THE HARTWELL
LAW OFFICES, LLP

# FEBRUARY 2017 CASE LAW UPDATE

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**Lutheran Senior Services Management Company v. WCAB (Miller),** 154 A.3d 892 (Pa. Cmwlth February 15, 2017)

**Issues**: Whether the coming and going rule applied to a claimant who was in route to work based upon special circumstances.

**Answers**: No.

**Analysis**: The instant case is extremely fact specific. The coming and going rule asserts that a claim is not compensable in the injury occurs during the period that the claimant is commuting to and from work. The claimant was a manager at a residential housing community. On the day of the injury the claimant was utilizing sick time when he received a call from his employer to address an issue with the security cameras. The claimant was injured in a MVA on the way into work at the employer's request.

The WCJ concluded that the claimant driving to work that day even though it was his normal fixed place of employment was considered to be a on a special mission because of the unique circumstances. The WCAB affirmed the WCJ Decision but for a different reason. They asserted that it was special circumstances of his employment.

On appeal the Commonwealth Court noted that generally, for an injury sustained in a commute to or from work, disability is not compensable, with four recognized exceptions: (1) the employment contract includes transportation to and/or from work; (2) the claimant has no fixed place of work; (3) the claimant is on a special assignment or mission for the employer; or, (4) special circumstances are such that the claimant was furthering the business of the employer.

The fourth exception "special circumstances" applies during a commute where: (1) the employee is requested by the employer to come in; (2) the request is for the convenience of the employer or in furtherance of its business; and (3) the trip is not simply for the convenience of the employee. Further, the request by the employer can be directly expressed, or implied, to qualify as a special request by the employer.

Here, Claimant was ill and intended to take a sick day. Claimant normally would have been on call for emergencies, but he would not have been expected to come to work when ill and taking a sick day. The other employee who usually responded to issues about the security cameras, was not available, and when Employer specially requested that Claimant come in, Claimant acquiesced to that request. Claimant was "on the clock" from the moment he picked up the phone at home and fielded employer's request to fix the security cameras. The Commonwealth

Court confirmed that the special circumstances surrounding Claimant's injuries fall within an exception to the "coming and going rule,".

**Conclusion and Practical Advice**: This is a very fact specific case. However, it should be noted that if an injury occurs during the claimant's travel to and from work this is generally not compensable but there are exceptions to the coming and going rule.

**Department of Labor and Industry v. WCAB (Lin and Eastern Taste),** 155 A.3d 103 (Pa. Cmwlth February 17, 2017)

**Issues**: 1). Whether claimant doing remodeling work for a restaurant was an employee of the restaurant.
2). Whether the Construction Workplace Misclassification Act is applicable.

**Answers**: No and No.

**Analysis**: The claimant was injured while performing remodeling work at a restaurant that had not yet opened. Based on the testimony, the WCJ found that the critical facts were essentially undisputed and made the following findings:

a. Eastern Taste is a restaurant, not a construction business.
b. The Claimant was hired to do remodeling before the restaurant had ever opened.
c. The most experienced person on the job in the construction business was the Claimant.
d. The owner's husband was in charge of what needed to be done.
e. The Claimant was paid on a per diem basis to do it along with three others.
f. The Claimant used his own tools and van. The owner's husband provided tools and materials as well.

The WCJ further determined that: (i) Claimant was not an employee of Eastern Taste Restaurant; (ii) Claimant's work was not in the regular course of the business of Eastern Taste; and (iii) Claimant's employment was casual in nature. The WCJ concluded that Claimant failed to sustain his burden to prove that he was an employee of Eastern Taste. The WCJ also determined that Claimant was not considered an employee under the Construction Workplace Misclassification Act (CWMA). The WCJ reasoned that the CWMA does not apply as Eastern Taste is not in the construction industry.

The Board reversed the WCJ's decision and remanded the matter to the WCJ for necessary findings and conclusions for an award of compensation. On remand, the WCJ entered an order, granting Claimant's Claim Petition and awarding benefits to Claimant. The Fund then appealed to the Board and requested that the Board's January 6, 2015, opinion be made final for the purpose of appealing to the Commonwealth Court.

The Commonwealth Court who examined the history of the case and determined that given the inferences addressed by the WCJ the Board erred in reversing the Decision of the WCJ.

The Commonwealth Court further examined the CWMA which concerns the construction industry and affects the determination of who is an independent contractor versus an employee under the WC Act. *See* sections 2 & 3 of the CWMA, 43 P.S. §§ 933.2, 933.3. Section 2 of the CWMA, 43 P.S. § 933.2. Because Eastern Taste is not in the construction industry, the CWMA does not apply to the circumstances here.

**Conclusion and Practical Advice**: Again, this is a very fact specific situation. However, it serves as a good reminder that there are often applicable laws to consider outside of the WC Act. Knowing about the CWMA may serve useful in evaluating a case.

**Green v. WCAB (US Airways),** 155 A.3d 140 (Pa. Cmwlth February 24, 2017)

**Issues:** Whether the WCJ violated the statutory requirement to issue a reasoned decision when she failed to address evidence that supported the claimant's testimony and claimant's medical expert's opinion.

**Answer:** No.

**Analysis:** The instant litigation has a long and protracted history of review petitions, suspension petitions and a series of appeals and remands. The basis for the current litigation arose from the claimant filing a reinstatement petition in 2008 seeking benefits for a 1993 injury. In 2009 the WCJ found the claimant to be not credible and her physician to be unpersuasive. After appeals to the Board and Commonwealth Court, in 2011 the Commonwealth Court remanded the case for additional findings by the WCJ. In a 2014 remand decision by the WCJ she again issued new findings. In this Decision the WCJ again found the claimant to be not credible based upon demeanor, exaggerated pain complaints and inconsistent testimony. The WCJ found the claimant's expert to be credible in that she suffered a worsening of her condition but rejected his testimony that the worsening of her condition caused her to be disabled from her pre-injury position.

On appeal back to the Commonwealth Court, Claimant argues that: 1) the WCJ's decision is not a reasoned decision, as required by Section 422(a) of the Act, 77 P.S. § 834; 2) the WCJ capriciously disregarded unrebutted testimony; 3) the WCJ exceeded the scope of the remand order; and the WCJ improperly applied a heightened burden of proof in deciding the reinstatement petition.

Claimant asserts that the WCJ's decision is not reasoned because the WCJ failed to address evidence that supports her testimony and Dr. Carson's opinions. However, the Commonwealth Court citing prior precedent asserted that the claimant's argument fails as the WCJ is only required to make finding necessary to resolve the issues raised by the evidence and relevant to the Decision. The WCJ is not required to address all of the evidence presented.

Claimant next argues that the WCJ capriciously disregarded the claimant's expert's testimony. More specifically, Claimant contends that the WCJ erred in rejecting the expert's medical testimony on the basis that he relied in large part on Claimant's subjective, exaggerated complaints. The Commonwealth Court explained that the claimant was misinterpreting prior case law. The Court stated that the WCJ rejected the claimant's expert's opinion because it was based in large part on information provided by Claimant that was rejected by the WCJ. The WCJ was justified in such a determination.

**Conclusion and Practical Advice:** This case provides a reminder to truly evaluate the nature of the Decisions rendered by the Judge when seeking an appeal. This case also provides further credence that the WCJ can deny a Petition based upon the lack of credibility of the claimant as long as the Judge explains the basis for this finding.