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Pennsylvania Workers' Compensation Bulletin

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"ALIENS AMONG US"

Illegal immigration has been a hot topic of political discussion nationwide. In Pennsylvania, the Commonwealth Court most recently addressed the impact of undocumented workers on the workers' compensation system in the case of Kennett Square Specialties and PMA Management Corp. v. Workers' Compensation Appeal Board (Cruz), 31 A.3d 325 (Pa.Cmwlth. 2011). However, this was not the first time that the Commonwealth's appellate courts have addressed the issue. In 2002, the Supreme Court examined the Immigration Reform and Control Act of 1986 (IRCA) in conjunction with the Workers' Compensation Act in the case of Reinforced Earth Co. v. Workers' Compensation Appeal Board (Astudillo), 810 A.2d 99 (Pa. 2002). In sum, the Court held that illegal alien workers were not precluded from receiving workers' compensation benefits simply because of their illegal status.

IRCA is a federal statute aimed at curbing illegal immigration by penalizing employers who hire undocumented workers. IRCA created an employment verification system under which an employer must attest that he or she has examined certain documents submitted by potential employees for identification purposes prior to hiring.[1] The claimant in Reinforced Earth presented his employer with falsified immigration papers so that he could be hired as a laborer. He then sustained an injury and filed a Claim Petition, which was denied by the employer. After the submission of medical evidence, the Judge ruled in the claimant's favor and awarded both wage loss and medical benefits, concluding that illegal aliens are not statutorily barred from receiving workers' compensation benefits. On appeal by the employer, the Supreme Court declined to make a public policy pronouncement by denying relief under the Workers' Compensation Act simply because of the claimant's naturalization status and violation of IRCA. Nevertheless, the Supreme Court recognized the unique predicament of employers of illegal aliens who wish to seek a modification or suspension of benefits – how is an employer to prove that an illegal alien has sufficiently recovered from an injury to return to work, and that work is available when, by law, that worker is not permitted to work in any capacity in the United States? Therefore, the Court held that the employer need only obtain medical evidence which proves that the illegal alien is recovered to the point that he or she can perform *any type of work at all*. More importantly, the Court held that, under these circumstances, the employer need not prove job availability (as required by Kachinski[2]) because an undocumented alien cannot accept any type of employment simply due to his or her status. Thus, the Supreme Court reasoned that an injured illegal alien's loss of earning power is caused not by the injury, but by his or her immigration status.

As noted above, the Commonwealth Court reexamined the issue of injured undocumented workers in the Kennett Square case. There, the claimant filed a Claim Petition alleging that he sustained a work-related injury to his low back. At a hearing before the Judge, the claimant was asked by the employer's counsel whether he was a naturalized citizen. Claimant refused to answer. Employer's counsel then asked if he was an undocumented worker. Again, claimant refused to answer. The litigation ensued and the claimant presented medical evidence establishing that he suffered a lumbar disc herniation

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COMMONWEALTH COURT CASE REVIEWS

Rhonda Walker v. Workers' Compensation Appeal Board (Health Consultants), No. 492 C.D. 2011, Filed May 3, 2012.

(Disfigurement - A discernable scar, blemish or alteration of the head, neck or face must rise to the level of an unsightly appearance; whether an injury is unsightly is a question of fact to be determined upon a personal view of the claimant.)

Claimant was employed as a meter reader when, on May 8, 2008, she fractured her nose when she fell down a flight of stairs. Claimant received benefits through August 6, 2007, at which time she was released to full duty work. Although she returned to work on August 6, 2007, claimant immediately tendered her resignation effective August 10, 2007, simply stating that she was moving to New York.

Claimant then sought reinstatement of her benefits effective August 10, 2007. During the litigation, claimant amended her petition to request an award of benefits for permanent disfigurement. Claimant also sought to expand the description of her injury to include injuries to her neck, back and shoulder.

Claimant testified that the major injury was to her nose, which caused her to undergo 2 surgeries. Claimant testified that she considers herself to be "deformed" because her nose had scars on it and the tip of her nose was crooked. The Workers' Compensation Judge instructed claimant to submit photographs of herself because a change to claimant's nose was not "obvious." Claimant complied, submitting photos taken both before and after the injury.

Both parties submitted expert medical testimony. The WCJ rejected the opinions of claimant's expert and denied claimant's request to add injuries to the NCP and to reinstate total disability benefits. Based upon her review of the photos, the WCJ also found that claimant's nose injury resulted in a permanent and unsightly disfigurement. Consequently, the WCJ awarded 45 weeks of compensation for the disfigurement.

Both parties appealed. The Workers' Compensation Appeal Board reversed the disfigurement award after viewing claimant in person and finding that her nose has a "slight crookedness" which "is not noticeably disfiguring" and, therefore, not compensable. The WCAB affirmed the WCJ's decision in all other respects.

Claimant then sought review by the Commonwealth Court arguing that the WCAB's acknowledgement that her nose is crooked entitles her to an award. The Court disagreed.

The courts have consistently held that, in order to establish entitlement to a disfigurement award, "there must be affirmative findings that the disfigurement be (1) serious and permanent, (2) *of such character as to produce an unsightly appearance*, and (3) such as is not usually incident to employment...Not every change to a claimant's head, neck or face is compensable." The alteration must rise to the level of creating an unsightly appearance or it will not be considered a disfigurement for purposes of the Act.

Here, the WCJ did not see an unsightly appearance in claimant and requested photographs. Based on those photos, the WCJ saw a change in claimant's nose and found it to be unsightly. The Supreme Court, however, in the case of Hastings Industries v. WCAB (Hyatt), 531 Pa. 186, 611 A.2d 1187 (1992), cautioned against gauging unsightliness on the basis of photos, which can be manipulated by lighting and focus. The WCAB personally viewed claimant and determined that the WCJ's decision was not supported by the record because, although there was a visible alteration to claimant's nose, it amounted to a slight crookedness and was not noticeably disfiguring. As such, the WCAB did not err in concluding that claimant failed to meet her burden of showing all necessary elements for a disfigurement award.

The order of the WCAB was affirmed.

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BJ's Wholesale Club v. Workers' Compensation Appeal Board (Pearson), No. 2010 C.D. 2011, Filed May 10, 2012.

(Discharge from Employment - Where claimant's loss of earnings is caused by termination for misconduct and not by the work injury, benefits may not be awarded.)

Claimant worked on a part-time basis checking receipts of customers as they left employer's store. On June 20, 2008, claimant was injured when a customer ran over her left foot with a shopping cart. Claimant was treated for the injury, but released to return to work with the restriction that she should be sitting 95% of the time. Employer provided claimant with sedentary work within that restriction at the same rate of pay.

Employer's substance abuse policy provided that an employee may be terminated if he or she is under the influence of alcohol while on the job. On June 28, 2008, claimant was requested to submit to an alcohol test, which revealed claimant had a blood alcohol level of .108. As a result, claimant's employment was terminated on July 3, 2008.

Claimant filed a Claim Petition seeking total disability benefits from the date of her termination onward. The Workers' Compensation Judge found that claimant was incapable of performing her time of injury position due to the

work injury. The WCJ also found that claimant was able to perform the modified duty provided to claimant. The WCJ found that, while claimant was under the influence of alcohol at work, employer was nonetheless liable for payment of benefits from the date of claimant's termination onward.

Employer appealed and the Workers' Compensation Appeal Board affirmed the WCJ's order.

Employer then sought review by the Commonwealth Court, arguing that the award of disability benefits was made in error where claimant's loss of earnings was caused by her termination for reporting to work under the influence of alcohol.

