WEBER GALLAGHER SIMPSON STAPLETON FIRES & NEWBY LLP

Pennsylvania Workers' Compensation Update
3rd Quarter 2012

SUPREME COURT CASE

Lillian Frazier v. WCAB (Bayada Nurses, Inc.), No. 56 EAP 2010 (Decided September 28, 2012)

Issue: Whether the sovereign immunity provisions of the Pennsylvania Workers' Compensation Act preclude an employer/carrier from recovering from an employee the proceeds obtained in a third party settlement against a government entity.

Answer: Yes.

Analysis: Claimant was injured when the SEPTA bus on which she was riding was involved in an accident. Claimant received workers' compensation benefits, filed a lawsuit against SEPTA, and ultimately received a third party recovery from SEPTA. Employer filed a petition asserting its right to subrogation. Claimant opposed the petition on the basis that SEPTA was immune from claims of subrogation or reimbursement from a claimant's tort recovery.

The WCJ agreed with Claimant and precluded the employer's subrogation. The WCAB reversed, holding that sovereign immunity provisions applied only to direct actions against the government entity and that the employer could recover from Claimant. The Commonwealth Court affirmed but the Supreme Court ultimately reinstated the Judge's decision and found that the employer did not have subrogation rights.

Conclusion: The Supreme Court found that Section 23 of Act 44 created a narrow exception to the Employer's absolute right to subrogation and precluded the employer in this case from obtaining a recovery from the Claimant.

COMMONWEALTH COURT CASES

Judy Smith v. WCAB (Caring Companions, Inc. and Uninsured Employers Guaranty Fund), 417 C.D. 2012 (Filed September 17, 2012)

Issue: Whether an employer is required to issue a new Notice of Ability to Return to Work following an employee's release to return to work by her own treating physician.

Answer: No.

Analysis: Claimant, while employed as a home health aide, was injured on October 29, 2008. Employer did not have workers' compensation insurance.

Claimant filed a Claim Petition followed by a Claim Petition for benefits from the UEGF. On January 11, 2009, Employer issued a Notice of Ability to Return to Work (NARTW) based on a medical release from claimant's family physician for her non-work related problems. On February 2, 2009, Dr. Mauthe, who was treating claimant for her alleged work injury, released her to return to light duty. Employer did not send a new NARTW. On April 16, 2009, Employer offered claimant light duty work and indicated that the job was within the restrictions of Dr. Mauthe. Claimant failed to return to work.

The WCJ granted the Claim Petitions against the Employer and the UEGF but modified Claimant's benefits based upon the job offer. Claimant appealed, alleging that the job offer was invalid as a NATRW had not been issued based upon Dr. Mauthe's release. The Board affirmed, rejecting Claimant's argument that the failure to issue a new NARTW rendered the job offer ineffective.

The Commonwealth Court affirmed. It first acknowledged that the Act requires the NARTW be issued "if the

insurer receives medical evidence that the claimant is able to return to work in any capacity. . . " However, the Court also reviewed cases in which a NARTW was not required, namely when the claimant was in a superior position to control timely notice. In each of those cases, unlike in this case, the claimant had actually returned to work

In the present case, the Court noted that the report of Dr. Mauthe releasing Claimant to return to work was actually provided by the Claimant to the Employer. The Court held that to require the Employer in this circumstance to issue a new NARTW would not serve the purpose of the NARTW.

Conclusion: This case concludes that an employer is not required to issue a NARTW where a claimant enjoys a superior position to control timely notice, as is the case where the claimant's own treating physician releases the claimant to return to work and claimant is made aware of the release by the physician. However, it is unclear whether the Court would have come to the same conclusion if the Employer had not sent the initial NARTW based on the family physician's initial medical release.

Caution: Despite the holding of this case, the safer way to handle new medical restrictions is to send out a NARTW each time there is a release from a new doctor or where the existing doctor provides updated restrictions. This practice will avoid any challenge that the requirements of the Act have not been meet.

Su Hoang v. WCAB (Howmet Aluminum Casting, Inc.), No, 2277 C.D. 2011 (Filed August 20, 2012)

Issue: Whether a Compromise and Release Agreement should be set-aside when it later became apparent that the Agreement did not provide for the payment of reasonable and necessary medical expenses up to the date of the Agreement.

Answer: No.

Analysis: Claimant entered into a C&R Agreement. At the hearing to approve the Agreement, the claimant was appropriately questioned as to his understanding of the Agreement and its effect on his release of past and future benefits. Claimant's son acted as a translator and claimant testified he understood the Agreement. The Judge approved the Agreement, finding that claimant understood its legal significance. Thereafter, an unpaid bill in the amount of $37,674.00 surfaced.

