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SIGNIFICANT CASE LAW DEVELOPMENT IN THE PENNSYLVANIA WORKERS' COMPENSATION ACT

By MITCHELL I. GOLDING, ESQ.
KENNEDY, DANIEL & LIPSKI

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1. COLLATERAL ESTOPPEL/RES JUDICATA

Technical *res judicata* precluded a claimant from litigating a second petition to review the Notice of Compensation Payable that sought to add cervical injuries where the claimant had filed a prior petition to Review the Notice of Compensation Payable to add as a compensable injury a definitive description of her shoulder injury and that stipulation was adopted by the WCJ in an order that granted the claimant's First Review Petition.

This is because technical *res judicata* may be applied to bar claims that were actually litigated as well as those that should have been litigated and the record showed that the claimant should have litigated the issue relating to the causal relationship of her alleged cervical injury to her work injury when she filed her First Review Petition since the claimant testified that she experienced pain in her neck immediately following her work injury and her medical expert testified that the claimant had several complaints at the time he initially treated her.

Therefore, since claimant attempted to raise the issue related to her cervical spine by her Second Review Petition and that issue should have been litigated during the early prior petition to review, her second Review Petition was barred.

Under the doctrine of technical *res judicata*, often refer to as claim preclusion, when a final judgment on the merits exists, a future suit between the parties raising the same cause of action is precluded. In order for a technical *res judicata* to apply, there must be:

1. Identity of the things sued upon or for;
2. Identity of the cause of action;
3. Identity of the persons and parties to the action;
4. Identity of the quality or capacity of the parties suing or sued.

The doctrine of collateral estoppel, often referred to as issue preclusion, is designed to prevent relitigation of an issue in a later action, despite the fact that the later action is based on a cause of action different from the one previously litigated. Collateral estoppel applies where:

1. The issue decided in the prior case is identical to the one presented in the later case;
2. There was a final judgment on the merits;
3. The party against who the doctrine is asserted was a party or in privity with a party in the prior case and had a full and fair opportunity to litigate the issue; and
4. The determination in the prior proceeding was essential to the judgment.

Weney v. WCAB (Mac Sprinkler Systems, Inc.), No. 678 C.D. 2008 (Decision by Judge Jubelirer, November 26, 2008).

FACTS

On October 21, 2005 the claimant suffered a compensable work injury that was recognized by the employer as being a left shoulder strain.

On March 2006 the claimant filed his first Petition To Review Compensation Benefits Seeking to amend the Notice of Compensation Payable to include a left shoulder injury in the nature of a tear of the anterior labrum with large glenohumeral joints effusion, tendinitis or a partial tear of the supraspinatus/infraspinatus, minimal impingement and biceps tenosynovitis.

The parties entered into a stipulation to which they agree that the Notice of Compensation Payable should be amended to include the additional shoulder injuries asserted by the claimant.

On March 19, 2006 the WCJ issued a decision and order adopting the stipulation and granting the claimant's first petition to review. Neither party appealed the order.

On March 30, 2006, the claimant filed a second Petition To Review seeking further to amend the NCP to include four herniated discs at C2-3, C3-4, C4-5 and C5-6. The claimant testified in support of his petition and presented his medical expert. The employer presented a medical expert in defense against the claimant's petition.

The WCJ granted the claimant's second Petition To Review.

The employer appealed the WCJ's decision to the board arguing that the WCJ had erred in failing to address employer's defenses of technical *res judicata*/or collateral estoppel.

The Board reversed the WCJ's decision finding that it was barred by technical *res judicata*.

The claimant's appeal followed.

ISSUE

Whether the claimant's second Petition To Review was barred by the doctrine of technical *res judicata* because the claimant alleged that he suffered the cervical injury at the time of his injury and had the opportunity to raise and litigate that issue at the time he filed and resolved his first petition to review?

HOLDING OF THE COMMONWEALTH COURT

Technical *res judicata* may be applied to claims that were actually litigated as well as those matters that should have been litigated.

Although the claimant did not actually litigate the specific issue of neck or cervical spine injury during the earlier proceedings on his first petition to review, the record of evidence clearly established that he should have done so. The claimant testified that he experienced pain in his neck following his work injury and his doctor testified that the claimant complained of neck pain at the time of initial treatment.

Therefore, since claimant attempted to raise a matter through his second Petition To Review that should have been litigated during the earlier proceedings on his first Petition To Review, claimant's Petition To Review was barred by technical *res judicata*.

