

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
DECEMBER 2014 AT A GLANCE
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SUBSTANTIAL EVIDENCE/PSYCHIATRIC CLAIM

- Substantial evidence is such relevant evidence a reasonable person might find sufficient to support the WCJ's findings. In determining whether a finding of fact is supported by substantial evidence, this Court must consider the evidence as a whole, view the evidence in a light most favorable to the party who prevailed before the WCJ, and draw all reasonable inferences which are deducible from the evidence in favor of the prevailing party.

Therefore, the WCJ's granting of the claimant's Claim Petition was not supported by substantial evidence where the WCJ granted the claimant's petition based upon finding, amongst other things, that the claimant began crying uncontrollably after having a meeting concerning the hanging of a noose at the work place, yet the record reflected that the claimant actually cried uncontrollably after a meeting to discuss a co-employee who would not work under the claimant because the claimant was unsafe in cranes.

The WCJ's findings were also not supported by substantial evidence where she found the testimony of the claimant's medical expert credible as supported by the facts of the case where that expert did not testify and made no reference to the alleged noose incident of the use of the "N" word".

- In psychic injury cases, the record must contain unequivocal medical testimony to establish the causal connection between the injury and employment. Due to the highly subjective nature of mental injuries, an injury's occurrence and cause must be specifically delineated. A claimant seeking benefits for a psychic injury must meet a higher standard for causation by proving that (1) he suffered a psychic injury and (2) his psychic injury was more than a subjective reaction to normal working conditions, i.e., his working conditions were 'abnormal.'

A doctor's reference to claimant's reference to Claimant's stress reaction and atypical depression after experiencing "stressful and overwhelming work conditions" is not substantial evidence that abnormal working conditions existed, or that Claimant's condition resulted from those working conditions which the WCJ referred to as abnormal where the factual predicate did not provide substantial evidence that abnormal working conditions existed.

In this matter none of the claimant's medical evidence specifically delineated the cause of Claimant's injury, or proved that Claimant's "injury was more than a subjective reaction to normal working conditions."

Frog, Switch & Manufacturing Company v. WCAB (Johnson), No. 149 C.D. 2014 (Decision by Judge Covey, December 4, 2014) 12/14

STATUTORY EMPLOYER

- Although the Statutory Employer provision at Section 302(a) of the Act references its applicability to "the removal, excavation or drilling of soil, rock or minerals, or (ii) the cutting or removal of timber from lands", Section 302(a) of the Act is not limited to scenarios involving the movement of soil, rocks, minerals, or timber.

Section 302(a), on its terms, also pertains to contractual delegations of aspects of an employer's regular or recurrent business activities.

Therefore, the defendant, who was a licensed realtor and investor and did construction rehabilitation work on residential properties, was found liable as statutory employer pursuant to Section 302(a) of the Act where he hired a person, who did not have workers' compensation, to perform Construction work on a property that he was rehabbing and that person hired the claimant who was injured performing the job on the rehab.

- Although the defendant was a licensed realtor, the WCJ did not err in finding that 302(a) was applicable because rehab was a regular part of his business where the record reflected that he was in the business of rehabilitating properties for resale and that he hired the person who hired the claimant to perform work that was a regular part of his business.
- A workers' compensation Claimant must satisfy the criteria set forth in either Section 302(a) or Section 302(b) Act in order to hold an entity liable as a statutory employer. As distinguished from Section 301(b), Section 302(a) does not require a claimant to demonstrate that the alleged statutory employer occupied or exercised control over the premises where the injury occurred.

Zwick v. WCAB (Popchocoj), No. 428 C.D. 2014 (Decision by Judge Friedman, December 11, 2014) 12/14

AVERAGE WEEKLY WAGE/SUSPENSION

- A claimant is no longer entitled to be paid compensation premised upon concurrent wages where following the injury the claimant no longer worked for the concurrent employer due to a voluntary resignation that was not related to the work injury.

Therefore, the WCJ committed an error upon denying the employer's Petition for Suspension where the claimant wrote a letter of resignation to her concurrent employer August 2, 2006 indicating she was resign due to personal reasons with the intention to resign on December 31, 2006, e-mailed her concurrent employer email dated November 4, 2006 she was going to voluntarily resign her teaching position because she wanted to go back to school and complete her Masters in Nursing effective December 31, 2006 and she suffered a work injury, during the period she was still concurrently employed on November 24, 2006.

