TR&C

Pennsylvania Workers' Compensation Bulletin

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

HARRY W. ROSENSTEEL, Editor MARGARET M. HOCK, Editor

Erosion of the "Abnormal Working Condition" Standard for "Mental-Mental" Injuries

For nearly three decades, Martin v. Ketchum, 568 A.2d 159 (Pa. 1990) has set the standard upon which a claimant may establish a compensable psychological injury as a result of a work-related mental stimulus or "mental-mental" injury. The Pennsylvania Supreme Court drew the following line in the sand:

> A claimant must produce objective evidence which is corroborative of his subjective description of the working conditions alleged to have caused the psychiatric injury. Because psychiatric injuries are by nature subjective, we believe that if a claimant has met his burden of proving the existence of a psychiatric injury, he cannot rely solely upon his own account of working environment to sustain his burden of proving that the injury was not caused by a subjective reaction to normal working conditions. *A claimant's burden of proof to recover [WC] benefits for a psychiatric injury is therefore twofold: he must prove by objective evidence that he has suffered a psychiatric injury and he must prove that such injury is other than a subjective reaction to normal working conditions.*

In short, an individual's "subjective reaction to being at work and being exposed to normal working conditions" does not form the basis for recovery.

Despite outlining the test, given the factual nature of this analysis, the Martin decision begged the question as to what was an abnormal working condition. Subsequent courts, until recently, have consistently applied a narrow view as to what conditions were considered abnormal so as to qualify as giving rise to a compensable injury. In the past, the WCAB has found that being robbed at gunpoint at an establishment frequently robbed, such as a liquor store, may not be an abnormal working condition. Similarly, courts in several instances have found that police officers witnessing a shooting, becoming engaged in a shootout, or even being engaged in an eight-hour standoff with a barricaded gunman were not subjected to abnormal working conditions.

Despite the court's generally consistent narrow approach to claims for "mental-mental" injuries, a series of recent opinions suggests that the courts are moving away from this narrow approach.

The recent string of decisions can be attributed to the Supreme Court's decision in Payes v. Workers' Comp. Appeal Bd. (Commonwealth Pa State Police)(Payes II), 79 A.3d 543 (Pa. 2013). In Payes II, a state trooper filed a claim petition asserting that he sustained PTSD after he struck and killed a pedestrian who had run in front of his patrol car. The WCJ acknowledged that the situation did not involve an abnormal working condition as police officers are exposed to vehicle accidents, mayhem, bod-

(Continued on page 7)

Inside This Issue...

COMMONWEALTH COURT CASE REVIEWS

Steven Smith v. Workers' Compensation Appeal Board (Consolidated Freightways, Inc.), No. 606 C.D. 2014, Filed March 9, 2015.

(Counsel Fees – After filing 17 petitions without merit, counsel fees may be assessed against claimant.)

In May 1996, claimant filed a claim petition alleging that he was disabled due to a brief exposure to a chemical on February 28, 1996 while a truck driver for employer. Workers' Compensation Judge Vallely eventually dismissed the claim petition, and also denied claimant's October 1997 petition to review medical treatment, wherein he sought to recover certain medical expenses allegedly related to the February 1996 incident. In so doing, WCJ Vallely concluded that claimant's complaints were caused by a non-work-related hiatal hernia. The Workers' Compensation Appeal Board affirmed both of these orders, and claimant did not appeal.

Claimant filed additional petitions involving the same February 1996 incident; however, after extensive litigation, the Pennsylvania and United States Supreme Courts declined to consider his appeals and/or requests for reconsideration.

With claimant's instant appeal, he now had come before the Commonwealth Court five times involving the same claim. When he came before the Court the prior time, the Court held that his attempt to raise a claim relating to the February 1996 incident was barred by the doctrines of res judicata and collateral estoppel because he was seeking to relitigate the same claim that he had been trying to re-litigate for over a decade. Therefore, the Court affirmed the WCAB's dismissal of the six review petitions then at issue and expressed concern with claimant's continued pursuit of litigation.