The Court agreed noting that where the claimant's loss of earnings is a result of a termination for misconduct unrelated to the work injury, the claimant cannot satisfy his or her burden of showing a causal relationship between the work injury and the loss of earnings and, as such, the claimant is not entitled to disability benefits.

Where, as here, the employer has provided work within the claimant's physical limitations at no loss of pay and has shown that the claimant was terminated for conduct evidencing bad faith or a lack of good faith, disability benefits must be denied, regardless of whether the claimant has a physical disability caused by the work-related injury.

The order of the WCAB was reversed.

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Michael Sladisky v. Workers' Compensation Appeal Board (Allegheny Ludlum Corporation), No. 67 C.D. 2011, Filed May 15, 2012.

(Reinstatement - Funded Employment - Where claimant works a light duty job funded by employer and receives the maximum 500 weeks of partial disability benefits, claimant is not entitled to an automatic reinstatement of total disability when the funded position ends.)

Claimant suffered a disabling work injury in March 1994. After returning to work for employer at various light duty jobs, claimant's total disability benefits were reinstated in May 2001. Thereafter, because employer could not provide light duty, employer referred claimant to Employment Alternatives, Inc. to find a job within his limitations. Employer committed to fund the light-duty job.

On August 8, 2005, claimant was placed in a full-time, light-duty job with the Easter Seals Society. When claimant began his job at Easter Seals, employer modified his total disability to partial based upon his earnings. Claimant did not challenge the modification.

On November 26, 2008, claimant was laid off from the Easter Seals job because employer would no longer fund the position. By that point, he had received 500 weeks of partial disability benefits, which is the maximum allowable under §306 (b)(1) of the Workers' Compensation Act. Claimant then filed a petition seeking reinstatement of total disability benefits effective November 29, 2008.

The Workers' Compensation Judge noted that, after exhausting 500 weeks of partial disability benefits, a claimant must prove that he or she can no longer physically perform the job he or she had when the 500 weeks expired. Claimant could not meet that burden. Nevertheless, the WCJ found that there should be an exception for claimant because he worked in a funded employment position tailored to meet claimant's restrictions, which did not mean claimant had an earning capacity on the open labor market.

Employer appealed and the Workers' Compensation Appeal Board reversed. The WCAB held that the WCJ erred in creating an exception for a claimant working at a funded light-duty job when he or she reaches the 500-week maximum for partial disability. Instead, claimant was required to satisfy the burden applicable to all claimants seeking reinstatement after exhausting their partial disability: he had to prove that his physical condition worsened such that he could no longer do the Easter Seals job.

Claimant then sought review by the Commonwealth Court, arguing that, where a claimant has exhausted 500 weeks of partial disability while working at a funded employment position, the claimant should be automatically returned to total disability when the employer stops funding the position.

The Court was not persuaded. The Court stated there is nothing untoward about funded employment. It is a legitimate way to bring an injured claimant back to work and reduce his disability from total to partial. After he collected 500 weeks of partial disability, claimant had to prove under the Supreme Court's decision in Stanek v. WCAB (Greenwich Collieries), 562 Pa. 411, 756 A.2d 661 (2000) that his physical condition worsened so that he could no longer perform the Easter Seals job. The record showed the opposite. In fact, claimant testified that he could have continued to do the job.

The order of the WCAB denying claimant's reinstatement petition was affirmed.

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Susan Miller v. Workers' Compensation Appeal Board (Wal-Mart), No. 1741 C.D. 2011, Filed May 25, 2012.

(Specific Loss Benefits—It is not necessary that the injured body part be 100% useless in order for the loss of use to qualify as being "for all practical intents and purposes.")

Claimant sustained a work-related injury which was acknowledged as a "left spiral humeral fracture post-operative, left shoul-

der adhesive capsulitis and weakness, and radial nerve palsy." Her injury required 2 surgeries, one to insert a rod and 15 bolts into her left arm from the shoulder down to the elbow and a second to remove the bolts. At the time of injury, claimant worked as a claims manager and was responsible for handling merchandise returns, which included lifting the merchandise. Following her injury, claimant worked as a door greeter. She was then moved to the dressing room area where she operates a telephone switchboard.

Claimant filed a petition on August 12, 2008, alleging a specific loss of her left arm. In addition to her own testimony, claimant presented testimony from Dr. Baddick and Dr. Mauthe. In response, employer presented testimony from 3 of claimant's coworkers and Dr. Prebola, as well as a short surveillance video of claimant filmed on June 16, 2009 and June 19, 2009.

The Workers' Compensation Judge ruled in favor of employer on the grounds that claimant failed to meet her burden of establishing a specific loss and that the loss was permanent. The Workers' Compensation Appeal Board affirmed the WCJ's decision and claimant appealed to the Commonwealth Court.

The Court noted that it is not clear from the statute or the case law what specific type or quantum of evidence will be sufficient to meet the claimant's burden of establishing that a specific loss is permanent for all intents and purposes. The issue of the extent of the loss is a question of fact for the WCJ. The claimant must, however, present competent medical evidence to support a specific loss claim.

Here, the WCJ credited the testimony of employer's medical witness, Dr. Prebola, who opined that, although claimant suffers from a partial disability, she did not suffer a specific loss of her left arm for all intents and purposes. Regarding claimant's left shoulder, Dr. Prebola concluded that she had 90 degrees of abduction (moving the arm up to the side away from the body) and 80 degrees of flexion (moving the arm upward to the front of the body), whereas 170 degrees is normal. He found that she retained 50% range of motion of the shoulder, but found that her left elbow, hand, and digits, and range of motion of her wrist, were normal. Further, the WCJ noted that claimant's own medical witness, Dr. Baddick, testified that she could use her left hand and use her arm at the elbow, enabling her to raise her hand to shoulder level, which is a normal function. The WCJ found the claimant's testimony and her demonstration of mobility during the hearing to be inconsistent with her actions as depicted on the surveillance video.

The WCJ stated that, in order to prove a specific loss of an arm, a claimant must also suffer the loss of the hand and the forearm. The Commonwealth Court stated that the WCJ erred. It is not necessary that an injured body part be 100% useless in order for the loss of use to qualify as being "for all practical intents and purposes."

The Court reviewed the case law to date and determined that there is no bright-line test that may be applied to determine when a loss of use is "for all practical intents and purposes" unless the claimant fails to present medical evidence (in which case, the claim will fail). The legal determination will hinge on the specific fact findings in each case. The degrees to which a claimant may continue to use the hand, wrist, and forearm are relevant to a determination of whether there is a specific loss of use of the arm, but these factors are not dispositive.

Here, the WCJ found, based on Dr. Prebola's testimony, that claimant had normal movements of her elbow, wrist and hand. He also found that, though limited, claimant was able to conduct many normal daily activities of life. Based on those facts, claimant failed to establish the specific loss of her left arm. Thus, although the WCJ applied the wrong legal standard, his decision was correct. Claimant's is not a specific loss of use for all intents and purposes.

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Harry Marnie v. Workers' Compensation Appeal Board (Commonwealth of PA/Dept. of Attorney General), No. 1583 C.D. 2011, Filed June 7, 2012.

(Pension Offset - In a defined benefit plan, "retained investment returns" reflect an actuarial assumption; if claimant wishes to challenge employer's calculation of the offset, claimant must offer credible evidence demonstrating that retention in the fund of investment returns of non-vesting employees impacted the extent to which employer contributed to his pension.)

Claimant suffered a work-related injury in February of 1998. On January 14, 2005, he began receiving a disability pension from the State Employees' Retirement System (SERS). Employer issued a Notice of Offset stating that it would offset or reduce claimant's workers' compensation benefits by the amount of SERS benefits attributable to employer. Claimant then filed a Review Petition challenging employer's entitlement to the amount of the offset.