PRACTICAL APPLICATION

This is a very useful decision that could be used to defend against multiple petitions to review.

A wise claimant's counsel will add the paragraph, to a stipulation that resolves the Petition to Review, which states that the stipulation does not preclude either party from having the right to file a review to allege additional injuries at a future date.

2. CREDIT/REMAND/APPEAL

Although a Board's remand order that is interlocutory is generally not appealable, there are two circumstances under which a Board's interlocutory order may be appealed to the Commonwealth Court pursuant to Pennsylvania Rule of Appellate Procedure Rule 311(App.):

(1) an order of a … government unit remanding a matter to an administrative agency or hearing officer for execution of the adjudication of the reviewing tribunal in a manner that does not require the exercise of administrative discretion; or

(2) an order of a … government unit remanding a matter to an administrative agency or hearing officer that decides an issue which would ultimately evade appellate review if an immediate appeal is not allowed.

The employer was permitted to appeal the Board's Interlocutory Order pursuant to 311(f)(2) where the employer successfully argued that denial of its right to appeal the Board's remand of a WCJ's Order that denied the claimant's Petition to Review, wherein the WCJ granted the employer's offset against the claimant's workers' compensation entitlement based upon the finding that the pension fund realized a 8.5 percent rate of return from the claimant's contributions, would have resulted in denying the employer's right to appeal the WCJ's initial decision resulting any evasion of appellate review.

An employer can use an expert actuarial opinion to establish its contribution to an employee's retirement annuity. This is because an employer may not be able to provide evidence of actual contributions by an individual member to a defined benefit pension plan. Employer's expert evidence, if accepted as credible, is legally sufficient to

establish the extent to which employer funded claimant's defined benefit pension for purposes of offset.

Commonwealth of Pennsylvania/Department of Public Welfare v. WCAB (Harvey), No. 802 C.D. 2008 (decision by Judge Leavitt, November 26, 2008.)

FACTS

Claimant suffered a compensable work injury on July 14, 2001.

On June 10, 2005 the employer issued a Notice of Workers' Compensation Benefit Offset, informing claimant that employer was taking a credit against claimant's disability compensation commensurate with its contribution to claimant's retirement benefits.

In September 2005, claimant filed a Review Petition to challenge employer's Offset.

The employer presented two witnesses. One was a licensed actuary. The actuary testified that upon calculating the claimant's contribution she took an 8.5 percent assumed rate of return. She noted that it was impossible to specify the exact earnings on a single member's contribution in any given year. She noted in a good year the plan might realize a 15 percent return but in a bad year it might realize a negative return on its investments. Therefore, an actuary testified that 8.5 percent annual return was reasonable.

The actuary agreed that it was a problem to take into account actual levels of investment return in the determination of the benefits under the defined benefit pension plan where the benefit is not and should not be a function of the results of investments of assets underlying the plan.

The claimant presented no evidence in support of his Review Petition.

The WCJ denied the claimant's petition and credited the unrefuted testimony of the employer's witnesses and concluded that the assumed 8.5 percent return of the claimant's contribution was appropriate. Upon reaching its conclusion, the WCJ cited the Commonwealth Court decision Pennsylvania State University v. WCAB (Hensal), 911 A.2d. 225 (Pa. Cmwlth. 2006) for the proposition that defined benefit plans are a subject particularly amenable to expert testimony.

The claimant appealed this matter to the WCAB who remanded it back to the WCJ. The Board reasoned that the remand was warranted because the WCJ's findings of fact were insufficient. The Board found that the WCJ failed to make critical findings of fact required by the Court in Department of Public Welfare/Western Center v. WCAB (Cato), 911 A.2d. 241 (Pa. Cmwlth. 2006). In Cato, the Commonwealth Court held that an expert actuarial opinion can be used to establish the employer's contribution to employee's retirement annuity.

Notwithstanding the Board's remand order the employer filed an appeal to the Commonwealth Court. The claimant argued that the appeal should be crossed because the Board's order was interlocutory.

ISSUES

1. Whether the employer was barred from filing an appeal to the Commonwealth Court because the Board's order was interlocutory?

