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Pennsylvania Workers' Compensation Bulletin

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Be aware of potential problems when your expert does not agree that a claimant sustained the accepted work-related injury

In a termination of benefits proceeding, the burden is on the employer to prove that the claimant has fully recovered from his work-related injury. The employer meets this burden when it presents a medical expert that unequivocally testifies that the claimant has fully recovered from the accepted work injury. A potential problem occurs when the expert does not agree that the claimant ever suffered from the accepted injury.

For example, in Wagman,[1] the claimant suffered a work-related back injury and the Notice of Compensation Payable (NCP) described the claimant's injury as an exacerbation of pseudoarthrosis L4-L5. The employer filed a termination petition alleging that the claimant fully recovered from his work-related injury. At the termination hearing, the employer's medical expert testified that the only work-related injury that the claimant suffered was a sprained muscle ligament in his back and that the claimant recovered from this injury. The employer's expert did not agree that the claimant ever suffered from the exacerbation of pseudoarthrosis.

The Commonwealth Court held that in order to terminate the claimant's benefits, the employer must submit medical evidence that the claimant recovered from the accepted injury described in the NCP (i.e., exacerbation of pseudoarthrosis L4-L5). The court concluded that because the expert never acknowledged that the claimant suffered from the injury set forth in the NCP, it was impossible for the expert to give an opinion that claimant had fully recovered from the injury. Thus, the medical expert's testimony was not competent to support the termination petition.

Recently, in Witherspoon,[2] the claimant suffered a work related back injury and underwent spinal surgery the following year. In the NCP, the employer acknowledged that the claimant suffered a cervical, trapezius, thoracic and lumbar strain. The employer also agreed in a stipulation of facts that the spinal surgery was causally related to the work injury. To support its termination petition, the employer offered testimony from a medical expert who opined that the claimant had fully recovered from her cervical, trapezius, thoracic and lumbar strain. The expert also tes-

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Commonwealth Court Case Reviews

Susan (Nawn) Green v. Workers' Compensation Appeal Board (U.S. Airways), No. 2539 C.D. 2010, Filed August 22, 2011.

(Sufficiency of Medical Evidence - The mere reference to the "degenerative nature" of a claimant's injury is insufficient to rule out work-relatedness; a degenerative condition may be activated or accelerated by work-related trauma.)

Claimant suffered a work-related injury on August 11, 1993,which employer acknowledged as a right meniscus tear. On August 28, 2000, claimant's description of injury was amended to include a left knee injury as well. Benefits were suspended as of August 12, 2003; however, on October 26, 2006, the Notice of Compensation Payable was again amended to include left tibial plateau cartilage damage and a lateral femoral condyle defect.

On January 7, 2008, claimant filed a reinstatement petition alleging a worsening of her condition as of December 1, 2007, as well as the non-payment of her medical bills. In support of her petition, claimant presented testimony from Dr. Carson, who stated:

> "[H]er original injury was a medial meniscus tear. Now she has further tearing of the medial meniscus. So [her extensive degenerative tear of the posterior horn of the medial meniscus] logically would progress from the original injury, work injury.
>
> …
>
> [S]he's got, you know, at this point, a degenerative knee that seems to be getting worse."

Employer presented no contrary medical testimony. The WCJ found Dr. Carson to be credible, but unpersuasive. As such, the WCJ concluded, "Claimant failed to prove that her condition had worsened as of December 1, 2007, leading to a recurrence of her work injury and related disability." The WCJ stated no reason for the rejection of Dr. Carson's testimony, other than noting that "Dr. Carson characterized claimant's injuries as degenerative in nature." Accordingly, claimant's petition was denied. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

Claimant then sought review by the Commonwealth Court arguing that the WCJ's decision was not "well-reasoned" due to the WCJ's erroneous interpretation of the medical evidence. The Court agreed, stating:

> "...a diagnosis that a condition is "degenerative" merely describes the condition, and does not, in itself, address the issue of causation. Somehow the Board and WCJ have missed that point in this case and have failed to distinguish between degenerative disability produced by work-related trauma, and degenerative disability which is not related to claimant's work. Clearly, Dr. Carson testified that claimant's degenerative disability is the natural progression of her original work injury. In failing to recognize the distinction between degenerative disability produced by work-related trauma and non-work-related degenerative disability, the WCJ erred by misreading Dr. Carson's testimony and misapplication of the law as a result."

The matter was remanded to the WCJ for a decision consistent with the Court's opinion.

Donald Werner, Deceased v. Workers' Compensation Appeal Board (Greenleaf Service Corporation), No. 25 C.D. 2011, Filed September 1, 2011.