In December 2012, claimant filed two more petitions, which brought the number of petitions that he had initiated based on the same incident to approximately seventeen. In the present petitions, claimant alleged, *inter alia*, that reasonable treatment for the February 28, 1996 injury had been refused, and employer had improperly refused to pay medical bills. In January 2013, employer filed an answer and motion to dismiss the petitions, in which it denied the critical averments and alleged that claimant's petitions were barred by the doctrines of res judicata and collateral estoppel, as well as time-barred by the three-year statute of limitations for compensation claims pursuant to §315 of the Pennsylvania Workers' Compensation Act. WCJ Ignasiak granted employer's motion to dismiss and denied claimant's review and penalty petitions. The WCAB affirmed.

The Court affirmed the WCAB's order denying claimant's petitions brought in December 2012. The Court held that these two petitions were barred by the doctrines of collateral estoppel and res judicata. Surprisingly, the Court also awarded costs and counsel fees incurred by respondent to defend the appeal, jointly and severally, against claimant and his appellate counsel for obdurate and vexatious prosecution of a frivolous appeal.

(Editor's Note: Please keep in mind the unusual circumstances here, i.e., 17 petitions filed by the claimant. An employer need file only one petition deemed without merit to be subject to unreasonable contest counsel fees.)

****

Benjamin Anderson v. Workers' Compensation Appeal Board (F.O. Transport and Uninsured Employer Guaranty Fund), No. 181 C.D. 2014, Filed March 10, 2015.

(Suspension – Where claimant has an earning power greater than or equal to his time of injury wage, a suspension of benefits is appropriate.)

(Average Weekly Wage – Where the Act does not address a method of calculating the AWW for a particular situation, the AWW is calculated using an alternative method which will advance the overall humanitarian purpose of the Act.)

Claimant filed a claim petition alleging that he had sustained an injury to his right ankle and foot on December 27, 2007 while working as a truck driver. He later filed a second claim petition for the same injury, against both employer and the Uninsured Employers Guaranty Fund.

Claimant testified before the Workers' Compensation Judge that, when he applied for a truck driver position with employer, employer's owner told him that he would earn $1100 to $1200 a week and would also receive $100 for each run to pay lumpers (people who unload a truck). During his first run on December 20, 2007, he unloaded the truck himself and kept the $100 lumper fee. Claimant testified that he also did this on the December 27, 2007 run, when he sustained a right bimalleolar fracture while unloading. After this injury, he received disability benefits under the insurance policy purchased by employer for its drivers. Employer's owner testified that claimant was told in November 2007 that he could have five or six runs per week while earning $900 to $1000.

Claimant's treating physician, Dr. Mooar, opined that claimant was unable to return to his pre-injury position. Conversely, Dr. Horenstein, who performed an independent medical examination on January 21, 2009, found that claimant could return to a truck driver position despite having some difficulty with heel and toe walking.

The WCJ accepted the testimony of claimant and Dr. Mooar as credible and rejected the testimony of employer and Dr. Horenstein. The WCJ found that claimant was an employee and not an independent contractor, and that he had not fully

recovered from the work injury and was unable to return to his pre-injury position. The WCJ further found that claimant had no set work hours or work days, and the most he earned in one run was $270. The WCJ concluded that claimant's average weekly wage (AWW) could not be calculated under §309(d.2) of the Act. Therefore, using an alternative method, the WCJ determined that claimant's AWW was $405 ($270 x 3 runs ÷ by 2 weeks of employment). The WCJ granted the claim petitions and ordered employer and the Fund to pay claimant weekly disability benefits of $364.50 based on his AWW of $405.

Claimant appealed, arguing that his weekly wage should have been $1100 to $1200 based on his testimony or $900 to $1000 based on employer's testimony. The Fund also appealed, arguing that the WCJ erred in directing both employer and it to jointly pay claimant disability benefits when it could only be secondarily liable.

The Workers' Compensation Appeal Board agreed with the WCJ's method of calculating the AWW, but noted that the WCJ did not address the lumper fees kept by the claimant. The WCAB modified the WCJ's order so as to make the Fund secondarily liable, but also remanded the case to the WCJ to recalculate the AWW and to determine the amount of credit to be awarded employer for disability benefits received by claimant under employer's insurance policy.

Thereafter, the Fund filed a petition to modify or suspend claimant's benefits as of January 13, 2011, arguing that he had a weekly earning power equal to or greater than his pre-injury AWW. The WCJ then held a hearing regarding the remanded matters and the Fund's petition.

Regarding the remanded matters, the WCJ awarded employer a credit for weekly disability benefits of $273 received by claimant for 104 weeks from employer's insurance policy, and concluded that the lumper fees were not part of claimant's wages and should not have been included in his AWW.