2. Whether WCJ's decision was supported by substantial evidence based upon the evidence presented by the employer?

HOLDING OF THE COMMONWEALTH COURT

Although a Board's remand order that is interlocutory is generally not appealable, there are two circumstances under which a Board's interlocutory order may be appealed to the Commonwealth Court pursuant to Pennsylvania Rule of Appellate Procedure Rule 311(App.):

> (1) an order of a … government unit remanding a matter to an administrative agency or hearing officer for execution of the adjudication of the reviewing tribunal in a manner that does not require the exercise of administrative discretion; or
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> (2) an order of a … government unit remanding a matter to an administrative agency or hearing officer that decides an issue which would ultimately evade appellate review if an immediate appeal is not allowed.

The employer was permitted to appeal the Board's Interlocutory Order pursuant to 311(f)(2) where the employer successfully argued that denial of its right to appeal the Board's remand of a WCJ's Order that denied the claimant's Petition to Review, wherein the WCJ grated the employer's offset against the claimant's workers' compensation entitlement based upon the finding that the pension fund realized a 8.5 percent rate of return from the claimant's contributions, would have resulted in denying the employer's right to appeal the WCJ's initial decision resulting any evasion of appellate review.

An employer can use an expert actuarial opinion to establish its contribution to an employee's retirement annuity. This is because an employer may not be able to provide evidence of actual contributions by an individual member to a defined benefit pension plan. Employer's expert evidence, if accepted as credible, is legally sufficient to establish the extent to which employer funded claimant's defined benefit pension for purposes of offset.

PRACTICAL APPLICATION

An employer who defends against a Challenge Petition filed following it takes an offset for a pension should always use an Actuary to offer expert evidence that addresses the extent the claimant contributed to the fund. The employer responsible for paying workers compensation is only entitled to an offset to the extent it contributed to the pension.

3. CREDIT/RETROSPECTIVE –PROSPECTIVE APPLICATION

A WCJ has jurisdiction to decide whether the employer properly took a credit for pension benefits received by the claimant notwithstanding the existence of a Collective Bargaining Agreement (CBA) because the mere existence of a CBA does not preclude a WCJ from adjudicating a petition filed concerning the receipt of workers' compensation benefits. This is because disputes concerning workers' compensation benefits are to be adjudicated by a WCJ and the employer's credit for pension benefits would have lessened the benefits that the claimant was receiving.

Section 204(a), enacted by Act 57 and effective as of June 24, 1996, only applies to injuries sustained on or after June 24, 1996. This section states "the benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employee shall also be credited against the amount of the award."

Prior to the enactment of Act 57, a Credit was allowed for pension benefits paid in lieu of compensation in the event the claimant sustained a work related injury prior to the effective date of Act 57. However, rather than taking the credit pursuant to a statutory mandate, the employer was required to show its entitlement to credit on a case by case basis. The factors to be considered include the employee's contribution to the pension, if any; whether the benefits can be depleted; whether pension payment amounts would vary depending on years of service; whether the pension ceased upon recovery from the disability, and the pension vesting period. Payments are in relief of inability to labor.

All employers whether self insured or privately insured, may seek an offset under Section 204(a) of the Act.

Bingnear v. WCAB (City of Chester), No. 335 C.D. 2008 (Decision by Judge Flaherty, November 19, 2008).

FACTS

This matter came to litigation as a result of the claimant's Petition to Review Benefit Offset. Although no date of injury was established on the record it appears that the claimant might have suffered his injury in 1991.

The employer entered its evidence document entitled "Article 143-Police Pension Fund" and a copy of the Collective Bargaining Agreement between the City of Chester and the Fraternal Order of Police.

A portion of the Collective Bargaining Agreement provided that "the City can claim as an offset from the aforesaid pension the following items: (a) 100 percent of whatever Workers' Compensation Benefits retired police officer is receiving as a result of his or her service connected disability."

The employer further entered into evidence a document indicating the claimant was receiving a monthly pension of $3,891.04.

The WCJ upon reviewing these documents granted the Claimant's Petition to Review a Benefit Offset finding that the offset taken by the employer was in violation of Section 204(a) of the Act.

The WCAB reversed the WCJ finding that that Section 450(a) of the Act, added by the Act of June 24, 1996, permits agreements allowing for benefits that supplement the Act and prohibits those that diminish a claimant's right to workers' compensation benefits. The Board went on to state that that the CBA is not contrary to Section 450 of the Act because "it is not an agreement that diminishes Claimant's entitlement to workers' compensation benefits. Rather, it is an agreement that diminishes his right to receive pension benefits."