(Course and Scope of Employment - Where decedent worked from his home but the evidence fails to demonstrate what the decedent was doing when he was injured, the injury cannot be found to have occurred in the course and scope of decedent's employment.)

Decedent was employed as an international sales manager. When he was not traveling, he worked either in employer's Saegertown office or from his home office. On March 8, 2007, decedent had taken sick leave to attend medical appointments for a cut on his hand, but he was able to perform some work from his home office, including phone calls and emails. Sometime between 11:30AM and 2:30PM, decedent took a break. He went outside the front door of his home and apparently fell, injuring his head. He left his eyeglasses on the ground and went inside to the bathroom to wash

away the blood. He then returned to his home office, where he was discovered by his wife, unresponsive in his desk chair.

His wife filed a fatal claim petition which was denied. The Workers' Compensation Judge determined that claimant filed to produce sufficient evidence to establish that decedent was acting in the course and scope of his employment at the time of his injury. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that the WCJ and WCAB capriciously disregarded the evidence which established that: 1) employer provided decedent with a computer, fax machine, printer, telephone and filing cabinets and reimbursed decedent for his home office expenses; 2) decedent had a long standing history of working from his home office, which employer permitted; and 3) decedent had a work-related telephone conversation and sent and received work-related emails on the date of his injury. While claimant acknowledged that decedent may not have actually been engaged in work-related activities at the precise time of his injury, claimant argued that the injury was nonetheless compensable under the "personal comfort" doctrine.

Under the "personal comfort" doctrine, an employee who sustains an injury during an inconsequential or innocent departure from work during regular working hours, such as going to the bathroom, is nonetheless considered to have sustained an injury in furtherance of the employer's business. The Court recognized that the doctrine applies to those employees who work at an "at-home office" outside of the employer's primary work office in the case of Verizon Pennsylvania, Inc. v. WCAB (Alston), 900 A.2d 440 (Pa.Cmwlth. 2006).

Here, however, the doctrine was not found to be applicable by the Court. The Court noted that:

> "The record is unclear as to how decedent was injured, where decedent was injured, and at what specific time decedent was injured. Perhaps more importantly, even if the cause, location, and time of decedent's injury were established, there is nothing in the record demonstrating what decedent was doing when he was injured. Claimant's proffered explanation that decedent slipped and hit his head while outside smoking a cigarette or retrieving business mail is speculative at best."

Thus, the WCJ and the WCAB did not err in determining that claimant failed to establish that decedent was injured in the course and scope of his employment.

The denial of the petition was affirmed.

James McClure, Sr., v. Workers' Compensation Appeal Board (Cerro Fabricated Products and PMA Group), No. 388 C.D. 2011, Filed September 15, 2011.

(Hearing Loss - When there is more than one employer responsible for a claimant's hearing loss, each employer shall be liable only for its proportionate share of the claimant's medical expenses.)

Claimant began working for Accurate Forging Corporation (Accurate) as a press operator in 1972. He continued working for the company when Accurate's assets were acquired by Cerro Fabricated Products (Cerro) on July 28, 2000. Claimant continued to perform the same job in the same plant for the same wages under the same collective bargaining agreement. Audiometric testing performed in 1997 indicated claimant had a binaural hearing loss of 18.1%. Subsequent testing in July 2004 indicated a binaural hearing loss of 24.60%.

In November of 2004, claimant filed a claim petition alleging that he sustained a hearing loss during the course and scope of his employment with Accurate and/or Cerro. The Workers' Compensation Judge granted the petition, holding Cerro liable and dismissing Accurate as a party because Cerro was the successor-in-interest of Accurate and bore all responsibility for payment of benefits.

Cerro appealed. The Workers' Compensation Appeal Board vacated and remanded the matter to the WCJ to include Accurate as a party. On remand, the WCJ found that claimant's petition against Accurate was time barred because it was filed more than three years after claimant could have had occupational noise exposure during the course of his employment with Accurate. The WCJ further found that Cerro was liable for 6.57% of

claimant's binaural hearing loss, but ordered Cerro to pay all reasonable and necessary medical expenses related to claimant's hearing loss.

Cerro appealed, arguing that that WCJ erred by holding it 100% liable for claimant's medical expenses based upon a 6.57% hearing loss, which was only a percentage of claimant's overall hearing loss. The WCAB agreed, concluding that Cerro was liable for 6.57% of the loss and 26.61% of all medical costs awarded under the Act.