In support of its petition for modification or suspension, the Fund relied on the testimony of Dr. Horenstein, who examined claimant on May 26, 2010. Dr. Horenstein testified that claimant's right ankle fracture had healed fully with a slightly decreased range of motion and released him to full-time, medium-duty work. The Fund's vocational expert located ten open, available full-time positions within Dr. Horenstein's restrictions, paying weekly wages of $360 to $440. In response, claimant testified that he could walk less than two blocks and stand for no more than 30 minutes. Also, claimant's then treating physician, Dr. Smith, testified that he would release claimant to only part-time work, with restrictions. Finally, claimant's vocational expert testified that claimant would have difficulty making a vocational adjustment for the positions located by employer's vocational expert.

The WCJ determined that claimant had a weekly earning power of $440 based on the wages that he would have earned in the positions located by employer's expert. Because claimant's weekly earning power exceeded his AWW of $405, the WCJ suspended his disability benefits as of the January 13, 2011 labor market survey. The WCAB affirmed this decision, and claimant then appealed to the Commonwealth Court.

Claimant first argued that his AWW should be $810, which was the total amount he earned before his injury, or $900 to $1200, which was his expected weekly earnings. He further argued that the $200 lumper fees he kept should have been added to his AWW. The Court agreed with claimant that his AWW should have been $810, because he had earned no wages in his first week of his two-week employment; however, the Court rejected claimant's argument about the lumper fees.

Claimant next challenged the WCJ's decision to suspend his benefits. The Court stated that Dr. Horenstein's testimony that claimant could return to the full-time positions listed in employer's expert's labor market survey was not equivocal. Also, the Court said that because the WCJ's finding of the vocational suitability of the positions identified by employer's expert was based on credibility determinations, that finding could not be disturbed on appeal.

Thus, the Court reversed the WCAB's order affirming the WCJ's decision to suspend claimant's benefits. In so doing, it remanded the matter to the WCJ to modify claimant's benefits based on his AWW of $810 and his weekly earning capacity of $440. The Court affirmed the WCAB's order in all other respects.

****

Nancy Little v. Workers' Compensational Appeal Board (Select Specialty Hospital), No. 1401 C.D. 2014, Filed March 25, 2015.

(Occupational Exposure—Where claimant has no symptoms when away from the workplace but cannot return to workplace due to ongoing sensitivity, benefits may be awarded.)

Claimant, a charge nurse at a long-term acute care facility, worked for employer for 4 years until one day she began to experience breathing difficulties. She received emergency room treatment, her condition improved and she returned to work. About one month later she again experienced sneezing and coughing while at work. She noticed a housekeeping employee waxing the floors. Claimant again received emergency room treatment and was directed to follow-up with a pulmonologist. Three months later, a third episode occurred. This time her condition was worse and she did not return to work for employer. A Medical Only NCP was issued describing the injury as an allergic reaction to the floor wax.

Claimant filed a claim petition for her lost earnings. She also obtained a part-time position with a

hospital, which made use of a different floor wax product. Claimant experienced no breathing problems while working for the hospital.

Before the Workers' Compensation Judge, both parties' medical experts agreed that claimant was disabled due to her exposure to Di-Isocyanate in the floor wax. Employer's expert opined, however, that, as of the date of his evaluation, claimant had fully recovered from her injury and had no pulmonary impairment or disability. The WCJ found employer's expert to be credible and awarded wage loss benefits only through the date of the IME.

The Workers' Compensation Appeal Board affirmed, noting that claimant did not present evidence showing any residual impairment relative to the work injury. Claimant then sought review by the Commonwealth Court.

Before the Court, claimant argued that she is incapable of returning to her pre-injury position because of her allergic sensitivity to Di -Isocyanate, which results in a continuing loss of earnings. As such, her ongoing loss in earnings is causally related to her work injury.

The Court noted that, in a claim petition, the claimant bears the burden of establishing all of the elements necessary to support an award, including proof of disability throughout the pendency of the proceeding.