The claimant, upon appealing to the Commonwealth Court, argued that the employer should be precluded from reducing his pension benefits by 100 percent of his workers' compensation benefits because employer only funded 31.73 percent of the pension benefits. The employer argued that the WCJ lacked jurisdiction to resolve any disputes regarding the Collective Bargaining Agreement because in language of Section 450 of the Act that provides:

> Any employer and a recognized or certified and exclusive representative of its employee may agree by collective bargaining to establish certain binding obligations and procedures relating to the workers' compensation…

ISSUE

Whether the WCJ has jurisdiction to rule upon the pension credit dispute since the parties had entered into a Collective Bargaining Agreement?

Whether Section 204(a) Section 450 would apply to this case if the claimant's injury occurred prior to the enactments of Act 57 on June 24, 1996?

HOLDING OF THE COMMONWEALTH COURT

The WCJ did have a jurisdiction to resolve this dispute. The amount of Workers' Compensation Benefits the claimant received is within the jurisdiction of the WCJ and the Board. It is true that neither the Board nor WCJ has subject matter jurisdiction over proceedings that relate to benefits other than Workers' Compensation Benefits. It is also true that the interpretation of the Collective Bargaining Agreement reserved interpretation to the grievance arbitrator. Where the WCJ is responsible for addressing an alleged entitlement under the Act, he may be permitted to rule upon questions that would ordinarily be outside his jurisdiction.

Moreover, the mere existence of a Collective Bargaining Agreement does not preclude the WCJ from the adjudicating a petition filed effecting the receipt of workers' compensation benefits. Accordingly, the WCJ has jurisdiction.

Moreover, the WCJ was not really required to interpret the language contained in the Collective Bargaining Agreement. Rather, he simply relied on the expressed language contained therein. Moreover, since the claimant was arguing that he was receiving less benefits that he was otherwise entitled to under the Act the WCJ did have a jurisdiction.

It is questionable however whether Section 450 of the Act would apply to this matter because it appears the claimant's injury might have occurred in 1991 and Section 450 of the Act was not added until five years after the claimant's injury. Moreover, it is clear that Section 204(a) of the Act only applies to injury sustained after the effective date of Act 57, which was June 24, 1996.

PRACTICAL APPLICATION

Although the WCJ does not a jurisdiction over a severance or pension issue provided for in a Collective Bargaining Agreement the WCJ does have a jurisdiction over issues that involve a diminishment of the receipt of workers' compensation.

This decision reminds us that the date of injury was controlling upon determining whether or not Section 204(a) of the Act would apply. Section 204(a) applies to any injury that occurred on or after June 24, 1996.

4. JURISDICTION/CREDIT

The amount of workers' compensation benefits a claimant receives is within the jurisdiction of the WCJ and the WCAB. Although neither the Board nor a WCJ have subject matter jurisdiction over proceedings that relate to benefits other than workers' compensation benefits, where the WCJ is responsible for addressing an alleged entitlement under the Act, it may be permitted to rule upon questions that would ordinarily be outside his jurisdiction. The mere existence of a Collective Bargaining Agreement does not preclude a WCJ from adjudicating a petition filed concerning the receipt of workers' compensation benefits. WCJ's are permitted to rule on issues that would ordinarily be outside of their jurisdiction when addressing an alleged entitlement to workers' compensation benefits.

Therefore, the WCJ had jurisdiction to rule upon a claimant's Review Petition that challenged a pension offset that the employer took against the claimant's workers' compensation benefits pursuant to a Collective Bargaining Agreement stated that the employer was entitled to an offset for 100 percent of whatever workers' compensation benefits the claimant was receiving as a result of his service connected disability, which differed from the language of Section 204(a) which provides the employer directly liable for the payment of compensation and the benefits from the pension plan is entitled to the

offset to the extent funded by the employer directly liable for the payment of the compensation.

Upon interpreting Section 204(a) the claimant's own funds should not be used by an employer to satisfy its workers' compensation obligation.

Jones v WCAB (City of Chester), No. 621 C.D. 2008 (decision by Judge Flaherty, November 12, 2008).

FACTS

The claimant was a Police Officer who suffered a compensable work injury.

The employer and the claimant's union entered into a Collective Bargaining Agreement that expressly stated:

The city can claim as an offset from the aforesaid pension the following items:

a. 100 percent of whatever workers' compensation benefits a retired police officer is receiving as a result of his or her service connected disability".