Claimant then sought review by the Commonwealth Court. Claimant maintained that the WCAB erred in vacating the original decision of the WCJ which held Cerro 100% liable as the successor-in-interest to Accurate. The Court noted that whether an employer is a successor-in-interest to a prior employer is determined by the following:

With respect to successor liability in this Commonwealth, it is well-established that 'when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the seller's property.'...This general rule of non-liability can be overcome, however if it is established that (1) the purchaser expressly or implicitly agreed to assume liability, (2) the transaction amounted to a consolidation or merger, (3) the purchasing corporation was merely a continuation of the selling corporation, (4) the transaction was fraudulently entered into to escape liability, or (5) the transaction was without adequate consideration and no provisions were made for creditors of the selling corporation…

Because none of these factors were met, the Court concluded that Cerro was not a successor-in-interest to Accurate.

As to his medical expenses, claimant argued that even if Cerro is not a successor-in-interest of Accurate, Cerro should be responsible for all of his medical expenses because Cerro was found to be partially responsible for his hearing loss and it should not be left to him to bear any of those costs. The Court was not persuaded. Section 306(c)(8)(iv) of the Act specifies that an employer is only responsible for its portion of a claimant's hearing loss, and there is no reason that section should not apply as well when it comes to paying claimant's medical bills. If a claim petition had been timely filed against Accurate, Accurate would have been responsible for its pro rata share of the medical expenses. Because Cerro is only responsible for the hearing loss incurred while claimant was in its employ, the WCAB did not err in modifying the WCJ's decision so as to limit Cerro's liability for medical expense to its proportionate share.

The order of the WCAB was affirmed.

PA Liquor Control Board v. Workers' Compensation Appeal Board (Kochanowicz), No. 760 C.D. 2010, Filed September 20, 2011.

(Psychic Injury - Abnormal Working Conditions - An armed robbery may be a "normal" working condition depending upon the specific industry.)

Claimant worked for employer for over 30 years and was last employed as the general manager of the retail liquor store located in Morrisville, Pennsylvania. He was working the evening shift on April 28, 2008, when the store was robbed by a masked man brandishing two guns. During the robbery, the perpetrator pointed both guns at claimant and prodded the back of claimant's head with a gun. The perpetrator stole money from the office and a cash register, tied claimant and his co-worker to chairs with duct tape and then fled the store. Neither claimant nor his co-worker was physically injured during the robbery. After the incident, however, claimant suffered anxiety, depression and flashbacks and could not return to work.

Claimant filed a claim petition seeking total disability benefits and alleging that he sustained PTSD as a result of being robbed at gunpoint while in the course and scope of his employment.

While testifying before the Workers' Compensation Judge, claimant admitted that the store was not in a "low risk" area, had a high volume of shoplifting and had customers on a daily basis who he considered to be safety risks. Claimant stated that he knew of the procedures employer had in place for dealing with emergencies such as robberies, that he had been trained on these procedures, and that he adhered to them during this incident. He

also acknowledged receipt of a management directive stating that violence in the workplace might take many forms, including robbery. Claimant admitted that during monthly meetings with the district manager, they reviewed procedures to be followed in the event of a robbery.

Nevertheless, the WCJ granted claimant's petition finding that claimant met his burden of proof that he was subjected to abnormal working conditions and that the workplace violence he experienced caused his psychic injury. The WCJ found that armed robbery was an abnormal working condition, despite the incidents of robberies at employer's other retail stores and despite the evidence that claimant attended training on workplace violence, including how to handle a robbery.

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

On appeal before the Commonwealth Court, employer argued that the WCJ erred in granting the petition because it presented uncontroverted evidence in the form of statistics as well as training provided to its employees that the armed robbery claimant experienced was "normal" for his specific industry.

The Court noted that, while there is no bright-line or generalized standard test to determine if a working condition is "normal" or "abnormal," the Court will consider whether the working condition was foreseeable or could have been anticipated. If the employer provided training to its employees on how to handle a specific working condition, that working condition could have been anticipated.

Here, the evidence established that employer provided claimant with training on workplace violence - some of which was specifically geared toward robberies and thefts. Claimant admitted that he attended these training sessions and received educational booklets. Given these findings, claimant could have anticipated being robbed at gunpoint.

Moreover, when determining if a working condition is abnormal, the Court will consider the frequency of its occurrence in the specific industry. Here, employer presented statistical evidence of robberies in its southeastern Pennsylvania retail stores of 15 robberies per year, or more than one per month. Therefore, unfortunately, the Court concluded that robberies of liquor stores are a normal condition of retail liquor store employment in today's society and the WCAB erred in holding otherwise.

The order of the WCAB was reversed.

Ronald K. Lewis v. Workers' Compensation Appeal Board (Andy Frain Services, Inc.), No. 1501 C.D. 2010, Filed September 22, 2011.