Here, the experts agreed that claimant's exposure to Di-Isocyanate while at work caused claimant to develop a sensitivity to the chemical, which resulted in 3 progressively worse asthma attacks requiring emergency room treatment. Because claimant did not suffer from a pre-existing asthmatic condition and did not have any work-related medical restrictions prior to her injury, the claimant never returned to her pre-injury baseline. Despite her normal pulmonary function, claimant's asthma and ongoing sensitivity to Di -Isocyanate preclude her from returning to her pre-injury job. Regardless of whether claimant lacks current pulmonary symptoms or does not need current treatment, she has residual medical conditions that she did not have prior to her employment with employer.

Thus, the order of the WCAB was reversed and the case remanded to the WCJ to consider an award of additional benefits based on the record.

****

Elk Mountain Ski Resort, Inc. v. Workers' Compensation Appeal Board (Tietz, deceased, and Tietz-Morrison), No. 1017 C.D. 2014, Filed April 7, 2015.

(Fatal Claim—Common Law Marriage—To establish a common law marriage, the surviving spouse must present clear and convincing evidence of a valid marriage contract prior to January 1, 2005.)

In January 2005, the legislature amended Section 1103 of the Marriage Law, 23 Pa. C.S. §1103, statutorily abolishing common law marriages in Pennsylvania. Subsequent case law held that any common law marriage contract entered into on or before January 1, 2005 remained valid.

On June 12, 2014, claimant, a Native American (Nanticoke and Cherokee) and decedent, also a Native American (Mohawk), who had been living together, visited claimant's parents. Decedent told claimant's parents that he and claimant would come back as husband and wife. Decedent and claimant then went down to the field by the stream behind the house of claimant's parents to have a traditional Native American marriage ceremony. The ceremony involved wrapping a Native American blanket around them, which signified their "joining as one," and exchanged vows and gifts. After the ceremony, they returned to claimant's parents' house where a traditional meal was prepared to celebrate the marriage.

Thereafter, claimant and decedent continued to live together and held themselves out as husband and wife. They had two daughters born in 2005 and 2011. Claimant used Morrison-Tietz and Tietz interchangeably as her last name. Decedent and claimant did not file joint tax returns because they believed there were required to wait 7 years before their common law marriage would be recognized by the IRS.

On November 10, 2011, claimant filed a fatal claim petition alleging that decedent died on October 11, 2011 as a result of multiple traumatic injuries sustained in a utility-tractor rollover accident. Claimant listed herself as decedent's wife and their daughters as dependents. Employer stipulated that the daughters were entitled to weekly death benefits. The parties agreed to submit the issue as to whether claimant was legally married to decedent at the time of his death for determination by a Workers' Compensation Judge.

The WCJ concluded that claimant established that she and decedent entered into a common law marriage contract on June 12, 2004 and that she was entitled to death benefits as decedent's surviving spouse. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, employer argued that the WCJ incorrectly required claimant to establish a common law marriage "by substantial evidence," rather than "by clear and convincing" evidence. "Substantial evidence" is sufficient evidence to support the fact-finder's finding; it is not a quantum of proof necessary to persuade a fact-finder. In contrast, "clear and convincing evidence" is evidence that is so clear, direct, weighty and convincing as to enable a jury or fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the issue.

The Court agreed that, because common law marriages are discouraged and viewed with great scrutiny, the heightened burden of proving the marriage by "clear and convincing evidence" applies. Here, claimant's testimony accepted by the WCJ as credible, constitutes clear and convincing evidence that she and dece-

dent entered into a common law marriage contract on June 12, 2004. She presented overwhelming evidence of constant cohabitation and a reputation of marriage. Thus, she was the common law wife of decedent at the time of his death and she is entitled to death benefits under §307(3)(b) of the Act.

The order of the WCAB was affirmed.

****

Pocono Mountain School District and Inservco Insurance Services v. Workers' Compensation Appeal Board (Easterling), No. 548 C.D. 2014, Filed April 10, 2015.

(Specific Loss—Where claimant proves that he has a disability separate and distinct from his specific loss, he is entitled to both specific loss and disability benefits.)

(Social Security Offset—Where claimant is entitled to Social Security retirement benefits before he suffers a work injury, the employer is not entitled to a credit or offset.)

Claimant suffered a work-related injury on January 20, 2010. The parties stipulated that the injury included complex regional pain syndrome (CRPS) of the upper left extremity and status post left ulnar nerve release. Employer denied claimant's review petition in which he alleged that he suffered a specific loss of his left hand.