The claimant subsequently filed a Petition To Review Benefit Offset.

The only evidence entered was the Collective Bargaining Agreement.

The claimant argued that the employer took an improper credit pursuant to the Collective Bargaining Agreement because Section 204(a) limits the pension offset to the extent the pension was funded by the employer directly liable for the payment of compensation.

The WCJ found that the relevant provisions of the Collective Bargain Agreement were contrary to the Pennsylvania Workers' Compensation Act and further held that the Collective Bargaining Agreement could not supersede the Act. Accordingly, he granted the claimant's Review Petition and held that any offset taken by the employer must be taken in accordance with the Act.

The WCAB reversed finding that the only issue before the WCJ was whether claimant's pension benefits were being properly reduced pursuant to the Collective Bargaining Agreement. The Board concluded that the WCJ lacked jurisdiction to entertain the claimant's Review Petition because neither the board nor a WCJ had subject matter jurisdiction over proceedings that relate to disability benefits other than workers' compensation benefits.

The claimant's appeal followed.

ISSUE

Whether the WCJ has jurisdiction to determine the employer's right to the offset where the parties entered into a Collective Bargaining Agreement that addressed the employer's offset entitlement?

HOLDING OF THE COMMONWEALTH COURT

The WCJ did have jurisdiction to entertain the claimant's Review Petition. The issue before the WCJ was whether employer was permitted to offset claimant's pension benefits in accordance with the Collective Bargain Agreement, or, in the alternative, whether any offset must be taken in accordance with the Act.

Section 204(a) of the Act specifically provides employer means to offset workers' compensation benefits when claimant also receives a pension. Section 450 of the Act, under which the WCJ can conduct hearings consistent with Section 401 of the Act, authorizes Collective Bargain Agreements concerning benefits supplement to workers' compensation benefits. Given the fact that these statutory provisions deal with the issues presented before the WCJ, the WCJ had jurisdiction to entertain the claimant's petition.

The Board and WCJ's are charged with a duty of guarding the workers' compensation system and to resolve disputes concerning the amount of indemnity benefits a claimant is due to receive. The issue raised by claimant's petition concerned whether the employer was entitled to the 100 percent offset pursuant to the collective bargaining agreement, which will be greater than the offset it would be entitled to under the Act. Consequently, this matter fell within the WCJ's jurisdiction. Moreover, WCJs are permitted to rule on issues that would ordinarily be outside of their jurisdiction when addressing an alleged entitlement to workers' compensation benefits.

PRACTICAL APPLICATION

The Commonwealth Court did not address a specific issue of whether Section 204(a) pension credit provision superseded the collective bargaining agreement. It should be remembered that Section 450 of the Act states "nothing in this section shall allow any agreement that diminishes an employee's entitlement to benefits as otherwise set forth in this section. Any agreement in violation of this provision shall be null and void."

The Commonwealth Court remanded this matter back to the WCJ.

5. OCCUPATIONAL DISEASE/FIREFIGHTER PRESUMPTION/REMAND

The presumption set forth by Section 301(e) offers a procedural or evidentiary advantage to a claimant who proves an occupational disease and employment in an occupation where such disease is a hazard. The presumption applies once the WCJ determines that the claimant, who is employed as a firefighter, was disabled. After the claimant meets his or her burden under Section 301(e) claimant becomes entitle to a non-conclusive presumption that the occupational disease arose out of employment.

An employer may rebut the presumption through competent medical expert testimony.

The WCJ should restrict remand proceedings to the purpose indicated by the Board's remand order.

Repash v. WCAB (City of Philadelphia), No. 114 C.D. 2008 (Decision by Judge Smith-Ribner, November 10, 2008).

FACTS

The claimant was employed by the City of Philadelphia as a firefighter for 39 years.

In December 2001 the claimant began experiencing chest pains upon exertion. On January 27, 2002 the claimant experienced an episode of chest pain while at work and he was subsequently admitted to the hospital where he underwent an angioplasty.

On February 12, 2004 the claimant filed a Claim Petition under Section 108(o) of the Worker's Compensation Act averring an occupational disease in the nature of heart disease occurring in the course of his employment as of January 28, 2002.

Section 108(o) is an occupational disease section that applies to diseases of the heart and lungs resulting in temporary permanent total disability or partial disability or death after four years or more of service in firefighting for the benefit of the safety of the public.