(Course and Scope of Employment—Determining whether an employee is acting in the course of employment at the time of injury is a question of law, which must be based on the findings of fact made by the WCJ.)

Andy Frain Services, which provided services at the U.S. Open in Oakmont, hired claimant to watch an open tent with a Lexus vehicle on display from 7 PM to 7 AM. At 6 AM, claimant left the tent to investigate the surrounding area because he had heard sounds and saw lights. While away from the tent, but still on Oakmont grounds and before his shift ended, claimant was injured. Employer denied claimant's claim, arguing that claimant's injuries were not compensable because claimant was outside the course of his employment when injured.

Following extensive hearings, the Workers' Compensation Judge rejected claimant's testimony and concluded that claimant failed to meet his burden to prove that he was in the scope of his employment when he fell. The WCJ also concluded that claimant violated a positive work order and abandoned his position.

The Workers' Compensation Appeal Board affirmed the WCJ's decision, reasoning that with the WCJ's rejection of claimant's testimony as incredible, claimant failed to carry his burden of proof as a matter of law.

On appeal to the Commonwealth Court, claimant argued that the WCJ and WCAB erred when they dismissed his petition by concluding that a per se violation of a work rule mandates forfeiture of benefits under §301(c)(1) of the Act. The Court chose not to consider that argument.

Instead, the Court recognized that the WCJ provided two bases for denying claimant's petition. First, the WCJ concluded that claimant did not meet his burden to prove that

he was within the scope of his employment at the time of injury. Second, the WCJ concluded that claimant violated a positive work order, thereby justifying the forfeiture of benefits under Dickey v. Pittsburgh and Lake Erie R.R. Co., 297 Pa. 172, 146 A. 543 (1929). The Court noted that the WCJ's first conclusion of law is sufficient in and of itself to deny benefits without consideration of Dickey and its progeny. The Court explained:

"In a claim petition, the claimant bears the burden of proving all elements necessary to support an award. Innovative Spaces v. WCAB (DeAngelis), 646 A.2d 51, 54 (Pa.Cmwlth. 1994), *appeal denied*, 541 Pa. 645, 663 A.2d 696 (1995). An injury is compensable under §301 (c)(1) of the Act only if the injury arises in the course of employment and is causally related thereto. Dep't of Labor & Industry v. WCAB (Savani), 977 A.2d 585, 588 (Pa.Cmwlth. 2009). An injury may be sustained "in the course of employment" under §301(c)(1) of the Act where the employee is injured on or off the employer's premises while actually engaged in furtherance of the employer's business or affairs. U.S. Airways v. WCAB (Dixon), 764 A.2d 635, 640 (Pa.Cmwlth. 2000), *appeal denied*, 567 Pa. 753, 788 A.2d 382 (2001). The operative phrase "actually engaged in the furtherance of the business or affairs of the employer," which is usually expressed as "in the course of employment," must be given a liberal construction. Southeastern Pa. Transp. Auth. V. WCAB (McDowell), 730 A.2d 562, 564 (Pa.Cmwlth. 1999). An activity that does not further the affairs of the employer will take the employee out of the course and scope of employment and serve as a basis for denial of the claim by the WCJ. Pesta v. WCAB (Wise Foods), 621 A.2d 1221, 1222 (Pa.Cmwlth. 1993). Determining whether an employee is acting in the course of employment at the time of an injury is a question of law, which must be based on the findings of fact made by the WCJ. Id."

Here, the WCJ found as fact that claimant "was hired as an event ambassador and his job was to sit in the Lexus tent and watch the car." Furthermore, the WCJ found that claimant "was directed to use the radio if he needed a break or if there was some type of problem." Instead, the WCJ found that claimant left his work station and wandered around the premises. In fact, the WCJ found that claimant "abandoned his position." Moreover, as employer's witnesses testified that an event ambassador leaving his fixed post would be detrimental to employer, the WCJ found that claimant's "activities were not furthering the interest of the employer." Based on these finding of fact, the WCJ and the WCAB did not err when they concluded that claimant failed to prove he was in the course of his employment at the time of injury.

The order of the WCAB was affirmed.

Westmoreland Regional Hospital v. Workers' Compensation Appeal Board (Pickford), No. 1188 C.D. 2009, Filed September 23, 2011.

(Impairment Rating Evaluation - It is the claimant's physical condition at the time of the IRE that governs the validity of the IRE.)

Employer issued a Notice of Compensation Payable acknowledging claimant's work injury of July 4, 1997 as cervical and lumbar sprains. Thereafter, in response to employer's unsuccessful termination petition, the Workers' Compensation Judge issued a decision expanding the description of claimant's injury to include cervical disc injuries, brachial plexus stretch, a lumbar strain and reflex sympathetic dystrophy (RSD).