Claimant was 62 years old when injured. He began receiving Social Security (SS) retirement benefits in February 2010. As such, employer filed a Modification Petition claiming an offset and credit for the SS retirement benefits received.

Claimant presented his own testimony before the Workers' Compensation Judge, as well as the testimony of his treating physician, Dr. Barnes. Dr. Barnes testified in detail as to the claimant's medical care. He diagnosed claimant with CRPS and left shoulder pain, and warned claimant of the infection potential due to complications and difficulty cleaning his left hand, which could lead to amputation. Dr. Barnes opined that: "[H]is left hand is functionless as far as I'm concerned. His left elbow doesn't have a functional range of motion….[H]e's got a stiff shoulder that goes along with the [CRPS]. And I explained to him that the fact that he wasn't using his hand makes it harder for every other joint to work appropriately because if you don't use your arm, shoulders will get stiff. As so[,] for the most part, to me, I thought his left upper extremity was not functional."

The WCJ found claimant and Dr. Barnes to be credible and, thus, determined that claimant suffered a specific loss of his left hand, which was separate and apart from his other work injuries and which entitled claimant to 335 weeks of specific loss benefits once his total disability benefits end. The Workers' Compensation Appeal Board affirmed that determination.

The WCJ concluded that employer was not entitled to an offset or credit for claimant's SS benefits because, although the benefits were received *after* the work injury, they were approved *before* the injury date. The WCAB reversed that determination.

Employer appealed, arguing that the WCJ and WCAB erred in determining that claimant suffered a specific loss of use of his left hand. Dr. Barnes, upon whom the WCJ relied, stated that claimant lost the use of his "left upper extremity" for which there is no specific loss provided in the Act. The Court noted that, although Dr. Barnes referred to claimant's "left upper extremity," he also testified, as found by the WCJ, that claimant's hand was nonfunctional.

Employer next argued that there was no competent medical evidence that claimant's left hand condition was permanent. Again, the Court disagreed. Dr. Barnes testified that there was medically nothing more that could improve claimant's condition. Amputation may change his condition, but not his function, and may even create new problems.

Employer then argued that claimant's left hand injury was not separate and apart from his disabling injuries, such that he is not entitled to both specific loss and total disability benefits. Again, the Court disagreed. The evidence was that but for claimant's loss of use of his left hand, he would still be disabled by CRPS of his left upper extremity. Because claimant suffered a destruction, derangement or deficiency of a part his body other than his left hand, employer's contention that claimant is not entitled to both specific loss and total disability benefits fails.

Finally, claimant appealed the WCAB's determination that allowed employer an offset due to his receipt of SS retirement benefits. The Court noted that, according to SSA's Regulations, one becomes entitled to Social Security Old Age benefits upon: 1) application for those benefits after attaining retirement age, and 2) upon proof of enough SS earnings to be fully insured.

Here, claimant applied for benefits in 2009, well in advance of his eligibility, and had been approved. As such, he was entitled to SS retirement benefits when he turned 62 on January 2, 2010, which was 18 days *before* his work injury. That his payments did not commence until 21 days after his work injury is irrelevant.

Hence, the WCAB's order was affirmed in part and reversed in part.

****

Sherry Aldridge v. Workers' Compensation Appeal Board (Kmart Corporation), No. 494 C.D. 2014, Filed January 26, 2015, Reported April 16, 2015.

(Notice of Temporary Compensation Payable—Once an employer issues a NTCP, a subsequently issued NTCP does not result in a de facto acceptance of the injuries identified in the second NTCP.)

Claimant suffered a work injury on March 7, 2011. Employer issued a Notice of Temporary Compensation Payable—Medical Only (May

2011 NTCP), by which employer agreed to pay for medical treatment relative to claimant's alleged left knee, left shoulder and left hand contusions. On June 13, 2011, the Bureau issued a Notice of Conversion of Temporary Compensation Payable to Compensation Payable regarding the May 2011 NTCP.

Employer then became aware of the possibility that claimant was suffering from conditions in the nature of a left labrum and biceps tear and was unable to work because of the injuries. As such, employer issued a second NTCP on August 11, 2011 (August 2011 NTCP) pursuant to which wage loss benefits were paid. On September 15, 2011, employer issued a Notice Stopping Temporary Compensation and a Notice of Denial (NCD).

