MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

VOLUME 25 | NO. 6 | JUNE 2021

Delaware Workers' Compensation

By Paul V. Tatlow, Esquire | 302.552.4035 | pvtatlow@mdwcg.com

Paul V. Tatlow

Superior Court affirms Board's decision finding that the grass area where claimant fell into a sinkhole on her way into work was not the employer's premises.

Kim Browning v. State of Delaware, (C.A. No. K20A-03-001 VLM - Decided May 3, 2021)

The employer in this case was represented by my colleague, Keri Morris-Johnston, Esquire, who has successfully litigated this matter before the Board and now the Superior Court. The claimant worked as a judicial assistant (formerly known as a bailiff) in the Superior Court in Kent County. Her job duties included protecting the judges and visitors to the courthouse and controlling the assigned courtroom. The claimant did not have a designated parking area, unlike some employees, and she normally parked on Federal Street as close to the courthouse as possible, although she was not required to do so. On January 24, 2018, the claimant parked her car at 7:50 a.m., which was 10 minutes prior to her start time. Upon exiting her car, she walked behind it and stepped onto the grass where she felt the ground move. She picked up her back foot and then the ground opened beneath her, causing her to fall in the sinkhole. The claimant was taken by ambulance to the hospital for serious injuries. Importantly, the claimant had not yet crossed the threshold of the courthouse when the fall occurred and the grass area where the sinkhole opened belongs to the state of Delaware, but it was not the employer's property.

A Petition to Determine Compensation Due was filed on behalf of the claimant, and an evidentiary hearing took place before the Board where the sole issue was whether the claimant was acting in the course and scope of her employment. The claimant argued that the location of the fall was on the employer's premises, thereby making her eligible for benefits, but the employer argued to the contrary, that under the "going and coming" rule, the claimant was precluded from receiving workers' compensation benefits. The Board denied the claimant's petition and determined she was not acting in the course and scope of her employment when she fell because she was not on the employer's premises. In so ruling, the Board took into account that the employer exercised no authority over Federal Street, that the street parking spaces were open to all persons and the employer had no responsibility for maintaining the parking spaces on Federal Street.

On Appeal, the claimant asserted the Board had committed a legal error. The court referenced the "going and coming" rule, which precludes an employee from receiving workers' compensation for injuries sustained while

traveling to and from the place of employment. Since the claimant's work hours were from 8:00 a.m. to 4:30 p.m. and the fall occurred at 7:50 a.m. while the claimant was on her way to work, the court reasoned that the "going and coming" rule initially applied to bar any recovery. However, the claimant argued that under the "control by use" theory, the Board should have determined that she fell on the employer's premises. The "control by use" theory provides that parking lots not owned by the employer may still be part of the employer's premises when exclusively used by employees of the employer. The claimant cited two prior cases, but in analyzing them, the court found that both were distinguishable as there had been a finding of control of the parking area by the employer. The court reasoned that the Board completed a proper legal analysis of the "going and coming" rule, as well as the premises exception, and found there was insufficient evidence to support a finding that the employer exercised the requisite control over Federal Street where the claimant fell. The court noted that it was sympathetic to the claimant given her significant injuries and commented it was unfortunate that she found herself in both "a literal and legal sinkhole." Nevertheless, the court denied the appeal based on the existence of substantial evidence to support the Board's decision that the claimant was not in the course and scope of her employment when injured.

Florida Workers' Compensation

By Linda W. Farrell, Esquire | 904.358.4224 | lwfarrell@mdwcg.com

Linda W. Farrell

Applying the 1989 version of the workers' compensation statute of limitations law for the right to remedial care relating to insertion or attachment of prosthetic device.

DECA Manufacturing and Southern Owners Ins./Auto-owners v. Faye O. Beckett, DCA#: 19-3441, Panel Judges: Osterhaus, Jay, Kelsey

The claimant was injured in early 1990, therefore, the 1989 version of the workers' compensation law was at play. That particular version of the statute contained an exemption that stated: "However, no statute of limitations shall apply to the right for remedial attention **relating to** the insertion or attachment of a prosthetic device to any part of the body."

Following the claimant's injury, surgery was performed where screws and rods were inserted to stabilize her cervical spine. Based on the doctor's testimony, the Judge of Compensation Claims found that the screws and rods were "placed in the cervical spine to allow for a discectomy and laminectomy surgery to join two vertebral bodies," which was necessary to treat her compensable injury. The judge held that this equated to the claimant having a prosthetic device. The claimant argued that the statute of limitations would not apply to her, and she further contended that the employer/carrier did not meet their burden to show that it does apply.