An Impairment Rating Evaluation (IRE) was subsequently performed by Dr. Klein, who concluded that claimant had a total body impairment of 22%. As a result, employer filed a modification petition seeking to change the status of claimant's benefits from total to partial.

In support of its petition, employer presented Dr. Klein's testimony. He stated that he performed a complete physical examination of claimant's neck, arms and back, and found her to manifest four conditions capable of being rated under the current edition of the AMA Guides: chronic discongenic cervical pain, chronic discongenic lower back pain, and bilateral shoulder pain with impingement.

Dr. Klein acknowledged claimant's work-related RSD and brachial plexus injury, but found no objective evidence of

either condition in his physical examination. Because the AMA Guides require objective evidence of a condition in order to rate it, Dr. Klein assigned a zero impairment rating to both conditions.

In opposition to employer's petition, claimant presented testimony of Dr. Navarro to establish that, five months after the IRE, claimant exhibited signs of RSD. Dr. Navarro's records confirmed, however, that he did not document any signs or symptoms of RSD one day prior to the IRE.

The WCJ rejected Dr. Klein's impairment rating because he did not include ratings for RSD and brachial plexus stretch. Employer appealed and the Workers' Compensation Appeal Board affirmed. The WCAB concluded that Dr. Klein's assignment of a zero impairment rating for RSD and brachial plexus stretch was the equivalent of rejecting these established injuries.

Employer then sought review by the Commonwealth Court. The Court agreed that the WCAB erred in asserting that Dr. Klein did not accept claimant's work injury. Dr. Klein did not opine that claimant had not sustained these injuries and, in fact, he specifically searched for evidence of both conditions. He found none and, as such, opined that those conditions did not impair claimant.

The WCAB further erred in holding that an IRE physician must assign an impairment rating greater than zero to each work injury in order for the IRE to be valid. This is true because the AMA Guides require objective evidence before a condition may be rated. In the absence of objective evidence, Dr. Klein could not assign more than a zero percent impairment to either condition without violating the AMA Guides.

Finally, the Court found that, because an IRE takes place on one specific day, the only relevant consideration is the claimant's condition on that day. Claimant offered no evidence to contradict Dr. Klein's testimony that he found no objective signs of RSD on the day of the IRE. In fact, claimant's doctor actually confirmed that there was no evidence of RSD the day before the IRE.

Consequently, the order of the WCAB was reversed.

Department of Public Welfare/ Norristown State Hospital v. Workers' Compensation Appeal Board (Roberts), No. 1677 C.D. 2010, Filed June 21, 2011, Reported October 14, 2011.

(Suspension - Voluntary Withdrawal from Workforce - Where claimant received a pension that precluded him from working, received the Notice of Ability which informed him he was capable of sedentary work and does not look for work for 2 years, the totality of the circumstances indicate claimant has voluntarily withdrawn from the workforce.)

Claimant worked at Employer's Youth Development Center for 20 years. Over the course of his employment, he suffered 3 separate work injuries. The last occurred on September 3, 1998, after which claimant did not return to work in any capacity.

On June 24, 2004, employer filed a Suspension Petition seeking to suspend claimant's benefits effective June 15, 1999, on the grounds that claimant voluntarily left the labor market at that time.

At hearings before the Workers' Compensation Judge, claimant testified that he was 51 years old when he stopped working for employer and, because he had more than 20 years of service with employer, he took a retirement pension. He also began taking a Social Security Disability pension shortly after taking his retirement pension.

The WCJ found claimant to be credible. The WCJ concluded that claimant did not voluntarily withdraw from the workforce because his choice to take a retirement pension was an economic decision.

Employer appealed to the Workers' Compensation Appeal Board, which held that claimant's retirement did not mean that he had left the workforce, only that employer.

Before the Commonwealth Court, employer argued that the WCAB erred in denying the Suspension Petition because claimant retired, thereby voluntarily withdrawing from the workforce.

Citing the Supreme Court's decision in Southeastern Pennsylvania Transportation Authority v. WCAB (Henderson), 543 Pa. 74, 669 A.2d 911 (1995), the Court stated that, if an employer can show that the claimant has voluntarily withdrawn from the workforce by retiring, the employer need not show that that the claimant has

been referred to open positions and failed to follow through or that work is generally available within the claimant's restrictions in the claimant's geographic area. Once an employer establishes that a claimant has retired, the burden then shifts to the claimant to show that he is still seeking employment after retirement or that he was forced to withdraw from the workforce due to his work-related injury. However, in determining whether acceptance of a pension should create a presumption that a claimant has terminated his or her career, it is important to look at the facts involved and the type of pension. The employer must show, *by the totality of the circumstances*, that the claimant has chosen not to return to the workforce.