Claimant filed Review and Penalty Petitions, alleging that there was a mutual material mistake of fact when the WCJ approved the C&R Agreement in that the parties were unaware the C&R would not cover the payment of all prior reasonable, necessary and causally-related medical bills. The WCJ denied the petitions and concluded that there was no evidence that Employer was ever mistaken as to the non-payment of Claimant's prior medical bills. In support of this conclusion, the Judge noted that there was none of the "normal" language in the Agreement as to the payment of all reasonable, necessary and related medical bills and there was no discussion on the record at the C&R hearing regarding the payment of past medical bills.

The WCAB and the Commonwealth Court both affirmed. The Court held that it can only rescind a C&R Agreement based upon a clear showing of fraud, duress or mistake. In showing a material mistake, the burden is on the party seeking to set-aside the Agreement and the burden is even more stringent than in duress or fraud situations. The Court stated that evidence demonstrating a mutual mistake must be clear and precise. As Claimant failed to present clear evidence of such a mistake, the Court affirmed.

Conclusion: Courts will not set-aside a C&R agreement based upon either a mutual or unilateral material mistake of fact unless the party seeking to set-aside the agreement can show through clear and precise evidence that a material mistake of fact existed.

Caution: Employer's counsel must review the terms carefully to insure a full and complete release is achieved if that is the intent; that subrogation rights are protected or actually waived and that the agreement forecloses any and all claims. For example, an agreement to only end wage loss and future medical may expose the employer to a subsequent claim for specific loss unless the agreement is inclusive of any specific loss claims.

The Pennsylvania State University and The PMA Insurance Group v. WCAB (Rabin, Deceased), No. 2224 C.D. (Filed August 15, 2012)

Issue: (1) Whether an employee is engaged in the furtherance of an employer's business or affairs at the time of

injury, when the claimant is a stationary employee, but is off employer's premises at a working lunch.

Answer: (1) Yes.

Issue: (2) Whether an employee can sustain her burden of proving that a work-related injury was a substantial, contributing factor to his disability or death when a medical doctor does not specifically use this language.

Answer: (2) Yes.

Analysis: Claimant filed a Fatal Claim Petition seeking benefits due to the death of Decedent following an alleged work-related fall at an off-site working lunch. Decedent, who had a number of pre-existing medical conditions, fell while attending a working lunch with a colleague. They had been discussing work issues when Decedent got up to go to the salad bar, fell, and eventually died. The WCJ granted the petition, finding that Decedent was in the course and scope of employment at the time of the fall and crediting Claimant's medical expert that the fall resulted in Decedent's death.

Employer appealed asserting that (1) Claimant failed to meet her burden that Decedent was in the course of employment; and (2) Claimant failed to meet her burden of proving that Decedent's fall was a substantial, contributing factor in Decedent's disability/death.

The WCAB and the Commonwealth Court affirmed and agreed that Decedent was in the course of his employment when injured because he was engaged in the furtherance of Employer's business and affairs. Specifically, even though an off premises lunch is generally determined to be outside the course and scope, in this case, Decedent was only at the restaurant to go over work with a colleague, and his departure from the conversation to go to the salad bar was an inconsequential departure from that work activity.

The Court further held that a doctor need not use the magic words, "substantial contributing factor", to meet Claimant's burden of proof in a case where there are multiple causes. Instead, a doctor's opinion only needs to permit a valid inference that causation is present. In this case the claimant's expert related Decedent's death to the injuries sustained when he fell and the subsequent treatment he received.

Conclusion: A stationary employee can be injured during an off - premises lunch so long as the employee is actually engaged in the furtherance of the employer's business or affairs, and an inconsequential or innocent deviation from any such work duties will not remove an employee from the course of employment. In addition, an employee can meet his burden of proving that an injury was a substantial, contributing factor of disability/death through the use of medical evidence that allows for a WCJ to draw a valid inference that causation is present between the injury and the death/disability. The medical opinion does not need to use the magic words, "substantial, contributing factor", in order to meet the burden of proof.

MEDICARE UPDATE

Medicare is experiencing a significant delay in rendering determinations on set asides. We are seeing at least a seven month time frame for determinations with a longer waiting period for older submissions due to the transfer of files from the prior contractor to the current contractor. We have not received notice of a time frame for reduction of this delay.

Congratulations!

Our firm is proud to announce that our Workers' Compensation associate, Wendy Smith, was named one of The Legal Intelligencer's "Lawyers on the Fast Track" for 2012. The editorial staff of The Legal Intelligencer and a group of seven evaluation panelists selected 35 Pennsylvania attorneys as the future leaders of the state's legal community. All attorneys included in the list are under the age of 40 and are not only committed to the practice of law, but also to furthering the legal profession and being an exemplary member of their communities. The list of honorees was included in a supplement published in The Legal on September 25th.

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