December 2015 Case Law Update

Davis v. WCAB (Pa. Social Services Union & Netherlands Ins. Co.), No. 216 C.D. 2015

Issue: Whether the Insurer is entitled to subrogation against Claimant's recovery of uninsured motor benefits from a non-negligent co-employee's personal auto policy for which the employer did not pay.

Answer: Yes

Facts: Claimant was a passenger in a motor vehicle owned and operated by her co-worker when she was involved in a motor vehicle accident while in the course of her employment and sustained injuries. The operator of the other motor vehicle was unknown. Pursuant to the Act, the Insurer (Netherlands) paid claimant wage loss and medical benefits totaling $89,785.22.

Claimant then filed an uninsured motor claim with her co-worker's auto insurance carrier(Allstate). In conjunction with this, Netherlands and Employer asserted their lien for wage loss and medical benefits paid. Claimant settled her claim with Allstate for $25,000.00 and the Employer/Insurer asserted their lien by filing an offset petition.

Procedural History:

The WCJ held Netherlands was entitled to subrogation of the Allstate settlement proceeds, noting that because the insurance had been purchased by someone other than the Claimant, Netherlands was entitled to subrogation in accordance with 319 77 P.S. §671 of the Act.

The WCAB affirmed and Claimant filed Petition for Review with the Commonwealth Court arguing Netherlands was not entitled to subrogation against Claimant's recovery of uninsured motorist benefits.

Analysis:

The court provided a history of uninsured motorist and subrogation claims. Notably in Standish v. American Manufacturers Mutual Ins. Co., 698 A.2d (Pa. Super 1997) the Court held that an Employer's workers' compensation carrier could *not* subrogate against motor benefits received by the claimant from the claimant's *personal* automobile insurance policy. Standish, 698 A.2d at 601-02. The court emphasized that this decision did not violate the Commonwealth's prohibition against 'double recovery' of Workers' Compensation and Tort benefits because the claimant did not receive damages in tort, but just an award of benefits based upon the insurance policy he purchased.

The Standish matter was essentially affirmed in American Red Cross v. WCAB (Romano), 745 A.2d 78 (Pa. Commw. 2000) when it found an employer could not subrogate against proceeds received by the claimant from an uninsured/underinsured policy paid for by the claimant. The court held that Section 319 of the Act puts limits on subrogation rights to the extent they can only be recovered from suits against third party tortfeasors.

American Red Cross was then distinguished in Hannigan v. WCAB (O'Brien Ultra Service Station), 860 A.2d 632 (Pa. Commw. 2004) which held that where a claimant has purchased his own insurance which then pays for his injuries due to the premiums he had bad, he will be entitled to double recovery which would otherwise be barred by Section 319 of the Act. However, *the same cannot be said of a claimant who recovers under a policy of insurance purchased by a third party such as a co-worker or customer*.

This court applied the reasoning laid out in Hannigan when they found an employer has the right to subrogation when: 1) the employer has paid for the policy; and 2) where a third party, such as a customer, or a co-worker has paid for the policy. In this matter, since Claimant's co-worker paid the automobile policy in question the employer was entitled to subrogate against Claimant's settlement proceeds.

Swigart v. WCAB (City of Williamsport), No. 493 C.D. 2015

Issue: Whether a medical testimony can be found to be incompetent because the expert refused to acknowledge the occupational causal presumption.

Answer: No.

Facts / Procedural History: Claimant filed a claim petition alleging a chronic pulmonary disease after 22 years working as a firefighter. Claimant also alleged the chronic pulmonary disease also caused him to stop working. The WCJ denied the claim petition, finding that asthmatic bronchitis does not disable the claimant from working as a firefighter therefore concluding Claimant does not benefit from the presumption that the lung condition was a work related occupational disease. WCJ also held claimant's medical evidence regarding the relationship of his lung condition to his work was equivocal.

Claimant appealed to the WCAB which affirmed the WCJ's decision. Claimant then appealed to Commonwealth Court.

Analysis:

Claimant first argued Defendant's medical testimony to be incompetent because the expert witness refused to recognize the causal presumption given to firefighters with a disease of the heart and lungs.

The court stated that they have repeatedly held that expert testimony which rejects any causal relationship between exposure to the hazards of firefighting and lung disease will be deemed incompetent. Marcks v. WCAB (City of Allentown Dep't. of Pub. Safety, Bureau of Fire), 547 A.2d 460 (Pa. Commw. 1988). *However*, if a medical expert states they acknowledge that the presumption exists but believes that its use as a risk factor is not as medically compelling, this does not render the doctor's expert opinion to be incompetent. Dillon v. WCAB, 853 a.2D 413, 418-19 (Pa. Commw. 2004).

In this matter, Defendant's medical expert stated he was familiar with the presumption that when a firefighter who develops diseases of the heart and lungs it is then presumed the disease was caused by firefighting *however,* the doctor stated that he rejected that presumption because there are a variety of factors on a case by case basis which will allow a doctor to determine the cause of a condition.

The court found that the Doctor did not testify that a causal relationship does not exist between exposure to the hazards of firefighting and lung disease, but instead stated that if a person has other significant causal factors, firefighting will not be attributed as the primary cause of the lung disease. The court therefore found that because the doctor "acknowledge[ed] that the presumption exists; but he believed its use as a risk factor for lung disease is not medically compelling this does not render his expert opinion incompetent." *Quoting* Dillon, 853 A.2d at 419.