Here, the totality of the circumstance show that claimant voluntarily withdrew from the workforce. He had not worked since his last injury on September 3, 1998. Soon thereafter, he applied for and received a retirement pension from employer and a Social Security Disability petition. Claimant stipulated that he could not work and still receive his Social Security Disability pension. Despite receiving a Notice of Ability to Return to Work in 2003, which informed claimant that he was released to full-time, sedentary duty work, claimant never attempted to secure employment.

Thus, the WCAB erred in denying employer's Suspension Petition. The matter was remanded for a determination from the record as to the date claimant's benefits should be suspended.

Charles Habib v. Workers' Compensation Appeal Board (John Roth Paving Pavemasters), No. 2612 C.D. 2010, Filed August 12, 2011, Reported October 21, 2011.

(Course and Scope of Employment - Violation of Positive Work Order - An injury sustained as a result of a violation of a positive work order is not sustained in the course of employment if 3 criteria are met: 1) the injury was caused by the violation of the order or rule; 2) the employee actually knew of the order or rule; and 3) the order or rule implicated an activity not connected with the employee's work duties.)

Claimant worked as a laborer when he sustained a laceration to his right eye while on a job site on May 23, 2008, resulting in a total loss of that eye. Following the injury, claimant filed a petition alleging that the injury occurred in the course and scope of his employment. Employer denied the allegations.

Before the Workers' Compensation Judge, claimant testified that, while the crew was awaiting a delivery of asphalt, a bowling ball was found next to the parking lot where they were working. After a round of shot-put, a challenge arose to see if anyone could break the ball with a sledge hammer. Claimant then swung the sledge hammer towards the ball, which cracked. He struck the ball a second time, causing a piece of the ball to break off and strike him in the eye.

Employer did not dispute the mechanics of the injury, but presented testimony from the foreman at the job site who denied issuing the challenge to break the bowling ball with the sledge hammer. He testified that, in between striking the ball, he told claimant to "knock it off, or stop."

The WCJ granted claimant's petition. The WCJ found that claimant did not deliberately put himself at risk of injury, but was merely careless. Further, although the foreman had issued a direct warning, the WCJ found the warning was not made sufficiently in advance to be considered a positive work order under the law.

Employer appealed to the Workers' Compensation Appeal Board. After reviewing the record and the WCJ's findings of fact, the WCAB agreed with employer that claimant was not entitled to benefits inasmuch as the facts established that claimant violated a positive work order. As such, the WCJ's order granting the claim was reversed.

Claimant then petitioned the Commonwealth Court for review, arguing that the WCAB's determination was not supported by the law or the WCJ's findings of fact.

The Court stated that, in order to assert the defense that a claimant was in violation of a positive work order when injured, the employer must prove: (1) the injury was, in fact, caused by the violation of the order or rule; (2) the employee actually knew of the order of rule; and (3) the order or rule implicated an activity not connected with the employee's work duties. Under

those circumstances, the injury did not arise in the course of employment and was not compensable.

Here, the WCJ found that the foreman told claimant to "knock it off" before claimant struck the bowling ball for the second time. Claimant was then injured by that activity. As such, the first criteria was met, i.e., the injury was caused by a violation of a work order. The second criteria was also met by the WCJ's finding of fact. Because claimant was told by the foreman to "knock it off," claimant was aware of the work order. Finally, the order must implicate an activity not connected with the employee's work duties. Here, the WCJ found that the activity of hitting the bowling ball was "clearly not connected to claimant's work duties."

Accordingly, all three elements necessary to prove that claimant's injury occurred while he violated a positive work order were established. As such, claimant was not injured in the course and scope of his employment and is precluded from receiving benefits.

The order of the WCAB was affirmed.