The fact that the claimant indicated in her resignation that she would be available to work for the concurrent employer again in fall 2007 did not preclude the employers entitlement to a suspension because claimant resigned from her concurrent employment prior to her work injury and did so without the guarantee of being rehired in the future.

The claimant was entitled to wages based upon concurrent employment on the date of the injury but she was not longer entitled to wages based upon the same concurrent employment at the date of her effective resignation, which was December 31, 2006.

- Section 413 of the Act allows an employer to suspend workers' compensation benefits when an employee quits voluntarily because the employee's loss of earnings was not caused by her injury, but by her voluntary decision to abandon employment.

Keller v. WCAB (UPMC Presbyterian Shadyside), No. 370 C.D. 2014 (Decision by Judge McGinley, December 15, 2014) 12/14

PSYCHIATRIC CLAIM

- The Commonwealth Court reverses its prior decision after its decision was vacated and remanded by the Supreme Court for reconsideration in light of Payes v. Workers' Compensation Appeal Board ([PA] State Police) 79 A.3d 543, 552 (Pa. 2013) and now finds that the WCJ's findings described "a singular, extraordinary event occurring during Claimant's work shift" that caused Claimant's psychiatric injury and those findings supported the WCJ's legal conclusion that Claimant, who was robbed by a masked man brandishing two guns and had a gun put to his head while managing employer's liquor store, established that the specific armed robbery here was not a normal working condition.

The fact that the claimant received training involving workplace violence and that robberies had occurred at Employer's other locations does not in and of itself render the armed robbery a normal working condition where the evidence indicated that robbery was an unusual event and the mental injury was the result of an "a singular extraordinary event".

- Where a claimant seeks WC benefits via Claim Petition, Claimant has the initial burden of proving that he has suffered a mental injury within the course and scope of his employment, and the injury results in a loss of earning power, i.e., disability.

However if the claim alleges mental injury due to mental stimulus the Claimant next has the additional burden of proving that the mental injury he has suffered is other than a subjective reaction to normal working conditions.

- 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, 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 benefits for a psychiatric injury is therefore twofold;

First, he must prove by objective evidence that he has suffered a psychiatric injury; and

Second, he must prove that such injury is other than a subjective reaction to normal working conditions. Even if the claimant adequately identifies actual (not merely perceived or imagined) employment events which have precipitated psychiatric injury, the claimant must still prove the events to be abnormal before he can recover.

- The question of whether working conditions are normal is a mixed question of law and fact.

Thus appellate review of this question a two-step process of reviewing the factual findings and then the legal conclusion.

First step- Issues of Fact- The means whether the claimant was subjected to abnormal working conditions must be evaluated on a case-by-case basis because certain mixed questions are more heavily weighted toward fact, while others are more heavily weighted toward law.

The WCJ finding as to the specific facts of the alleged incident is an issue of fact, to which deference must be given by the appellate courts. The review of the WCJ's factual findings is limited to determining whether they are supported by

the evidence and these findings may be overturned only if they are arbitrary and capricious.

Where the WCJ issues findings in favor of the claimant, the appellate court reviewing this evidence must make all reasonable inferences deducible therefrom in the light most favorable to Claimant.

Second Step- Abnormal working conditions- The issue of whether the claimant has established 'abnormal working conditions' is a question of law

For actual working conditions to be considered abnormal, they must be considered in the context of specific employment.

When considering the question of whether a working condition is normal, while there is no bright line test or generalized standard, Pa. Supreme Court has provided multiple iterations of a standard that can be employed, such as requiring the claimant to establish that he was subject to conditions to which an employee in his position is not normally subject," and that his is a "reaction to a highly unusual and singular event."

The factual finding of "a singular, extraordinary event" can be the factual predicate for the legal finding of an abnormal working condition.

Abnormal working condition cases must focus on the particular incident in question when determining whether that incident was a "singular extraordinary event," even where the claimant is employed in a highly stressful or dangerous position.

- Certain events are considered normal working conditions associated with employment, such as the loss of employment, an offer of a position with less responsibility, the retroactive application of performance standards followed by a negative performance evaluation, or a promotion with more responsibility, and mental injuries caused by such events are not compensable under the Act.

PA Liquor Control Board v. WCAB (Kochanowicz), No. 760 C.D. 2010 (Decision by Cohn Jubelirer, December 30, 2014) 12/14