A claimant who alleges an occupational disease pursuant to Section 108(o) is entitled to a presumption under Section 301(e) that states:

> *If it be shown that the employe, at or immediately before the date of disability, was employed in any occupation or industry in which the occupational disease is a hazard, it shall be presumed that the employe's occupational disease arose out of and in the course of his employment, but this presumption shall not be conclusive.*

The employer presented a medical expert who, notwithstanding the presumption of Section 301(e), opined that firefighters did not suffer a higher risk of coronary artery disease than non-firefighters. He further offered no opinion as to whether or not the claimant suffered any disability from his work as a firefighter.

The WCJ initially concluded that the claimant did not present unequivocal medical evidence to establish that his cardiovascular incident in January 2002 was causally related to his exposure to smoke as a firefighter. Upon making this credibility determination the Judge accepted the employer's medical expert as credible.

The claimant appealed to the WCAB who remanded this matter to the WCJ to apply the rebuttable presumption of work-relatedness under Section 301(e) and Section 108(o).

On remand the WCJ applied the firefighter's presumption and concluded that the claimant met his burden of establishing a compensable injury due to heart disease occurring on January 28, 2002. The WCJ now rejected the employer's medical expert's testimony, noting that the employer's medical expert rejected the statutory presumption that exposure as a firefighter to fighting fires of four or more years is a risk factor in the developments of coronary artery disease.

The employer appeal to WCAB who reversed the WCJ holding that it had erred in remanding the case as an occupational disease claim. The Board noted that based on the credible medical evidence of record in the first instance there was no showing of disability. The claimant's appeal followed.

ISSUE

Whether the evidence of record accepted as credible by the WCJ following the remand supported the claimant satisfaction of the statutory presumption in support of his Claim Petition alleging an occupational disease to subsequent firefighting?

HOLDING OF THE COMMONWEALTH COURT

The WCJ found on remand that the claimant was disabled from firefighting by crediting the testimony of the claimant's medical expert as credible and accepting as a fact that the claimant was disabled from firefighting due to his condition. Therefore, once the WCJ made this finding of credibility the claimant satisfied the condition precedent to the application of the presumption set forth by Section 301(e).

The employer failed to rebut the statutory evidentiary advantage afforded to the claimant by failing producing substantial competent evidence to show that the presumption should not apply.

PRACTICAL APPLICATION

Once the claimant's medical expert testifies credibly that the claimant is disabled from firefighting due to his work condition there was a presumption set forth by Section 301(e) that the claimant's occupational disease arose out of and in the course of his employment.

Section 108(o) provides that occupational disease includes diseases of the heart and lungs resulting in either temporary or permanent total or partial disability or death after four years or more of service in firefighting for the benefit of the safety of the public caused by extreme overexertion in time of stress or danger or by exposure to heat, smoke, fumes or gases arising directly out of employment of any such fireman.

In this case the WCJ found that the claimant is disabled from firefighting due to his condition. Once this finding was made the presumption of Section 301(e) applied.

6. PSYCHIATRIC CLAIM/REASONED DECISION/FINDINGS

A claimant seeking workers' compensation benefits because of a mental stimulus resulting in a disabling psychic injury must show that she has suffered a psychic injury that the injury is more than a subjective reaction to normal working conditions. To classify working conditions as normal or abnormal, there is no bright-line or generalized standard. Rather, one must consider the specific work environment of the claimant. Consequently, compensation is denied for events that are expected in the relevant working environment, whether it is an office workers' change in job title or responsibility or a police officer's involvement in life-threatening situations. In assessing whether work conditions are abnormal, the Court recognizes that the work environment is a microcosm of society. It is not a shelter from rude behavior, obscene language, incivility, or stress

The claimant was subjected to abnormal working conditions where the WCJ found credible claimant's testimony that she was subjected to sexual harassment by her boss and religious harassment by the employer where the claimant was non-Moslem working in an environment that employed predominantly Moslems and the claimant was frequently asked to "wrap up", she was recognized as the "individual" because she was not a Moslem and a purification ceremony took place that involved the burning of incense, chanting and splashing of water by a person who was not an employee who was given an office space by the employer. This was all a departure from the normal business practice.