SUPREME COURT CASE REVIEWS

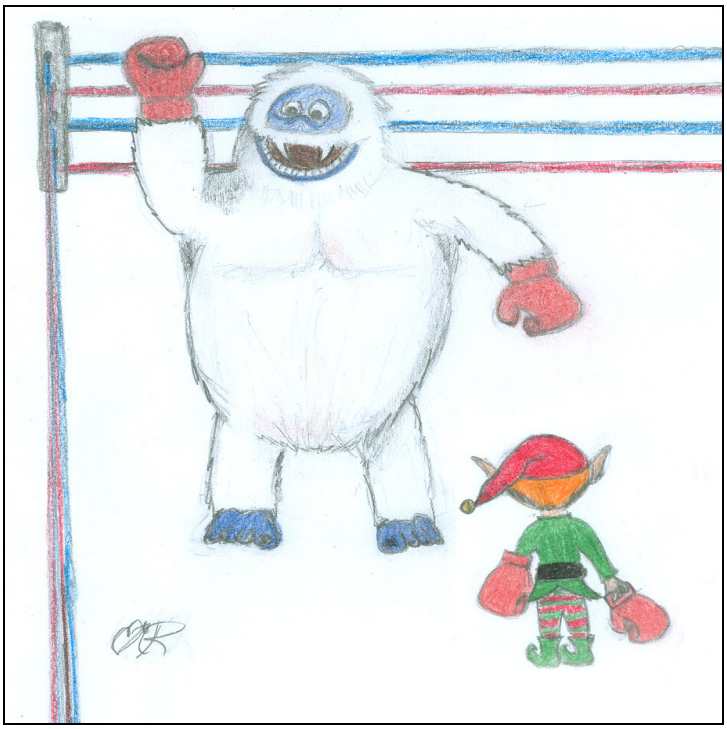
City of Philadelphia v. Workers' Compensation Appeal Board (Kriebel), No. 49 EAP 2010, Decided October 19, 2011.

(Expert Testimony - Where an expert's opinion is based on a series of assumptions that lack the necessary factual predicate, that expert's opinion does not constitute substantial competent evidence.)

Joseph Kriebel (decedent) worked for the City of Philadelphia as a firefighter from 1974 until 2003. He died on October 25, 2004 at the age of 52 from liver disease caused by hepatitis C. His widow filed a claim petition alleging that decedent contracted hepatitis C in the course of employment. Section 108(m.1) of the Act identifies hepatitis C as an "occupational disease among professional and volunteer firefighters." Section 301(e) of the Act creates a rebuttable presumption that an occupational disease is causally related to employment.

At hearings held before the Workers' Compensation Judge, decedent's widow presented testimony from one of decedent's co-workers as well as from decedent's physician. The testimony raised the presumption of occupational exposure inasmuch as it established that decedent was employed as a firefighter for 30 years, was diagnosed with hepatitis C during that time, and died from complications caused by the disease.

Employer sought to rebut the presumption with the testimony of Stephen J. Gluckman, M.D. While Dr. Gluckman agreed with the opinion of decedent's treating physician that decedent's hepatitis C lead to cirrhosis, cancer and untimely death, Dr. Gluckman had a different opinion as to the source of decedent's hepatitis. According to Dr. Gluckman, decedent acquired the disease through drug use, not occupational exposure. As support for



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his conclusion, Dr. Gluckman cited a note in decedent's military records indicating that he contracted "serum hepatitis from drug usage" in 1969. He explained that "serum" hepatitis, now known as hepatitis B, is often contracted through contaminated needles. Hepatitis B and C, although distinct diseases, are transmitted in a similar manner, most commonly through needle-related drug use. Dr. Gluckman observed that decedent had an appropriate social history for the disease. He also explained that the timing of the development of cirrhosis was consistent with acquisition of hepatitis C in 1969 because the medical literature suggests that complications from the disease will not manifest for approximately 30 years. Finally, Dr. Gluckman explained that, while decedent encountered the blood of numerous victims as a first responder, there was no indication that it penetrated his skin.

On cross-examination, Dr. Gluckman admitted that the sole foundation for his causation opinion was the 1971 note in decedent's military records. He conceded that there were no medical records indicating that decedent was treated for drug addiction. He acknowledged that none of decedent's physical examinations revealed indicia of drug use. In fact, he admitted that there was no mention of intravenous drug use in decedent's medical records. Further, Dr. Gluckman recognized that hepatitis B is commonly spread through other means, including sexual contact, and that the word "serum" does not indicate that an injection was involved.

The WCJ credited Dr. Gluckman's opinion that decedent acquired hepatitis C through intravenous drug use as opposed to blood exposure during his career as a firefighter. Hence, the WCJ concluded that employer successfully rebutted the presumption. Consequently, he denied the widow's fatal claim petition.

The Workers' Compensation Appeal Board reversed, concluding that Dr. Gluckman impermissibly assumed, based on the coexisting factors of drug use and hepatitis B, that decedent used needle-based drugs when there was no evidence to substantiate that finding.

A divided panel of the Commonwealth Court concluded that Dr. Gluckman's testimony constituted substantial, competent evidence to rebut the statutory presumption. The Commonwealth Court stated that Dr. Gluckman drew upon numerous factors, including his own expertise, to opine with a reasonable degree of medical certainty that decedent's condition stemmed from intravenous drug use. As such, the Court held that the WCAB erred in reversing the WCJ's decision.