At hearings before the Workers' Compensation Judge, claimant presented testimony from his own actuary, Frank Iannucci. Mr. Iannucci testified that he would limit offset calculations to the employer's *actual* contributions and *actual* investment returns. Mr. Iannucci admitted, however, that the actual rate of return was at times in the negative (for example, it was minus 30% in 2008) and he agreed that employer would have to "kick in substantial additional funds at some point to cover that

shortfall."

In opposition, employer presented testimony from SERS Director of Benefits Determination, Linda Miller, and SERS actuary, Brent Mowery. Both explained the SERS formula as it applied to claimant's benefits and offset amount, stating that the actuarial formula subtracts the specific amount claimant contributed, plus an actuarially determined investment rate of return from the total value of the employee's actuarially determined lifetime benefit, in order to determine the employer's share of the pension. Mowery further opined that the use of *actual* returns is invalid as it would result in a non-neutral calculation methodology that is contrary to the basic tenets of defined-benefit plans.

The WCJ credited the testimony of Miller and Mowery and held employer sustained its burden of proof. The opinions of Iannucci were rejected by the WCJ.

Claimant appealed to the Workers' Compensation Appeal Board, which concluded that the WCJ erred in fully accepting employer's actuarial evidence as presented. The WCAB then remanded the case to the WCJ for further testimony.

On remand, additional testimony was presented by Mowery and Iannucci. The WCJ again credited employer's evidence and denied claimant's Review Petition. Claimant again appealed to the WCAB, which affirmed the WCJ's decision given the Supreme Court decision in Department of Public Welfare v. WCAB (Harvey), 605 Pa. 636, 993 A.2d 270 (2010).

Claimant then sought review by the Commonwealth Court, arguing that the formula used by employer inaccurately attributes funds to employer that should have been attributed to claimant. Claimant argued that the SERS formula improperly credited employer for the investment returns in excess of 4% on projected refunds to employees who will separate from state service before their retirement benefits have vested - i.e., the non-vesting employees. Claimant argued that the retained investment returns must be isolated out of the employer's portion of the offset calculation.

The Court was not persuaded noting that the Supreme Court considered a similar, if not identical, issue in Harvey. In that case, the Court found nothing that precludes the sound use of actuarial principles in evaluating employer funding in defined-benefit pension plans. If the actuarial testimony is, as here, accepted as credible, it is legally sufficient to establish the extent of an employer's funding for offset purposes.

Once the employer establishes a prima facie case, and if claimant desires to maintain a challenge to the offset, claimant is required to offer his own evidence demonstrating the materiality and relevance of his assertion that retention in the Fund of investment returns of non-vesting employees impacted the extent to which employer contributed to claimant's pension.

Here, although claimant presented testimony from Iannucci, that testimony was not deemed credible. Further, claimant's argument, premised upon attributing retained investment returns to employer as if there were an actual, existing fund, fails to appreciate the essence of a defined-benefit pension plan that "impedes direct tracing and quantification of employer funding for which actuarial science offers a rational alternative."

The decision of the WCAB was affirmed.

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Ryan Miller v. Workers' Compensation Appeal Board (Millard Refrigerated Services and Sentry Claims Service), No. 2306 C.D. 2011, Filed June 22, 2012.

(Violation of Positive Work Order - When employer raises the affirmative defense of a violation by claimant of a positive order or rule, employer must prove that (1) the injury was, in fact, 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 was employed as a pallet jack driver. On August 12, 2009, claimant was scheduled to work the second shift, 4 PM to 12:30 AM. During his shift, he was told by a supervisor that he needed to stay until 1:30 AM to complete his work. He finished his work at 12:58 AM. Instead of leaving, he jumped on a forklift and drove it around for a while before driving it to the punch-out area. While doing so, he crashed into a pole, crushing his foot.

At hearings before the Workers' Compensation Judge, claimant testified that Butz, a lead man for the second shift, saw him drive the forklift but never told him not to operate it. Claimant also testified that it was common practice for employees to drive the forklifts to the punch-out area and that supervisors said nothing about it. Claimant acknowledged that he knew he was not to extend any part of his foot beyond the platform of the forklift.

In response, Butz testified that he hired claimant to run the pallet jack, but that claimant was not permitted to use the forklift. Butz stated that claimant was told not to be on other equipment unless he was certified. Butz testified that he did not see claimant on the forklift.

The WCJ found Butz entirely credible and rejected claimant's testimony. The WCJ determined that claimant was not in the course and scope of employment at the time of injury. The WCJ stated:

> Claimant was not acting in furtherance of the employer's interests at the time

of the injury. The following prohibited activities were entirely outside the scope of his job duties: a) riding around on equipment after his work duties and personal cleanup were complete; b) riding a piece of equipment that he was prohibited from driving; and c) sticking his foot out as he was driving the forklift. Claimant was clearly aware that he was engaging in activities not permitted by his employer. Moreover, operating the forklift had no connection whatsoever to claimant's job of operating a pallet jack. Claimant's activities went beyond mere negligence, and are analogous to the example of a brakeman who operates an engine when he has no duty to do so, runs a red signal and is injured. Dickey v. Pittsburgh and Lake Erie R.R. Co., 146 a.543, 544-545 (Pa. 1929). Therefore, I find claimant was not in the course and scope of his employment at the time of the injury.

The Claim Petition was denied and dismissed. Claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

Claimant then sought review by the Commonwealth Court. The Court noted that, in a Claim Petition, the claimant bears the burden of proving all elements necessary for an award. Specifically, a claimant must establish that he sustained an injury during the course and scope of his employment and that the injury was causally related to his employment. Here, employer raised the affirmative defense that claimant's actions removed him from the course and scope of employment because he violated a positive work rule or order. When such a defense is raised, the employer must prove that (1) the injury was, in fact, 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. Here, employer met that burden through the credited testimony of Butz.

The decision of the WCAB was affirmed.

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The Pennsylvania State University and PMA Insurance Group v. Worker's Compensation Appeal Board (Rabin, Deceased), No. 2224 C.D. 2011, Filed August 15, 2012.

(Course of Employment - Where the injured worker is a stationary employee who sometimes works off-site, the injury may be considered in the course of employment under §301(c)(1) of the Act where the injury occurs off the employer's premises but while the employee is actually engaged in furtherance of the employer's business or affairs.)

Decedent worked for Penn State as a professor of public administration. As such, he was the chairperson of a dissertation committee, before which doctoral students presented and defended their theses. One such student, Wachhaus, worked closely with decedent in crafting his dissertation. Wachhaus began meeting decedent off campus in order to discuss his doctoral material. According to Wachhaus, he and other students met with decedent in an off-campus restaurant setting 6-8 times during 2006.

On October 20, 2006, decedent and Wachhaus met at a Harrisburg restaurant to finalize the outline for Wachhaus' dissertation. They requested that their lunches be held and, for approximately 1 to 1 and 1/4 hours, Wachhaus and decedent discussed the outline in line by line, word by word detail. Wachhaus then suggested that they begin eating and both he and decedent rose to visit the salad bar. While standing on one side of the salad bar, Wachhaus heard a loud crash. Upon walking to the other side, Wachhaus discovered decedent lying on the floor and groaning. Decedent stated that he had caught his foot on something.

An ambulance took decedent to the hospital, where he was diagnosed with a left shoulder fracture/dislocation and left humeral shaft fracture. According to Wachhaus, had decedent not been injured, their meeting would have lasted until 3 PM and that, after they got their food, they would have continued to discuss topics of public administration, methodological problems and other scholarly matters.