On October 5, 2011, claimant filed a claim petition alleging that she suffered a left rotator cuff tear, left knee injury and left hip injury. She sought wage loss from the date of injury, as well as medical benefits. Claimant also filed a penalty petition. On January 27, 2012, employer filed a termination petition asserting that claimant was fully recovered and able to return to work without restrictions. All of the petitions were joined for purposes of hearing and decision.

The Workers' Compensation Judge determined that claimant's work-related injury consisted of left knee, left shoulder and left hand contusions as reflected in the May NTCP, but that those conditions had fully resolved. The WCJ also determined that claimant failed to provide evidence that any wage loss benefits were owed to her. Finally, the WCJ concluded that employer violated the Act by issuing the August 2011 NTCP and NCD, but no penalties were awarded inasmuch as no benefits were owed.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that employer's issuance of the August 2011 NTCP, in which it described the injuries as left labrum and biceps tears for which wage loss benefits were paid, estopped employer from denying liability for those injuries. The WCAB disagreed, noting that employer never accepted liability for the left labrum and bicep tear injuries because employer issued the NSTC and NCD relative to the August NTCP. The WCAB found no fault with employer's action, noting that there is no prohibition in the Act against an employer filing a subsequent NTCP upon receipt of new information concerning conditions that could potentially be related to a previously indentified, non-disabling, work-related injury.

On appeal to the Commonwealth Court, claimant argued that the WCJ and WCAB erred in concluding that that August 2011 NTCP did not convert to an NCP, such that employer was estopped from asserting that it was not liable for claimant's left labrum and biceps tear. Claimant maintained that, once an employer issues a subsequent NTCP and accompanies that issuance with the payment of work-loss compensation, such action results in a de facto acceptance of the injuries identified on the subsequent NTCP. The claimant relied upon the Court's decision in Mosgo v. WCAB (Tri-Area Beverage, Inc.), 480 A.2d 1285 (Pa.Cmwlth. 1984).

Employer responded by asserting that it was statutorily required to file the August 2011 NTCP under §406.1(a) of the Act which provides that: "the first installment of compensation shall be paid not later than the twenty-first day after the employer has notice or knowledge of the employe's *disability*" - not injury. Moreover, Mosgo stands for the proposition that where payments are made in lieu of workers' compensation indemnity benefits, without issuance of any Bureau documents, the employer is deemed to have admitted liability for the work injury. In contrast, here, employer specifically issued an NTCP, thereby reserving the right to dispute liability.

The Court agreed with the WCAB that the Act does not specifically allow for or disallow the filing of a subsequent NTCP, and that employer neither violated that Act nor is estopped from denying liability for claimant's left labrum and bicep tear conditions. The Court also agreed with employer that Mosgo is inapplicable as employer here did not make payments without issuing Bureau documents. To the contrary, employer filed the August 2011 NTCP in response to new information regarding disability resulting from alleged additional work injuries. But, by issuing an NTCP, followed by an NCD, employer, unlike the insurer in Mosgo, signaled to claimant that it did not accept liability for the alleged additional injuries.

The decision of the WCAB was affirmed.

****

Deborah Roundtree v. Workers' Compensation Appeal Board (City of Philadelphia), No. 1182 C.D. 2014, Filed May 8, 2015.

(Due Process—A WCJ's denial of a request for a continuance is not necessarily tantamount to a deprivation of one's due process rights.)

In October 2010, claimant filed a claim petition alleging that, in October 2007, while employed as a Forensic Technician, she sustained "major depressive disorder, recurrent, severe without psychotic features," when exposed to long-term harassment, a hostile work environment causing her occupational disease, and race, gender and age discrimination. Employer denied the allegations.

A hearing was held before the Workers' Compensation Judge on February 11, 2011, which claimant did not attend. Four more hearings were held on March 25, 2011, April 20, 2011, October 26, 2011 and December 14, 2011. Claimant attended the March 25th hearing without counsel. The WCJ continued the case and stated that another hearing would be held in 30 days, at which time claimant could testify and present medical evidence. Claimant did testify on April 20th, but offered no

(Continued from page 1)
ily injuries, death, murder, and violent acts in the normal course of their duties. Despite recognizing this, the WCJ found that the events did constitute an abnormal working condition as state troopers are not normally exposed to: "a mentally disturbed individual running in front of a Trooper's vehicle while he is operating the vehicle, for no apparent reason." Recognizing the mixed factual and legal test, the court deferred to the WCJ's determination, upholding the award. The court outlined an analysis which suggested a determination as to whether the mental injury arose from "a singular, extraordinary event occurring during [the claimant's] work shift."