The Supreme Court, however, disagreed, finding that Dr. Gluckman's opinion was incompetent because it was based upon a series of assumptions that lack a factual predicate. The Court explained that, initially, Dr. Gluckman assumed that the drug use referenced in the 1971 medical note was needle-based or intravenous; however, there was absolutely no evidence in the subsequent 30 years of medical records to corroborate the finding that decedent was an intravenous drug user. Despite the lack of independent evidence to corroborate the premise for Dr. Gluckman's opinion, he "extrapolated" from his finding of injectable drug use and concluded that decedent used contaminated needles and concurrently contracted hepatitis B and hepatitis C, a separate disease that was not referenced in the treatment note at issue.

While an expert may base his opinion on facts of which he has no personal knowledge, those facts must be supported by evidence of record. Here, there is no evidence in the over 30 years of subsequent medical records to support a finding of drug use, yet alone intravenous drug use. Thus, there were no competent facts supporting Dr. Gluckman's expert opinion regarding how and when decedent acquired the hepatitis C that ultimately caused his death. Stated simply, Dr. Gluckman based his opinion upon facts which were not warranted by the record. The law prohibits such action.

Dr. Gluckman's opinion was found by the Court to lack an adequate factual foundation and, thus, insufficient to overcome the statutory disease causation presumption. Decedent's widow was entitled to the procedural or evidentiary advantage of the presumption. The order of the Commonwealth Court was reversed and the decision of the WCAB was reinstated.

(Continued from page 1)

tified that the spinal surgery was not related to her work injury, but was due to a preexisting problem. The expert was not aware that the employer had previously stipulated that the spinal surgery was related to the work injury.

The Commonwealth Court held that because the employer stipulated that the spinal surgery was related to the work injury and resulted in disability, the employer was required to prove that the claimant was fully recovered from any disability resulting from the surgery. The court concluded that the employer's medical expert's testimony was insufficient for the employer to meets its burden in the termination proceeding because the expert testified that the surgery was not related to the work injury.

In addition to the accepted injury acknowledged in the NCP or in stipulations of fact, the expert must also be aware of any findings of fact by the workers' compensation judge (WCJ) in prior litigation. In Gillyard,[3] the NCP described the claimant's injury as a lumbar sprain and strain. The employer filed a termination petition alleging that the claimant fully recovered from his work-related injuries. The WCJ denied the petition and found that the claimant's work-injury was chronic sciatica with disc bulging at L4-5 and L5-S1 area, and that the claimant continued to suffer from this injury. The employer did not appeal.

Six years later, the employer filed a second termination petition. In support of this petition, the employer's medical expert testified that the claimant suffered **only** lumbar sprain and strain as a result of the work injury and that the claimant had fully recovered from these injuries. The expert did not agree that the claimant suffered from chronic sciatica and disc bulging due to the work-related injury. The expert also failed to offer any opinion regarding whether the claimant recovered from the chronic sciatica and disc bulging.

The Commonwealth Court held that based on the doctrine of collateral estoppel, the employer is bound by the determination of the WCJ in the first termination petition that the claimant's work-related injury was chronic sciatica with disc bulging at the L4-5 and L5-S1 areas. The court denied the termination petition due to the expert's failure to offer any testimony regarding whether the claimant fully recovered from the established work-related injury. The expert's testimony that the claimant had recovered from the lumbar strain and sprain was not sufficient to meet the employer's burden of proof.

It is important to note that it is not necessary that the medical expert believes that a particular work injury actually occurred. If a medical expert disbelieves that a claimant sustained a particular injury previously found to be work-related, the expert's testimony can be deemed competent if he assumes **hypothetically** that the injury occurred and finds it to be resolved by the time of his examination.[4] Therefore, it is essential that the medical expert be made aware of the accepted injury so that the expert can unequivocally testify that the claimant no longer suffers from either an actual or hypothetical work-related injury. Employers should be certain to stress the exact nature of all accepted or adjudicated injuries in its letter to an independent examiner; and the employer should make certain that the examiner recognizes those injuries in his report.

1-GA & FC Wagman, Inc. v. WCAB (Aucker), 785 A.2d 1087 (Pa. Cmwlth. 2001).
2-Witherspoon v. WCAB (Lower Bucks Hosp.), 2011 Lexis 274 (Pa. Cmwlth. April 4, 2011).
3-Gillyard v. WCAB (Pennsylvania Liquor Control Board), 865 A.2d 991 (Pa. Cmwlth. 2005).
4-O'Neill v. WCAB (News Corp. Ltd.), 29 A.3d 50 (Pa. Cmwlth. 2011).

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