Decedent underwent surgery on the date of his injury. He subsequently developed an infection and passed away. His physician, Dr. Acri, testified that decedent's unchecked pain and stress, which were caused by his upper arm fracture and left shoulder dislocation, caused decedent's kidneys and heart to fail and suppressed his immune system to the point where he succumbed to aseptic pneumonia.

The Workers' Compensation Judge credited the testimony of Wachhaus and Dr. Acri. As such, the WCJ concluded that decedent was actually engaged in furtherance of the business or affairs of Penn State when he fell on October 20, 2006, and that he died as a result of those injuries. Employer appealed to the Workers' Compensation Appeal Board, which affirmed.

Employer then sought review by the Commonwealth Court, arguing that decedent's widow failed to meet her burden of proving that decedent sustained his injuries while in the course of his employment. Employer argued that decedent was a stationary employee who was on a lunch break at a public restaurant when he fell and, therefore, decedent cannot be construed to have been actually engaged in the furtherance of his employer's business or affairs at the time of his injury.

The Court was not persuaded. The credited testimony established that, although decedent was a stationary employee, he sometimes met his students off site for teaching purposes. On the date of his injury, decedent and Wachhaus planned a multiple-hour meeting, including a working lunch, in direct furtherance of Penn State's affairs. Furthermore, it is well established that an employee is considered to have sustained an injury while actually engaged in the furtherance of an employer's business interests and affairs where the injury occurred during an inconsequential or innocent departure from work within the regular working hours. Here, decedent's trip to the salad bar was nothing more than an inconsequential departure from his work as a professor.

The decision of the WCAB was affirmed.

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Su Hoang v. Workers' Compensation Appeal Board (Howmet Aluminum Casting, Inc.), No. 2277 C.D. 2011, Filed August 20, 2012.
(Compromise and Release—Courts may rescind a compromise and release agreement based on a clear showing of fraud, deception, duress or mutual mistake; the party seeking to set aside the agreement has the burden of proof, and the test to set aside a compromise and release on the basis of mistake is more stringent than for fraud or duress, and must be clear, precise and indubitable.)

On May 7, 2009, the parties entered into a Compromise and Release Agreement (C&R) pursuant to which claimant settled his workers' compensation claim for a lump sum payment of $9,900. Of that sum, claimant was to pay $1,900 in legal fees.

During the hearing before the Workers' Compensation Judge, with his son acting as translator, claimant testified that he understood the C&R agreement. Claimant specifically stated that he understood that he was giving up his right to any claim for workers' compensation benefits and that "if the Judge approves the settlement that [he] won't be able to come back to [employer] or the insurance company at a later date for any reason. The WCJ found that claimant understood the legal significance of the agreement and issued a decision on May 8, 2009 approving the C&R agreement.

On April 30, 2010, claimant's counsel sent employer's counsel a medical bill from Dr. O'Brien showing a total balance due of $37,674. Shortly thereafter, claimant's counsel sent employer's counsel another letter claiming to restate a telephone conversation in which employer's counsel admitted to being unaware of the outstanding medical bill at the time of the settlement.

Claimant then filed Review and Penalty Petitions, arguing that the WCJ should rescind the C&R agreement based on a mutual mistake of fact since both parties allegedly were mistaken as to the fact that medical bills remained unpaid as of May 7, 2009. The WCJ rejected claimant's mutual mistake argument, noting that there was no direct evidence that employer was mistaken at the time the C&R agreement was executed. The WCJ also noted that there had been no discussion of medical expenses at the C&R hearing. Moreover, the C&R agreement did not contain language acknowledging that all reasonable and necessary medical bills had been paid.

Claimant appealed to the Workers' Compensation Appeal Board, which ultimately agreed that claimant failed to produce clear evidence that employer was mistaken as to the unpaid bills or that employer knew of a unilateral mistake on claimant's part. Accordingly, the WCAB affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant again argued that the Court should rescind the C&R agreement based on a mutual mistake of fact regarding the unpaid medical bills. Alternatively, claimant argued that the C&R agreement should be rescinded based on a unilateral mistake of fact, asserting that employer had good reason to know of claimant's mistake and that enforcement of the C&R agreement would be unconscionable.

Relying upon its decision in the case of North Penn Sanitation, Inc. v. WCAB (Dillard), 850 A.2d 795 (Pa.Cmwlth. 2004), the Court observed that a C&R agreement may be rescinded upon a clear showing of fraud, deception, duress or mutual mistake. However, the party seeking to set aside the agreement has the burden of proof, and the test to set aside a C&R on the basis of mistake is more stringent than for fraud or duress. Evidence demonstrating a mutual mistake must be clear, precise and indubitable.

Here, claimant failed to produce any credible evidence showing that employer was mistaken regarding the unpaid medical bill at the time of settlement.

With regard to claimant's argument that he operated under a unilateral mistake of which the employer was aware, the Court noted that a unilateral mistake which is not caused by the fault of the opposing party affords no basis for relief. Here, claimant presented no credible evidence of employer's intent. There is no evidence that claimant communicated to employer, either before or at the time of settlement, his belief that the C&R did not apply to unpaid, pre-existing medical bills. There simply was no evidence that employer knew or should have known of claimant's mistake regarding the unpaid medical bills.

Hence, the order of the WCAB was affirmed.

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Judy Smith v. Workers' Compensation Appeal Board (Caring Companions, Inc. and Uninsured Employers Guaranty Fund), No. 417 C.D. 2012, Filed September 17, 2012.

(Notice of Ability to Return to Work—Where claimant provides employer with information that he is able to return to work in some capacity, employer is not required to issue an LIBC-757 under Section 306(b)(3) of the Act.)

Claimant was employed as a home health aide when, on October 29, 2008, she fell while attempting to prevent a patient from falling. She felt the immediate onset of low back pain and treated at the emergency room that evening. Employer did not have workers' compensation coverage on the date of her injury.

Claimant, who was suffering from a head cold when she was injured, sought treatment from Dr. Albert, who took her off work until she was cleared by her family physician regarding the sinus infection. Her family physician, Dr. Kolzlowski, then excused claimant from work for 2 weeks, but did not state if claimant's inability to work was due to the work injury or her sinusitis.

Nevertheless, employer paid claimant bi-weekly checks that approximated her potential compensation rate.

On December 5, 2008, claimant filed Claim and Penalty Petitions. On January 26, 2009, claimant also filed a Claim Petition seeing workers' compensation benefits from UEGF.

On December 14, 2008, claimant received a light duty job offer letter from employer. Although the letter identified the duties and pay rate of the proffered position, the letter did not indicate the number of hours per week. Claimant did not return to work.

On February 2, 2009, at her counsel's suggestion, claimant was examined by Dr. Mauthe, who released her to permanent light-duty work.

Again, employer offered her a light-duty position, paying $9.50 per hour for 40 hours per week. The job offer letter contained a list of job responsibilities and explained that the job fell within Dr. Mauthe's restrictions. Again, claimant did not return to work.

After hearings, the Workers' Compensation Judge granted claimant's Claim Petition, but modified benefits effective April 16, 2009 given the second job offer made by employer.

Claimant appealed to the Workers' Compensation Appeal Board arguing that employer was required to send her a Notice of Ability to Return to Work form (LIBC-757) based on Dr. Mauthe's release before she was required to accept the job offer. The WCAB disagreed and affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant again argued that notice under Section 306 (b)(3) of the Act was required. That section provides:

> "If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then insurer must provide prompt written notice, on a from prescribed by the department, to the claimant, which states all of the following:
> (i) The nature of the employe's physical condition or change of condition.
> (ii) That the employe has an obligation to look for available employment.
> (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.
> (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions."

