is not available to the employer.

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[1]A detailed history of how the defense developed and how it has been applied by the Courts may be found in the Spring 2003 Edition of the TR&C Pennsylvania Workers' Compensation Bulletin.

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ATTENTION READERS: The editors of the 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.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

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