Miller v. WCAB (Millard Refrigerated Services and Sentry Claims Service), No. 2306 C.D. 2011 (Commw. Ct., June 22, 2012)

Issue: Whether the Employer presented substantial evidence that the Claimant violated a positive work order.

Answer: Yes. The testimony offered by the Employer was found to be credible by the WCJ. The WCJ clearly explained his reasons for finding the Employer's witnesses more credible and persuasive than the Claimant.

Analysis: Claimant filed a Claim Petition seeking benefits for an injury that allegedly occurred on August 12, 2009. He alleged that he injured his left foot while riding a forklift, which was in the course and scope of his employment. He was employed as a pallet jack operator working second shift (4:00 p.m. to 12:30 a.m.) on August 12, 2009 when he decided to ride a forklift around the floor. He acknowledged during cross-examination that he was not certified to drive the forklift and knew that he was not permitted to ride the forklift, but drove it because it was "fun to drive."

Claimant drove the forklift to the punch-out area of the warehouse, but crashed into a pole on the way. His foot had been sticking out the passenger compartment when he hit the pole and it was unfortunately crushed upon impact. Claimant knew that he was not to extend any part of his body beyond the platform of the forklift.

Claimant testified that the lead man for his shift observed him driving the forklift, but never told him that he was not permitted to do so. He testified that it was common practice for other employees to drive the forklift despite their lack of certification.

Employer's witness testified that Claimant was hired to run a pallet jack, not a forklift. He testified that Claimant knew that he was not permitted to operate the forklift because he was not certified. Claimant was not assigned to the forklift, was not permitted to practice on the forklift, and had not been observed operating the forklift.

The WCJ found Employer's witness more credible and persuasive than Claimant. The WCJ credited the Employer's witnesses where the testimony was inconsistent with Claimant's. The WCJ write in his Findings of Fact:

> Claimant's activities went beyond mere negligence, and are analogous to the example of a brakeman who operates an engine when he has no duty to do so, runs a red signal and is injured. *Dickey v. Pittsburgh and Lake Erie R.R. Co.*, 146 A. 543 (Pa. 1929). Therefore, I find that claimant was not in the course and scope of his employment at the time of the injury.

The Commonwealth Court laid out the burden of proving the affirmative defense of a violation of a positive work order, stating that the Employer must prove: 1) the injury was, in fact, caused by the violation of the order or rule; 2) the employee actually knew of the order or rule; and 3) the order or rule implicated an activity not connected with the employer's work duties. Because the WCJ articulated the basis for his decision, and

that substantial evidence supported his decision, the Board's Decision to affirm the denial of the Claim Petition was affirmed.

Conclusion and Practical Advice: This case nicely articulates the burden placed on an employer when asserting the affirmative defense of a violation of a positive work order. It should be remembered that, although the activity Claimant is engaged in in on the employer's premise and occurs during the scheduled shift, it may be outside the course and scope of the employment, as it was here, ***if*** the employee was told to refrain from a certain activity ***and*** the employee ignores the rule or order.

Despite this affirmative defense, one should always be aware that a claimant can still prevail in a case even where he/she is outside the course and scope of employment if the injury is a result of a condition of the premises under the control of the employer. If, in this case, the forklift he was impermissibly driving hit a hole in the floor and threw him from the forklift resulting in injury, such an injury would likely be compensable even though the act of driving the forklift took him outside the course and scope of employment.

Marnie v. WCAB (Commonwealth of Pennsylvania/Department of Attorney General), No. 1583 C.D. 2011 (Commw. Ct., June 7, 2012)

Issue: Whether the actuarial calculation utilized by the Employer's expert (an actuary from the State Employee's Retirement System) comports with Section 204(a) of the Act and is therefore proper when calculating an off-set for a State employee who receives a disability pension from SERS.

Answer: Yes. The calculation utilized by SERS, which was upheld by the Pennsylvania Supreme Court in Harvey, is proper because it is otherwise impossible to determine which funds were contributed by the employer and which funds were contributed by the employee.

Analysis: Claimant sustained a work injury and was receiving benefits pursuant to an Agreement for Compensation. Subsequently, Claimant began receiving a disability pension from the State Employees Retirement Service. Employer notified Claimant through the Notice of Offset that is would offset, or reduce, Claimant's workers' compensation benefits by the amount of the SERS benefit attributable to Employer's contribution. Claimant filed a Review Petition challenging Employer's entitlement to offset in the amount on the Notice of Offset.