The Court noted that, here, claimant's own physician determined that she was capable of performing light duty work. Employer received the "new medical information" from claimant herself. To mandate employer to provide claimant Notice when it was claimant herself who furnished employer the information in no way serves the purpose of the notice requirement of §306(b)(3) of the Act.

Upholding the WCAB's decision, the Court concluded that where, as here, the claimant enjoys a superior position to control timely notice, employer is not required to provide claimant with formal notice of a change in her physical condition before benefits may be modified.

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Morris Steckel v. Workers' Compensation Appeal Board (Have-A-Vend, Inc.), No. 2011 C.D. 2011, Filed June 7, 2012, Reported September 19, 2012.

(Going and Coming Rule—Where claimant has a fixed place of employment and employment contract does not provide transportation, an injury sustained while traveling home from work is not compensable.)

Claimant was employed as a manager for employer's coffee division. His duties included supervising the entire department, ordering supplies, performing customer service, supervising delivery drivers and working with equipment technicians. Employer provided claimant with a company car which he used for both business and personal purposes. Employer told claimant in a memo that travel to and from work was personal use; business use started when he got to the warehouse or the first customer location and ended when he left the warehouse or his last customer location.

On June 24, 2009,claimant left his place of employment at 3 PM. He planned to make a bank deposit for employer on his way home, but received a call from a customer requesting that he drop off a new coffee pot. After mak-

ing the bank deposit and dropping off the coffee pot, claimant proceeded to drive home. On his way home, he was involved in an accident in which he suffered injuries.

Employer issued a Notice of Compensation Denial, asserting that claimant's injuries did not occur while he was in the course and scope of his employment. Claimant then filed a Claim Petition. Hearings were held and both parties presented evidence.

The Workers' Compensation Judge determined that claimant was a stationary employee, that he did not have an employment contract that included transportation to and from work, that he was not on a special mission for employer when injured and that he failed to establish that any of the exceptions to the "going and coming" rule applied.

The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant first argued that the WCJ erred in finding that he was a stationary employee. The Court disagreed. While claimant testified that he traveled as a part of his job, he also testified that he had an office and was a supervisor required to spend time in the office on a regular basis. As such, claimant was a stationary employee.

Claimant next argued that he was within the course and scope of his employment at the time of injury because his employment agreement included a company vehicle for both business and personal use. Again, the Court disagreed. The plain language of the memorandum given to claimant along with the company car shows that claimant's travel to and from work was not considered "business usage."

The Court reiterated that the general rule is that an employer is not liable to the employee for compensation for injuries received off the employer's premises while the employee is traveling to or from work. However, an injury will be considered compensable if one of the following exceptions to the "going and coming rule" apply:

1) Claimant's employment contract includes transportation to and from work;
2) Clamant has no fixed place of work;
3) Claimant is on a special mission for employer; or
4) Special circumstances are such that claimant was furthering the business of the employer.

None of the exceptions apply to the case at hand. Consequently, the order of the WCAB was affirmed.

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Leo R. Bosch v. Unemployment Compensation Board of Review, No. 639 C.D. 2012, Filed November 7, 2012.

(Unemployment Compensation - Where parties resolve workers' compensation claim but employer does not accept liability for injury, claimant may not rely on §204(b) of the WC Act to establish alternate base year for entitlement to unemployment compensation benefits.)

On May 5, 2010, claimant filed a claim for workers' compensation benefits alleging that he suffered a work injury on February 22, 2010 and seeking total disability benefits from that date. For the second and third quarters of 2010, claimant received short-term disability insurance benefits totaling $19,947. On March 15, 2011, claimant signed a Compromise and Release Agreement which specifically stated that employer did not recognize any liability for claimant's injury and had a reasonable basis to contest his claim.

Thereafter, on August 21, 2011, claimant filed an application for unemployment compensation, resulting in a base year of April 10, 2010 to March 31, 2011. The local UC service center determined that claimant was ineligible for benefits under §401(a) of the UC Law because he did not report sufficient wages in his base year to qualify for benefits. The service center further determined that claimant could not rely on §204(b) of the Workers' Compensation Act and elect to use an alternate base year because claimant's injury was not determined to be compensable.

Section 204(b) of the WC Act provides:

> For the exclusive purpose of determining eligibility for compensation under the [Unemployment Compensation Law], any employe who does not meet the monetary and credit week requirements under section 401(a) of that act due to work-related injury *compensable under this act* may elect to have his base year consist of the four complete calendar quarters immediately preceding the date of the work-related injury.

Claimant appealed the service center's determination and a hearing was held before a UC Referee. The Referee also found that claimant was ineligible for UC benefits because he had not earned sufficient wages during his base year and he was not entitled to use an alternate base year under §204(b) of the WC Act because the C&R expressly stated that employer did not accept liability for his work injury. As such, claimant did not demonstrate that his injury was compensable. The Unemployment Compensation Board of Review affirmed the Referee's decision.

Claimant then sought review by the Commonwealth Court, arguing that the UCBR erred in holding that he was not entitled to use an alternate base year pursuant to §204(b) of the WC Act. The Court noted that, because the procedural provisions of the WC Act require employers and insurers to

commence payment of benefits pending a final determination of the claimant's entitlement to them, a claimant's receipt of benefits, in and of itself, does not establish that the claimant suffered a compensable injury. A *compensable injury under this act* is an injury for which a claimant is entitled to benefits under the substantive, as opposed to the procedural provisions, of the WC Act.

Here, claimant settled his workers' compensation claim without establishing that he suffered an injury compensable under the WC Act. Accordingly, the Court affirmed the decision of the UCBR denying benefits to claimant.

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Cleveland Brothers and its third party administrator, PMA v. Workers' Compensation Appeal Board (Hazlett), No. 68 C.D. 2012, Filed August 24, 2012, Reported November 21, 2012.

(Penalties - Failure to pay the proper amount of interest due may result in the imposition of penalties; failure to pay the subrogation lien of a third-party health insurer on the basis that additional records or forms are required may result in the imposition of penalties.)

On December 2, 2005, claimant filed a Claim Petition alleging a work injury of April 14, 2005. Ultimately, on January 29, 2009, the Workers' Compensation Judge granted claimant's petition and ordered employer to pay workers' compensation benefits in the amount of $430.18 per week for the closed periods of November 9, 2005 through March 26, 2006 and April 12, 2007 through September 30, 2007, at which time benefits were suspended. The WCJ assessed interest at the rate of 10% on all overdue benefits and directed employer to pay all reasonable and necessary medical expenses incurred by claimant relative to the work injury.

On March 24, 2009, claimant filed a Petition for Penalties, alleging that employer refused to pay all interest due to claimant, as well as the subrogation liens of his heath insurers, Healthcare and Highmark.

In support of his petition, claimant presented correspondence between counsel, an itemized statement of claimant's out-of-pocket medical expenses, records of the outstanding subrogation liens of Highmark and Healthcare, and records of the payments made by PMA.

In response, employer presented testimony from the adjuster, who explained that she calculated the benefits and interest due using a worksheet provided by the Bureau of Workers' Compensation. That worksheet provides: "This spreadsheet assumes that interest accrues from the end of the first week through the end of the payments period. If this assumption is inappropriate for your calculation, please consult another source."

The WCJ concluded that interest was payable beyond the payment period inasmuch as payment of the overdue benefits was not made until February 13, 2009. Thus, claimant was owed interest through that date. Because interest was only paid through September 30, 2007, the Act was violated.