Shortly after the decision in Payes II, a second court relied upon this analysis to find another "mental-mental" injury compensable. In PA Liquor Control Bd. v. Workers' Comp. Appeal Bd. (Kochanowicz III), 108 A.3d 922 (Pa.Cmwlth. 2014), a retail liquor store manager was robbed at gunpoint. Testimony established that the claimant had a gun pressed to his head and was tied up by the assailants. In his thirty-year career, this was the first time he was robbed. He alleged that, as a result of the incident, he suffered PTSD. Based on prior precedent, the WCJ initially found that claimant failed to show that the robbery was an abnormal working condition. The Judge specifically relied upon the fact that the claimant had been trained for robbery situations, and thus should have known a robbery was potentially part of the job. On appeal, the court vacated the order in light of Payes II.

In Murphy v. Workers' Comp. Appeal Bd. (Ace Check Cashing Inc.), 110 A.3d 227 (Pa.Cmwlth. 2015), a claim was filed by a check cashing manager who was also robbed at gunpoint. The court vacated the WCJ's order denying benefits, in part, because the WCJ "did not examine the actual events of the [armed robbery] to determine whether they represented 'a singular, extraordinary event occurring during [claimant's] work shift' that caused claimant's PTSD."

Based on the Payes II decision itself, as well as the subsequent precedent, it appears that the courts have begun to broaden the potential availability of compensation for "mental-mental" injuries. Specifically, these cases appear to have opened the door to compensation for those workers who have traditionally been denied benefits due to the nature of the job. While the test has always been factually based, it appears that Payes II now provides a WCJ with more latitude to award benefits for "mental-mental" injuries even where the job is one which may be subject to dangerous or disturbing environments.

While Payes II appears to have lowered the bar necessary to obtain compensation for "mental-mental" injuries, it has not destroyed the fundamental test outlined in Martin. To this end, the average claimant is stilled barred from seeking benefits for mental anguish caused as a result of his or her day-to-day job. Nonetheless, it can be expected that claimants, especially those in high risk positions, e.g., convenience and liquor store clerks, police officers, prison guards, etc., will begin to test the extent to which Payes II has opened the door to mental injuries previously barred.

medical evidence. The WCJ told claimant that he would continue the case for 90 days, but she would then need to be prepared to proceed. At the hearing on October 26th, claimant attempted to enter her medical records, but employer's counsel objected on the basis of hearsay. The WCJ provided claimant 30 days to determine if she would depose a medical expert or limit her claim to 52 weeks, in which case the medical records could be admitted. The final hearing was held on December 14, 2011. Claimant did not provide any additional evidence and had not scheduled the deposition of a medical expert. Employer's counsel moved to dismiss the case and the WCJ granted the motion.

Claimant appealed to the Workers' Compensation Appeal Board, which affirmed, noting that claimant had ample opportunity to obtain medical testimony to support her claim.

On appeal to the Commonwealth Court, claimant argued that, as a disabled layperson, she should have been provided with more time to present her evidence. The Court agreed that due process requires that a party be provided an opportunity to present its case; however, a WCJ's denial of a continuance is not necessarily tantamount to a deprivation of one's due process rights. A WCJ's decision to grant or deny a request for a continuance is discretionary and subject to review only upon a clear showing of an abuse of discretion. Here, it is clear that the WCJ did not abuse her discretion in denying further continuance of claimant's case. The dismissal of the claim petition was solely the result of claimant's repeated failure to adhere to the deadlines set forth by the WCJ, even when they were extended multiple times.

Claimant next argued that her own testimony was sufficient to support her claim and that medical evidence was not necessary. The Court noted that medical evidence may not be necessary in cases where the causal connection is obvious, but here claimant alleged a major depressive disorder due to long-term harassment, a hostile work environment and discrimination. Because a causal connection between the alleged injuries and the work activity is not obvious, medical evidence is required. The dismissal of the claim was upheld.

Thomson, Rhodes & Cowie, P.C.
1010 Two Chatham Center
Pittsburgh, PA 15219

TR&C

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

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

Prior issues are available on our web site at http://www.trc-law.com or upon request. Please direct inquiries to Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, hwr@trc-law.com.