Both the Employer and the Claimant offered expert testimony from actuaries. Employer's actuary testified that the actuarial calculation used by SERS is the proper method of calculating the proper amount for the offset. Claimant's expert testified that the SERS calculation impermissibly credits Employer for investment returns in excess of 4% on projected refunds to employees who will separate from state service before their retirement benefits have vested. There is a guaranteed 4% return on these investments. The SERS actuarially assumes an investment rate of return of 8.5% on total accumulated contributions- 4.5% is the retained investment returns. SERS does not include the unaccounted 4.5% retained investment return as employee-contributed funds. Instead, it is included in the Employer-contributed portion and is thusly included in the offset amount. Claimant contended that process is in violation of Section 204(a) of the Act, which renders Employer's actuarial evidence neither competent, nor legally sufficient.

The Commonwealth Court found that the Act, as interpreted by the Pennsylvania Supreme Court in Department of Public Welfare v. WCAV (Harvey), 992 A.2d 270, 276 (2010), does not explicitly require an employer to prove the amount of its actual contributions. The Supreme Court also noted that SERS, the administrative agency charged with administering the state pension system, supports use of the actuarial calculation in dispute to determine employer funding of pensions, which militates in favor of allowing use of same. The Supreme Court concluded that there is nothing to preclude the sound use of actuarial principles in evaluating employer funding of defined-benefit pension plans.

The Commonwealth Court analyzed the evidence presented below, noting that the burden is on the Employee to show that the materiality and relevance of the assertion that retention in the Fund of investment returns of non-vesting employees impacted the extent to which Employer

contributed to Claimant's pension. Because the Claimant could not overcome that burden, the Court affirmed the WCAB's decision.

Conclusion and Practical Advice: The lesson to be learned from this case is twofold. First, pension offsets need not be calculated in certain terms. Rather, actuarial calculations are permissible where it would otherwise be impossible to calculate the exact amount of employer's contribution. Second, the holding effectively lays out the evidence a state employer must present in order to prevail in these types of cases. Pages 10-13 summarize the most important portions of Employer's expert's opinion and the method used to arrive at that opinion.

Wagner v. WCAB (Anthony Wagner Auto Repairs & Sales, Inc.), No. 1527 C.D. 2011 (Commw. Ct., June 4, 2012)

Issue: Whether a WCJ has the authority to decide a contract dispute where an executive of a corporation executes paperwork and voluntarily makes himself exempt from coverage under his workers' compensation insurance policy.

Answer: No. The WCJ was barred from interpreting the terms of a contract. The WCJ was also not permitted to enforce the provisions of The Insurance Company Laws of 1921.

Analysis: Claimant was the sole proprietor of an auto repair business, which precluded him from being covered under the business's workers compensation insurance policy. Prior to being injured, Claimant incorporated the former sole proprietorship and make himself the sole shareholder of the Subchapter S corporation. The corporation employed only two people, a mechanic's assistant and a mechanic (Claimant). His existing policy holder was made aware that he incorporated and as such, an agent prepared the requisite paperwork. Upon notification by the Claimant's girlfriend, who was instructed by Claimant to handle the matter, that the main concern was the cost of the policy (it could not go up) and that the claimant would be taking the exemption, the agent sent the Claimant a packet of documents, including Form LIBC-509, Application for Executive Officer Exemption and Form LIBC-513, Executive Officer's Declaration. The agent made it clear that Claimant could be included in coverage, but that his earnings would be calculated in with the employee's earnings and premiums would go up accordingly.

The WCJ accepted Employer's evidence, mainly the testimony of the agent, which showed that the proper documentation for executive exemption was signed by the Claimant. The WCJ found that the Claimant should be held to have executed the documents with knowledge of their effectiveness. The WCJ properly refrained from construing the terms of the insurance contract as being beyond his jurisdiction to do so.

The Commonwealth Court affirmed, noting that the WCJ properly refrained from delving into issues beyond his responsibility. The Court specifically rejected the argument that the contract was invalid to exempt Claimant from his policy, noting that substantial evidence existed to show that the LIBC forms were properly executed: this was found to be within the WCJ's ability to rule on.

Conclusion and Practical Advice: A WCJ may only decide issues within his/her jurisdiction, and contract construction is not one. This case stands for the proposition that an executive can exempt him or her-self from workers' compensation insurance, as stated in the Act.