The WCJ further found the adjuster's testimony to be incredible regarding PMA's failure to receive the proper medical records or forms and determined that the Act was violated by failing to make timely payment of the outstanding subrogation liens. The WCJ noted that medical bills associated with subrogation liens did not need to be repriced because the third-party health insurer is entitled to 100% reimbursement of the bills.

Overall, a 50% penalty was awarded of all unpaid interest due and owing to claimant from September 30, 2007 through February 13, 2009, plus a 50% penalty on the outstanding suborgation liens.

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

Employer then sought review by the Commonwealth Court.

Employer argued that, although it refused to pay claimant interest from the end of the disability periods through February 13, 2009, it did not owe interest past the closed period because claimant was fully employed at that time. Further, employer argued that it reasonably relied upon the Bureau's worksheet to calculate the interest due. The Court was not persuaded, noting that the purpose of §406.1(a) of the Act is to compensate a claimant for the loss of the use of the money during the time the payment was delayed. There is no limitation in the Act if the claimant returns to work or is no longer disabled. Further, reliance on the Bureau worksheet to calculate the interest was improper inasmuch as the worksheet clearly did not calculate interest up to the actual payment of compensation.

Employer next argued that, under §306(f.1)(2) of the Act, it is entitled to receive medical bills and records verifying medical charges before it must pay for the treatment. The Court rejected that argument, noting that §306(f.1)(2) does not apply because it is directed towards provides, i.e., the person who actually rendered treatment, not insurers requesting subrogation of payments made on behalf of a claimant. Under §319 of the Act, Healthcare and Highmark, are not required to resubmit any bills after an award of compensation. Employer should have paid the subrogation liens - without the receipt of additional records or forms - in a timely manner.

The decision of the WCAB affirming the WCJ's award of penalties was affirmed.

SUPREME COURT CASE REVIEWS

Six L's Packing Company and its Claims Administrator, Broadspire Services, Inc. v. Workers' Compensation Appeal Board (Williamson), No. 46 EAP 2011, Decided May 29, 2012.

(Statutory Employer - Where a person or entity contracts with another to perform work which is a regular part of their business, either on or off their premises, that person or entity may be deemed to be the statutory employer of the contractor's employees if the contractor does not carry workers' compensation insurance.)

Six L's Packing grows, harvests, processes and distributes tomatoes and other produce. It contracted with F. Garcia & Sons to transport tomatoes between a warehouse in Pennsylvania and a processing facility in Maryland. Claimant, who was employed as a truck driver by Garcia, suffered injuries in a vehicular accident which occurred in Pennsylvania while transporting the tomatoes.

Claimant filed claim petitions against both Six L's Packing and Garcia. During the litigation, it was determined that Garcia did not maintain workers' compensation insurance. Six L's Parking argued that, because it did not own trucks or employ drivers but rather utilized independent contractors like Garcia, it was not claimant's employer and could not be found liable. Six L's Packing asserted that it could not be found to be a statutory employer under §302 of the Act because, under the case of McDonald v. Levinson Steel Co., 302 Pa. 287, 153 A. 424 (1930), §302 liability may be established only where:

1) the entity is under contract with an owner or one in position of an owner;
2) the entity occupies or is in control of the premises where the injury occurred;
3) the entity entered into a subcontract;
4) The entity entrusted a part of its regular business to the subcontractor; and
5) The injured party is an employee of such subcontractor.

Since claimant was injured on a public highway and not on premises occupied or controlled by Six L's Packing, the company took the position that the requirements of McDonald were not satisfied and, thus, it could not be deemed a statutory employer.

The Workers' Compensation Judge was not persuaded and found Six L's Packing liable as a statutory employer.

The Workers' Compensation Appeal Board affirmed, but did not agree with the WCJ that the McDonald test had been met. Rather, the WCAB determined that McDonald simply did not apply. Instead, the WCAB determined that Six L's Packing contracted with Garcia to perform work of a kind that was a regular part of its business and, therefore, Six L's Packing was a contractor and Garcia a subcontractor. Because claimant was an injured employee of Six L's Packing's uninsured subcontractor, Six L's Packing was claimant's statutory employer.

The Commonwealth Court affirmed on essentially the same reasoning as that of the WCAB.

Before the Supreme Court, Six L's Packing contended that McDonald applies and, as such, liability may not be imposed. Further, Six L's Packing took the position that, under the decisional law, a property owner simply cannot be a statutory employer.

The Court accepted review of the case to determine the Legislature's intentions regarding statutory employer liability under §302 of the Act. The Court reviewed the case law as well as the statute and recognized that there is inherent ambiguity in the overall scheme for statutory employer liability. For instance, there are differences in the definition of "contractor" as used in various provisions of the Act. There is a substantial overlap between §§302 (a) and (b), including apparent differences in the depiction of the concept of statutory employment as between the Act's liability and immunity provisions.

Viewing the statutory scheme as a whole, however, and noting the remedial purposes of the Act, the Court found it plain that the Legislature meant to require persons (including entities) contracting with others to perform work which is a regular or recurrent part of their businesses to assure that the employees of those others are covered by workers' compensation insurance, on pain of assuming secondary liablity for benefits payment upon a defaut.

The order of the Commonwealth Court was affirmed.

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Lancaster General Hospital v. Workers' Compensation Appeal Board (Weber-Brown), No. 69 MAP 2010, Decided May 29, 2012.

(Average Weekly Wage - Where claimant changes employers after the injury and later suffers a specific loss due to that injury, the average weekly wage is calculated based on the claimant's wages at the time the specific loss is manifested, not at the time of the original injury.)

Claimant was employed in 1979 as a licensed practical nurse. While cleaning the tracheotomy of a patient infected with the herpes simplex virus, the patient coughed, causing sputum to spray in claimant's left eye. Her eye became swollen and infected. Her symptoms subsided with treatment and she did not miss any work as a result.

Claimant left the hospital's employ in 1985 for reasons unrelated to the eye incident. At that time, she earned $8 per hour and worked full-time. After leaving the hospital's employ, claimant's eye became infected several more times. Each time, her symptoms subsided with treatment and she did not miss any work with her subsequent employers. In October of 2006, however, while claimant was working for the Heart Group, her eye again became infected but did not respond to treatment. By February 2007, she lost the vision in her left eye. Despite a cornea transplant, her vision did not improve and, as a result of her blindness, she was not able to return to work. At that time, Claimant earned $21 per hour working for the Heart Group on a part-time basis.

Claimant filed a petition against Lancaster General Hospital claiming the loss of use of her left eye as of March 8, 2007. The Workers' Compensation Judge determined claimant suffered a work-related on May 16, 2007, the date on which her doctor informed her of her likely permanent blindness and inability to return to work. The WCJ also found her work-related injury stemmed from the 1979 incident which caused her blindness almost 30 years later. The WCJ awarded benefits at $389.50 per week for 275 weeks based on claimant's 2007 wages with the Heart Group.

The hospital appealed to the Workers' Compensation Appeal Board, which affirmed. The WCAB determined the WCJ correctly calculated claimant's average weekly wage by using her wages at the time of her injury, which, it agreed, was in May 2007.

The hospital then appealed to the Commonwealth Court, which affirmed the WCAB. The Court rejected the hospital's argument that §309(d.1) of the Act governed and that claimant's wages with the hospital, not the Heart Group, control. The Court observed that the Act defines wages in terms of a claimant's weekly pay *at the time of injury.* In a specific loss case, the date of injury is the date when the claimant is informed by a physician of the loss of use of the member or faculty for all practical intents and purposes and that the injury is job related.

The hospital then filed a petition for allowance of appeal with the Supreme Court, which the Court granted to address whether §309 of the Act permits a claimant's average weekly wage to be based on wages earned with an employer different from the one paying benefits where the claimant suffered in initial incident, changed employers and later suffered a work-related injury caused by the initial incident.