Generally, in mental/mental injury cases, corroborative evidence is required to support the claimant's description of the abnormal working environment that caused the injury. If, however, actual event is described as occurring and found by the WCJ to have occurred, corroborative evidence is not required. Therefore, corroborative evidence is not necessary where events are found by the WCJ have occurred or are based on the claimant's credible testimony.

A medical opinion is not competent if it is based on inaccurate or false information. However, the fact that a medical expert did not have all of the claimant's medical records upon formulating his opinion only go to the way of the experts' testimony, not its competency.

A WCJ may adopt, verbatim, findings of fact submitted by a party as long as substantial evidence in the record supports the findings.

On appeal, the prevailing party below is entitled to all inferences that can be reasonably drawn from the evidence. Moreover, it does not matter that there is other evidence of record that supports a factual finding other than that made by the WCJ. Rather, the proper inquiry is whether there is any evidence that supports the WCJ's factual findings.

Pursuant to Section 422(A) of the Act, all parties to an adjudicatory proceeding are entitled to a reasoned decision. Where the fact finder has had the advantage of seeing the

witnesses testify live and had the opportunity to assess their demeanor, a mere conclusion as to which witnesses are deemed credible is sufficient to render the decision reasoned.

In instances where credibility assessment cannot be tied to inherently subjective circumstances, i.e. when a witness appears via deposition, some articulation of an actual objective basis for a credibility determination must be offered for the decision to be considered reasoned.

Community Empowerment Association v. WCAD (Porch) No. CD 2008 (Decision by Judge Flaherty, November 25, 2008).

FACT

The claimant filed a Claim Petition alleging she sustained psychological injuries as a result of her employment as a Case Manager for the employer. The claimant was the sole witness who testified on her own behalf.

The WCJ found that the claimant testified credibly that she was subjected to sexual harassment by the employer's president. For instance, unwanted sexual advances were made against her and he asked her questions about her personal and sexual life. When the claimant rejected his advances, he became "mean" to her.

The claimant, who is a Christian, also testified that most of her coworkers were Moslem. According to the claimant, meetings were held and she would be held out by the employer's president for being a non-Moslem. She further testified that meetings could go on for several hours and the employer's president would discuss religious topics such as a power of wrapping up, meaning to put the traditional Islamic head garb on, and funding to build a mosque. The claimant stated that her coworkers would come into her office and tell her that she should wrap up. She further asserted that a man named Sheikh Tajohni would go around the premises burning incense, chanting and splashing water.

The claimant last worked for the employer on December 16, 2005.

This was a claim for under 52 weeks and the claimant submitted the psychological report of her treating psychologist who diagnosed the claimant as having a major depressive disorder as a result of religious and sexual harassment while working for the employer.

The employer presented several fact witnesses in defense against the claimant's petition. Two of the fact witnesses were found not credible and three of the fact witnesses were found to be irrelevant.

The WCJ granted the claimant's Claim Petition finding that she was subject to religious and sexual harassment at work that this harassment rose to the level of an abnormal working condition.

The employer appealed the WCJ's decision to the WCAB making two main arguments. First, the employer argued that the claimant failed to produce corroborative evidence in support of her claims of harassment. Second, the employer argued that the claimant's medical evidence was not based upon accurate and complete medical history and was therefore incompetent.

ISSUE

Whether a claimant who testifies credibly sexual and religious harassment is required to produce corroborative evidence to support her claim of harassment?

HOLDING OF THE COMMONWEALTH COURT

It is true that generally in mental/mental injury cases, corroborative evidence is required to support the claimant's description of the abnormal working environment that caused the injury. If, however, actual events are described as occurring and found by the WCJ to have occurred, corroborative evidence is not required.

Noting that a credibility determination is not reviewable, the events found by the WCJ to have occurred were based on claimant's credible testimony and are accepted facts. Therefore, corroborative evidence was not necessary.

PRACTICAL APPLICATION

Abnormal working conditions are analyzed in the context of the job that a claimant performs. The claimant worked for a community organization and the degree of sexual harassment and religious harassment that she was subjected to was not part of the normal business practice.

The Court noted that it is difficult to address the "religious harassment" that the WCJ found to have occurred. The Court acknowledged that conversations concerning religious faith may take place in any workforce setting. The pivotal question would be whether it can be said that the events that have been described and found to have occurred by the WCJ constitute abnormal working conditions. The Commonwealth Court in essence found that although the occasional religious comment might have been not abnormal, repeated and unwelcome requests of a religious nature did contribute to an abnormal working condition.