With regard to the petition issue, the claimant sought pain management and a replacement mechanical bed without establishing that either were related to the screws and rods in her spine. The First District Court of Appeals pointed out that the fact that she may have a prosthetic device is not, standing alone, sufficient to prevent the statute of limitations from accruing. They contrasted this case with another case where bursitis treatment was not barred by the statute of limitations because the medical evidence showed it was related to the claimant's hip replacement as a result of his compensable work injury (*Peo v. Maas Brothers*, 634 So.2d 1130 (Fla. 1st DCA 1994). In this case, however, there was no evidence that either the prosthesis or the surgery required to insert it caused the need for the requested treatment and the benefits, as opposed to the underlying condition that necessitated the prosthesis in the first place.

The First DCA pointed out that, although continued use of a prosthetic would toll the current version of the statute of limitations, it does not toll the 1989 version given its inapplicability to remedial treatment "relating to" the prosthesis.

The First DCA also agreed with the lower court judge that mistaken payments do not toll the statute of limitations. The case was reversed in that the Judge of Compensation Claims erred by denying the employer/carrier a statute of limitations defense.

New Jersey Workers' Compensation

By Kiara K. Hartwell, Esquire | 856.414.6404 | kkhartwell@mdwcg.com

Kiara K. Hartwell

The Appellate Division affirms two decisions: A win for each side.

Pilone v. Cnty. of Middlesex, Docket No. A-1676-19, (Appellate Division, Decided Mar. 15, 2021) and *Soto v. Exclusive Coachworks, Inc.*, Docket No. A-2331-19, (Appellate Division, Decided Apr. 12, 2021)

In *Pilone v. Cnty. of Middlesex*, the petitioner appealed the dismissal of her workers' compensation claim. The Appellate Division affirmed the Judge of Compensation's decision, finding her injury was not compensable based on the premises rule. The petitioner, an assistant prosecutor, had an office located a block away from the prosecutor's main office. The petitioner regularly walked between these two offices. On March 21, 2017, she met a colleague in front of the main office to walk to a donut shop to discuss a case and meeting with a victim-witness later that day. She fell on the sidewalk and was taken by ambulance to a hospital.

She filed a workers' compensation claim, and the respondent confirmed she was an employee, but that her injury did not arise out of and in the course of employment. In a bifurcated trial, the judge first addressed if the injury was compensable. The petitioner argued it was common practice to meet colleagues outside the office to discuss cases and, in this case, she intended to grab some coffee, and she testified that she "probably" brought her file to discuss with her colleague. Her colleague testified they were meeting to discuss how to approach a victim-witness.

In a written decision, the judge found the petitioner's injury was not compensable as it did not arise out of and in the course of employment. The petitioner appealed, contending the judge should have recognize the special mission exception to the "premises rule."

The Appellate Division reviewed *de novo* as the petitioner only challenged the Judge of Compensation's legal conclusions. The premises rule limits an employer's liability to areas that the employer controls, such as by ownership, maintenance or exclusive use. It is a fact-sensitive inquiry to determine if an injury is compensable during ingress or egress to work. The petitioner argued her frequent travel between the offices, the courts, etc. was required by her job. However, in rejecting her argument, the Appellate Division noted the respondent had no control over the sidewalk where the petitioner fell. In addition, the Appellate Division pointed out the petitioner failed to prove the respondent directed her to have her meeting in the donut shop. The Appellate Division declined to contradict public policy that an employer is only liable for injuries that occur in employer-controlled areas.

In *Soto v. Exclusive Coachworks, Inc.*, the respondent appealed an order by a Judge of Compensation, requiring it to pay for the petitioner's knee replacement and temporary disability benefits. The Appellate Division affirmed, confirming the judge's finding of a causal relationship between the work accident and the need for treatment based on Dr. Horowitz's opinions.

On October 3, 2017, the petitioner was struck by a hammer on the inside of his left knee while employed by the respondent as an auto repairman. He saw Dr. Innella, and after obtaining an MRI, Dr. Innella recommended an arthroscopic procedure. The workers' compensation carrier had the petitioner evaluated by two orthopedists, Dr. Nordstrom and Dr. Colizza. Both agreed arthroscopic surgery was necessary and causally related to the October 3, 2017, incident. Dr. Colizza performed the arthroscopic surgery in July 2018. The petitioner's condition did not improve, and Dr. Colizza initially opined the work injury and surgery "accelerated" the need for a total knee replacement.

However, after review of prior medical records, he changed his opinion. The petitioner had undergone left knee surgery after a 1995 incident. He also suffered another injury to his left knee in 2009 as a result of a motor vehicle accident and had undergone an arthroscopy and partial meniscectomies in 2010. The petitioner saw Dr. Innella for a second time and in 2011, he opined the petitioner "may need a knee replacement." After 2011, the petitioner had no treatment to his left knee until the October 3, 2017, incident.