The hospital again argued that §309(d.1) should apply. That section provides:

> (d.1) If the employe has not been employed by the employer for at least 3 consecutive periods of 13 calendar weeks in the 52 weeks immediately preceding the injury, the average weekly wage shall be calculated by dividing by 13 the total wages earned in the employ of the employer for any completed period of 13 calendar weeks immediately preceding the injury and by averaging the total amounts earned during such periods.

The hospital argued that the phrases "by the employer" and "in the employ of the employer" plainly refer to the employer who would pay workers' compensation benefits (the "payor"). Further, the hospital argued that the term "immediately" directs courts to use the 13-week period of employment with the payor nearest to the date of the injury, no matter the length of time between the actual injury and the completed 13-week period of employment. Thus, it was the hospital's position that claimant's wages earned during her final 13-weeks of employment at the hospital in 1985, rather than her 2007 wages with the Heart Group, should be used to calculate her average weekly wage.

The Court was not persuaded and concluded that the term "employer" in §309 refers to the employer at the time of the work-related injury. Interpreting "employer" to mean the employer at the time of injury is consistent with the goal of providing a claimant specific loss benefits which have been calculated using an accurate representation of claimant's actual lost wages as of the date of the injury. Otherwise, the claimant would receive benefits calculated using out-of-date wages merely because the injury happened to lie dormant for a period of time.

Accordingly, the Court held that "employer" as used in §309 must be construed as the employer at the time of injury. As such, claimant's average weekly wage should be based on her 2007 wages with the Heart Group, as those wages were earned with claimant's employer at the time of her injury. The decision of the Commonwealth Court was affirmed.

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Lillian Frazier v. Workers' compensation Appeal Board (Bayada Nurses, Inc.), No. 56 EAP 2010, Decided September 28, 2012.

(Subrogation - Subrogation or reimbursement from a claimant's third-party tort recovery is not available to employers where the third-party is the Commonwealth.)

Claimant fractured her ankle when a bus operated by the Southeastern Pennsylvania Transportation Authority (SEPTA), on which she was a passenger, was involved in a motor vehicle accident. At that time, claimant was employed by Bayada Nurses, Inc., and the accident occurred in the course and scope of her employment.

Accordingly, claimant filed a claim for workers' compensation benefits, which was granted. Claimant then filed a third-party lawsuit against SEPTA, alleging that it was liable for the injuries she suffered. During the pendency of that lawsuit, Bayada Nurses, through its carrier, filed notice of its intent to recoup the benefits it paid to claimant for any award received from the third party lawsuit under §319 of the Workers' Compensation Act.

Claimant eventually settled her lawsuit with SEPTA for $75,000. Bayada Nurses filed a petition and asserted its §319 rights in the amount of $47,351.93. Claimant opposed the petition, claiming that Bayada Nurses was really attempting to collect from money paid to her by SEPTA and that SEPTA was immune from claims of subrogation or reimbursement from a claimant's tort recovery with respect to WC benefits under §23 of Act 44.

The Workers' Compensation Judge agreed with claimant, finding that the immunity provided by §23 applies both to subrogation claims asserted by and employer against a governmental entity and reimbursement from settlement proceeds a government party pays to an injured employee.

Bayada Nurses appealed to the Workers' Compensation Appeal Board, which reversed, holding that §23 only extends to direct actions for recovery against a governmental entity. As Bayada Nurses' petition, in the WCAB's view, equate to a direct suit between an individual an a governmental entity, it opined that §23 did not apply.

Claimant appealed to the Commonwealth Court, which affirmed, noting that §319 provides for an absolute and automatic right to subrogation. Bayada Nurses sought recovery from the claimant for the $75,000 she received from SEPTA and was not seeking recovery directly from SEPTA. Claimant then sought review by the Supreme Court.

The Court noted that this case concerns two pieces of legislation: §319 of the WC Act and §23 of Act 44.

Claimant's focus was on the plain language of §23 which provides that government shall "benefit from sovereign and official immunity from claims of subrogation or reimbursement from a claimant's tort recovery." According to the claimant, §23 immunity is negated if a governmental entity would have to include in a settlement agreement amounts equal to subrogation liens in recognition that an employer may merely wait for a claimant to receive funds from a governmental entity and then demand reimbursement.

Bayada Nurses' focus was on §319, arguing that, if claimant's argument was accepted, Bayada Nurses would be forced to pay compensation for an injury which was not its fault and SEPTA will escape liability. Further, Bayada Nurses argued that §23 is not implicated in this case because SEPTA is not involved in the litigation.

The Supreme Court noted the ambiguity that exists within §23 of Act 44. On the one hand, as Bayada Nurses pointed out, the factual situation here is not contemplated by §23. At the same time however, as claimant pointed out, the immunity clause of §23 is rendered meaningless if subrogation is allowed.

The Court rendered an extensive opinion discussing the tools of statutory construction. In sum, the Court found that §23 of act 44 relegated the right of subrogation and reimbursement to the sovereign's immunity through a narrowly tailored exception to a general rule. The Court sought to give effect to all provisions of the Act without ignoring the plain language of the statute. Further, the Court recognized that a primary purpose of sovereign immunity, protection of the public fisc, is satisfied if the Commonwealth and its political subdivision can enter into reduces settlement agreements and "benefit" from sovereign immunity and official immunity.

Accordingly, the Court reversed the order of the Commonwealth Court and reinstated the decision of the WCJ.

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Department of Labor and Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Excelsior Insurance), No. 46 MAP 2011, Decided November 21, 2012.

(Supersedeas Fund Reimbursement - Where claimant receives a settlement from a third-party tortfeasor and employer's suspension petition is subsequently granted, employer is entitled to reimbursement from the supersedeas fund for unreimbursed pre-settlement payments and grace period payments.)

Claimant sustained significant injuries when he fell from a ladder in 2003. His employer paid workers' compensation benefits of $410 per week. Thereafter, employer filed a petition to suspend compensation benefits as of August 12, 2005. Employer's request for supersedeas filed in connection with that petition was denied in January 2006.

Subsequently, claimant settled his claim against a third-party tortfeasor for $310,000. Employer and claimant then entered into a Third-Party Settlement Agreement providing for the distribution of the settlement in accordance with §319 of the Act.

The parties first determined that claimant had expended $124,314.23 in counsel fees and costs to recover the settlement.

Employer had previously paid $120,698.48 in benefits to claimant. As such, employer's accrued lien amounted to roughly 39% of the settlement total. ($120,698.48 divided by $310,000 = 0.3893499) Therefore, employer's prorated

share of the expenses of recovery was calculated to be $48,401.73 (38.93499% of $124,314.23). Thus, employer's net lien was $72,296.75 ($120,698.48 minus employer's share of expenses $48,401.73 = $72,296.75).

Subtracting the employer's accrued lien from the total settlement amount of $310,000 resulted in a balance of recovery of $189,301.52 ($310,000 minus $120,698.48 = $189,301.52). Dividing that amount by the claimant's weekly compensation rate resulted in employer's entitlement to a grace period of 461.7 weeks. Recognizing employer's liability for its pro rata share of the expenses of recovery, the Third Party Settlement Agreement provided that employer would pay claimant $164.42 each week during the grace period.

Following several months of grace period payments by employer, the Workers' Compensation Judge granted employer's suspension petition. Employer then filed an Application for Supersedeas Fund Reimbursement seeking the unreimbursed portion of the amount it paid claimant between November 22, 2005 and February 15, 2006, and the $164.42 weekly payments it paid between February 16, 2006 and the date of the WCJ's decision.