Ziegenfuss Drilling Inc., v. WCAB (Dailey), No. 1975 C.D. 2014 (Unreported)

Issue: Whether a Claimant who was provided with a company vehicle and was travelling home at the conclusion of the work day can be deemed to be in the course and scope of employment.

Answer: Yes

Facts: Claimant was a North Carolina resident working as a driller in Pennsylvania having travelled to over 20 different drilling sites during the course of his employment. He did not maintain a residence in Pennsylvania while working for Defendant but stayed at numerous motels at the Defendant's expense. He was allowed the use of a company car for personal reasons as well. The Claimant had concluded work for the day, and was travelling to the next town to stay in a rented room where the new job site would be when he was involved in a motor vehicle accident.

Procedural History: The WCJ Concluded that the Claimant was in the course and scope of his employment at the time of the motor vehicle accident. Specifically, the WCJ noted that the claimant was on a "special mission" and was using the company vehicle when the accident occurred and was therefore not engaged in any personal activities but was in fact in the course and scope of his employment when the accident occurred. The WCAB affirmed, stating claimant was in the course and scope of his employment at the time of the injury.

Analysis: The court provided a breakdown and history of the course and scope of employment issue for travelling employees. Generally, when a travelling employee is injured setting out on the business of the employer it will be presumed he is furthering the employer's business at the time of the injury. Investors Diversified Services v. WCAB, 520 A.2d 958 (Pa. Commw. 1987). The Act is liberally construed for travelling employees and the term 'course of employment' is made more broad for said employees. Aluminum Co. of America v. WCAB (Howar), 380 A.2d 958 (Pa. Commw. 1977). In order to rebut this presumption an employer must show Claimant's action were so far removed from usual employment they constitute abandonment from employment. Port Authority of Allegheny County v. WCAB (Stevens), 452 A.2d 902 (Pa. Commw. 1982).

In this matter, the court found the facts established that Claimant was a travelling employee at the time of his injury and therefore was entitled to the *broad* presumption that he was injured during the course and scope of his employment when he was injured while going to his rented room after performing a job for the employer. Since there was no evidence to rebut that presumption in the facts, the WCJ did not err in finding Claimant was in the course and scope of his employment at the time of the injury.

Pioneer Drilling v. WCAB (Crowley), No. 792 C.D. 2015 (Unreported)

Issue: Can an employer rightfully terminate an employee an employee for cause for violation of safety standards who suffers a work injury as a result of the workplace safety violation?

Answer: No, unless the employer is able to identify a specific rule or order that was violated which caused the injury

Facts: Claimant stated he was injured on the job when a piece of pipe landed on him. The employer terminated him the next day. The employer provided evidence that Claimant had received a formal reprimand from his employer a number of months prior and that in connection with the work injury in question, the employer also provided the claimant with a written reprimand and terminated him the next day. Employer stated it was ordinary practice for them to terminate an employee who had two accidents within a 7-9 month timeframe.

Procedural History: The WCJ found that claimant was terminated for cause on 9/2/11 for violating the employer's safety procedures two times within a nine-month period and thus his loss of earnings were attributable to his own misconduct, not the work injury.

On Appeal, the WCAB found the WCJ erred in the finding that Claimant was terminated for cause. Relying on Eat'n Park Rest. v. WCAB (Skinner-Ford), 737 A.2d 359 (Pa. Commw. 1999) the Board stated that an employer cannot terminate an employee because of a work injury. The employer appealed.

Analysis:

The court reaffirmed the ruling in Eat'n Park Rest. which was summarized to state that "if a claimant proves his wage loss is attributable to the work injury, he is entitled to benefits. They did however note that if the employer is able to show that wage loss is attributable to another cause, such as termination for misconduct, or economic turndown, then those benefits are not warranted. BJ's Wholesale Club v. WCAB (Pearson), 43 A.2d 559 (Pa. Commw. 2012). The primary issue then became whether the WCJ's finding that the claimant was terminated for violating the employer's safety procedures two times within a nine-month period was supported by the substantial evidence or if the WCAB impermissibly substituted its own version of the facts.

The court stated the question to be asked in matters such as these is whether or not there is evidence to support the findings actually made, not whether the record contains evidence to support

findings other than those made by the WCJ. Minicozzi v. WCAB (Indus. Metal Plating Inc.), 873 A.2d 25, 29 (Pa. Commw. 2005).

The claimant must establish a causal connection between the work injury and his wage loss in order to have a compensable claim. BJ's Wholesale Club, 43 A.2d 559. Once this burden is met, the employer can show the loss of earning power was a result of something other than a work injury, such as misconduct unrelated to the injury which resulted in termination. The misconduct must be of such nature that amounts to bad faith, or a lack of good faith on part of the claimant. Ibid.

Additionally, Employer has an affirmative defense that claimant's actions were removed from the course and scope of employment because of violation of a positive work rule/order. To be successful in this defense the employer must show: 1) injury was caused by violation of the order; 2) the claimant knew of the order; and 3) the order implicated an activity not connected with the claimant's duties. Miller v. WCAB (Millard Refrigerated Serv, and Sentry Claims Serv.), 47 A3d 206, 212 (Pa. Commw. 2012).

In applying the rules, the court found that although the employer testified the claimant was terminated because the injury was his second safety violation of the year, there was no evidence to suggest Claimant did anything wrong other than sustain the injury. The court noted that the employer failed to identify a specific rule or policy to prove claimant's violation of the policy caused the injury. Further, the court found that claimant's conduct did not amount to bad faith or lack of good faith. For these reasons the court found the WCJ's finding was not supported by substantial evidence and the WCAB properly determined Claimant sustained a compensable injury.