In April 2019, a motion for medical and temporary benefits was filed, seeking the knee replacement surgery and temporary disability benefits. During the four-day trial, testimony was taken of the petitioner and two experts. On behalf of the petitioner, Dr. Horowitz testified that he evaluated him in January 2018 and February 2019. He stated that Dr. Innella's opinion that the petitioner "may need a knee replacement" was not a definitive diagnosis. He also found the petitioner's condition could have been aggravated in the nine months between the injury and surgery. After reviewing the records, he opined there was a causal relationship between the injury and need for total knee replacement.

On the other hand, Dr. Colizza testified for the respondent, noting his opinion changed on causation after reviewing prior medical records. Specifically, he opined that the petitioner's need for the knee replacement was a result of his osteoarthritis and pre-existing injuries of 1995 and 2009. Afterwards, the judge issued an order for the respondent to provide the knee replacement and temporary disability benefits from the date of the surgery. In doing so, the judge noted the petitioner had an arthritic left knee at the time of the work incident, but that the employer takes an employee as he/she is found. The respondent acknowledged the 2017 incident resulted in a work injury and that its expert, Dr. Colizza, confirmed the nine months without treatment and surgery possibly aggravated the osteoarthritis. In finding Dr. Horowitz's opinion more credible, the judge reasoned it was probable the work injury and nine months without treatment accelerated the need for the total knee replacement, though it was not the sole reason.

The respondent appealed, contending the judge should have weighed Dr. Colizza's opinions more, as he was the treating doctor, rather than Dr. Horowitz's. The Appellate Division disagreed, noting the Workers' Compensation Judge is in the best position to weigh the credibility of experts as the trier of fact and the decision was well-supported by the record. In this case, both experts agreed the petitioner needed a total knee replacement; that as a result of the 2017 incident, he required arthroscopic surgery, at a minimum; and his underlying arthritis was exacerbated by the 2017 incident. The Appellate Division found no basis to disturb the judge's finding that Dr. Horowitz was more credible than Dr. Colizza.

Stop Work Orders and Workers' Compensation Compliance

Maintaining compliance with Florida's workers' compensation law is a costly burden on Florida employers. The state's Division of Workers' Compensation employs investigators and auditors to identify, audit and fine employers who are not in compliance with state laws. This burden is magnified when an employer is forced to defend itself against an enforcement action from the state. Our Florida workers' compensation attorneys are experienced in representing and protecting employers' interests and have achieved successful results for our clients in matters involving stop work orders, business records requests and penalty assessments from the state of Florida. We work with our clients to refute charges of noncompliance from the state, lift stop orders and identify bases for reductions in penalty assessments so employers can get back to doing what they do best, running their businesses.

We are committed to protecting Florida's employers. We advise our clients of legal developments impacting workers' compensation compliance for employers and are here to assist in navigating this specialized area of the law.

For more information, please contact:

Heather Byrer Carbone, Esquire
904.358.4225 | hbcarbone@mdwcg.com

Linda Wagner Farrell, Esquire
904.358.4224 | lwfarrell@mdwcg.com

Kelly M. Scifres, Esquire
904.358.4229 | kmscifres@mdwcg.com

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire | 610.354.8263 | fxwickersham@mdwcg.com

Francis X. Wickersham

Commonwealth Court holds that Act 111 applies to injuries that occurred prior to its enactment and that the employer is credited for payment of pre-Act 111 temporary total disability benefits and partial disability benefits relative to their obligations under Act 111 for IREs.

Johnny Pierson, Jr. v. WCAB (Consol Pennsylvania Coal Company LLC); 423 C.D. 2020; filed Feb. 9, 2021; Judge Crompton

The claimant sustained a work injury on August 13, 2014. The employer acknowledged the injury as compensable via a Notice of Compensation Payable (NCP) on December 21, 2018. The employer filed a modification petition based on a December 19, 2018, Impairment Rating Evaluation (IRE) performed on the claimant. This was a post-Act 111 IRE. Act 111 became law effective October 24, 2018.

The claimant raised constitutional challenges to the IRE. The Workers' Compensation Judge granted the employer's modification petition and indicated the constitutional issues were beyond his jurisdiction to decide. The claimant appealed to the Appeal Board, which affirmed.

On appeal to the Commonwealth Court, the claimant argued that Act 111 was unconstitutional and could only be applied to claims that originated on or after the date of the passage of the present IRE mechanism, October 24, 2018. The claimant further argued that the IRE was invalid because it occurred before he had received 104 weeks of temporary total disability benefits after the enactment of Act 111. The employer countered by arguing that it was clear that § 3(1) of Act 111 states that an employer seeking an IRE after 104 weeks of temporary total disability benefits would be given credit for any weeks of temporary total disability benefits paid prior to Act 111.