The Bureau, as the conservator of the Supersedeas Fund, opposed employer's application arguing that the payments made by employer were not compensation reimbursable under §443 of the Act, but instead constituted payments of counsel fees in the third party action.

The WCJ rejected the Bureau's argument and ordered a total reimbursement to employer of $7,606.36. The Bureau appealed the WCJ's decision to the Workers' Compensation Appeal Board, which affirmed after noting the lack of case law addressing the interaction of supersedeas reimbursement under §443(a) and third-party settlement distribution under §319.

The Commonwealth Court also rejected the Bureau's argument, concluding that employer was entitled to reimbursement for the payments made. However, the Court opined that employer did not receive full reimbursement because claimant's costs of recovering the third-party settlement were deducted prior to distribution to employer. The Court explained:

> While the $164.42 per week that [employer] was required to pay claimant during the grace period was calculated based on [employer's] share of the costs for recovering claimant's balance of recovery from the Third-Party Settlement, this amount was, in effect, paid to claimant to ensure that he received his full compensation rate of $410 per week during that period.

The Bureau appealed the Commonwealth Court's decision to the Supreme Court, which granted review to answer the following question: Whether the payments made by employer to claimant, for which employer sought reimbursement from the Supersedeas Fund, constituted payments of compensation within the meaning of §443 of the Act and were, therefore, subject to reimbursement by the Supersedeas Fund, or whether such payments constituted the payment of costs associated with obtaining the settlement of claimant's third-party tort action under §319 of the Act?

The Bureau argued that the payments were attorney fees and costs and were thus not compensation under §443. Alternatively, the Bureau argued that the payments were not made as a result of a denial of supersedeas as is required for reimbursement under §443.

The Court rejected the Bureau's arguments, noting that had supersedeas been granted when first requested in 2005, employer would not have been making any payments between November of 2005 and February of 2006, nor at the $164.42 rate during the grace period. Moreover, the Bureau failed to recognize that, at the time of the Third-Party Settlement Agreement, employer compensated claimant for its pro rata share of the attorney fees.

The Court noted that the Act balances the competing interests of employers and employees. Section 319 provides an employer the right to subrogation in regard to an employees' recovery from a third-party tortfeasor, while §443 provides reimbursement to an employer denied supersedeas. In short, in exchange for requiring employers to compensate injured employees regardless of fault, the Act protects employers from tort litigation by the injured employee and, under §319, provides the employer "the absolute right of subrogation." Similarly, while the Act requires employers to compensate injured employees even while contesting responsibility for the injury under the Act, §443 provides reimbursement from the Supersedeas Fund for such payments made if it is later determined that the employer was not responsible.

Here, employer properly paid claimant his $410 weekly benefits initially and then the reduced $164.42 payments during the grace period, despite the protest it lodged via its suspension petition and its request for supersedeas. The fact that the amount of the unreimbursed pre-settlement payments and the grace period payments were calculated based on the funds expended by claimant to recover from the third-party tortfeasor does not detract from the fact that employer paid these funds as compensation to claimant. In accordance with §§319 and 443, employer should be reimbursed for the full amount of compensation paid. The decision of the Commonwealth Court was affimred.

(Continued from page 1)

and that he was capable of only modified-duty work. As such, the Judge granted the Claim Petition and ordered employer to pay the claimant's work-related medical expenses. At the same time, seemingly consistent with the Supreme Court's decision in Reinforced Earth, the Judge suspended the claimant's wage loss benefits based upon the Judge's finding that the claimant was an undocumented worker. In his written opinion, the Judge explained that he drew an adverse inference from the claimant's refusal to answer questions at the hearings about his citizenship and immigration status. The claimant appealed and the Workers' Compensation Appeal Board held that there was insufficient evidence in the record to support the Judge's finding that the claimant was an undocumented alien. Aside from the claimant's refusal to answer the specific questions about his status, there was no other evidence of record to establish the claimant's illegal alien status.

On appeal by the employer, the Commonwealth Court upheld the Board's decision and explained that the issue was not whether the Judge erred in suspending benefits based on the finding that Claimant is an undocumented alien, but rather, whether there was substantial evidence in the record to support the Judge's finding that claimant was an undocumented alien in the first place. The Court stated that an adverse inference alone, deduced from a claimant's refusal to answer questions about his immigration status, is insufficient to support a finding of fact. The court explained that the reason that an adverse inference cannot serve as substantial evidence to support a finding of fact is because an adverse inference does not constitute *any type of evidence*, period. There must be something "more" in the record before the Judge can make such a finding. In a nutshell, the Commonwealth Court's decision in Kennett Square held that an employer must essentially "prove the negative." It is simply not enough for the employer to ask the injured worker at a hearing whether he is undocumented. Instead, the Commonwealth Court would have the employer prove that valid immigration documents for a worker do not exist. Only after this affirmative offer of proof may a Judge make a finding that a worker is an illegal alien who is not eligible for employment.

Fortunately, on August 15, 2012, the Supreme Court granted the employer's Petition for Allowance of Appeal. Among others, one issue that the Supreme Court has stated it will consider is:

> Did the Commonwealth Court err in placing the burden of proof in a claim petition on the employer, when the claimant failed to establish his ongoing entitlement to benefits by providing information on his documented status to the employer and to the court?

Until the Supreme Court renders its decision, however, the Commonwealth Court's decision is the law and must be followed. An employer must have evidence that the claimant is an undocumented worker in order to successfully suspend the claimant's benefits based on citizenship status. An employer cannot simply rely on the injured worker's "silent admission" that he or she is an illegal. It may be time consuming and expensive, but an affidavit from the U.S. Citizenship and Immigration Services may be enough, per the Supreme Court's prior decision in Reinforced Earth, to establish that valid immigration documents do not exist. Ideally, the Supreme Court will provide more guidance on this issue when it renders its decision in Kennett Square. In the meantime, employers are advised to take all reasonable steps necessary to verify the citizenship and immigration status of workers and new hires, lest they find themselves involved in a "close encounter" of the worst kind with an alien injured worker.

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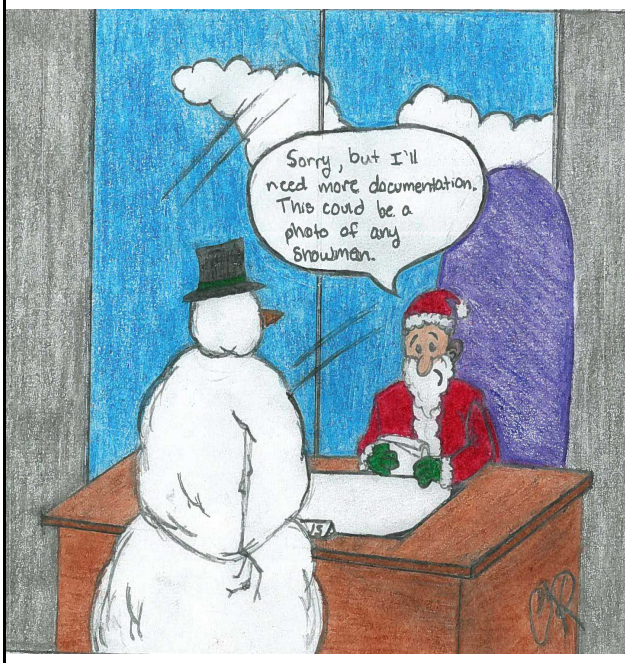
[1] The applicable regulations may be found at 8 U.S.C. § 1324a(b).

[2] Kachinski v. WCAB (Vepco Constr. Co.), 532 A.2d 374 (Pa. 1987).

"ALIEN INTERVIEW"



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