The court agreed with the employer and dismissed the claimant's appeal. In doing so, the court noted that the General Assembly made it clear in Act 111 that weeks of temporary total disability and partial disability paid by an employer/insurer prior to the enactment of Act 111 would count as a credit against an employer's new obligations under Act 111. Citing their prior holding in the case of *Rose Corporation v. WCAB (Espada)*, 238 A.3d 551 (Pa. Cmwlth. 2020), the court said that the General Assembly, in enacting Act 111, through the use of very careful and specific language, provided employers/insurers with credit for the weeks of compensation, whether total or partial in nature, previously paid.

Primarily because of the employer's ownership and control of the availability and use of its trucks, the decedent driver of a tow truck was an employee at the time of his work-related fatality.

Berkebile Towing and Recovery v. WCAB (Harr, State Workers' Insurance Fund and Uninsured Employer's Guaranty Fund); 220 C.D. 220; filed May 10, 2021; Judge Fizzano Cannon

The decedent's fiancé filed a fatal claim petition, alleging the decedent was working for the employer as a tow truck operator when he became pinned between two vehicles, causing him to suffer fatal injuries. The employer and the Uninsured Employer's Guaranty Fund (UEGF) answered the petition, denying liability and that there was an employer-employee relationship.

At the Workers' Compensation Judge level, evidence was presented on a number of factors concerning an employment relationship or lack thereof, including the tow trucks, tools, work schedule, job duties, training and supervision, uniforms, payment, independent contractor agreements and workers' compensation insurance. The judge granted the petition, finding the existence of an employer-employee relationship. On appeal, the Appeal Board affirmed.

At the Commonwealth Court, the employer argued that based on the existence of a written independent contractor agreement, pay and tax arrangements, the lack of a regular schedule or actual supervision of towing

and service jobs, and the decedent's freedom to pursue work or income from other sources, the judge and the Board erred in finding that the decedent was an employee.

Conversely, the claimant argued that the judge correctly found an employment relationship, citing a prior tow truck case, *Sarver Towing v. WCAB (Bouser)*, 730 A.2d 61 (Pa. Cmwlth. 1999) wherein the Commonwealth Court held that the employer exercised substantial control over the claimant and the manner in which he performed his work by limiting his use of trucks to work its tow jobs, requiring him to be on call 24/7, and maintaining their ability to take back the truck and equipment at any time if not satisfied with the work. The court further noted in that decision that it was the existence of the right to control the manner of a claimant's work which was critical, even when that right was not exercised.

The court concluded that the Workers' Compensation Judge properly weighed all of the evidence and properly concluded that, although there was not micro-management of any individual tow job, the employer maintained extensive dominion over the decedent's work day. The judge noted that the employer's name and information was highly visible on the trucks and the employer exercised a significant degree of control over how drivers could and could not use the trucks. For example, drivers could not loan the trucks out or use them for other jobs, and if at any time a driver declined more calls than the employer preferred, the employer could stop assigning calls to the driver and reclaim its truck. The judge found that these facts overrode the existence of other facts mitigating in favor of contractorship, such as a written independent contractor agreement and payment by job rather than by time. The Commonwealth Court held that they were bound by the judge's factual and credibility determinations in this fact-specific case.

News

Ashley Eldridge (Philadelphia, PA) was a speaker at the Dispute Resolution Institute's Person Injury Potpourri, presenting "COVID-19 and Workers' Compensation."

Outcomes

John Swartz (Harrisburg, PA) successfully appealed the workers' compensation judge's decision denying a termination petition. The parties had entered into a Compromise and Release Agreement regarding the claimant's future benefits only. The judge found that the employer had presented sufficient evidence for a termination of benefits and accepted the employer's medical witness. However, the judge denied the termination petition on the basis that the Compromise and Release Agreement settled all benefits. John specifically reserved the right for a decision on the termination petition, and the Compromise and Release Agreement specifically stated it only applied for future benefits. The Appeal Board agreed and overturned the judge's decision. The decision will allow the employer to obtain a significant recovery from the Supersedeas Fund on past-due benefits that were paid for over a year, including medical and indemnity benefits.

John was also successful in defending a claim petition. The petition was actually granted, but only for a closed period of disability of a little over three months. Benefits were then terminated by the Workers' Compensation Judge on the basis that the claimant failed to present any ongoing evidence of injury. Furthermore, the judge commented that the evidence presented from the employer's medical expert was credible and persuasive, that the claimant was fully recovered from the left shoulder sprain/strain, despite the treating physician recommending ongoing treatment and an MRI study, which had not been completed. In addition, John secured a credit for unemployment compensation benefits paid to the claimant, which reduced by half the indemnity benefits owed to the claimant.