

# Bisel's PA WORKERS' COMPENSATION UPDATE

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## HOUSE ARREST MAY LIMIT CLAIMANT'S ABILITY TO APPLY FOR POTENTIAL EMPLOYMENT

#### CASE SUMMARY

Claimant hurt his low back on September 22, 1999, and began

receiving workers' compensation. While off work for the time of injury employer, claimant took a job with a different employer but did not report his wages to the workers' compensation carrier. He was convicted of insurance fraud, was placed under house arrest in February of 2002, and, as a result, his benefits were suspended by the compensation carrier.

On May 14, 2002, claimant was fully released from house arrest. The employer filed a Petition for Suspension/Modification, alleging claimant was capable of returning to alternative employment that he failed to pursue while under house arrest.

The employer presented evidence that claimant had been referred jobs within his restrictions in late February, 2002 and early March, 2002, and that claimant did not apply. Claimant had advised the employer's vocational expert that he could not apply because he was under house arrest. Claimant testified he was only allowed out of the house for between two and three hours per day.

The Workers' Compensation Judge (WCJ) held that the employer met its burden for modification of benefits.

Claimant appealed to the Board. The Board reversed the WCJ's decision, holding that the jobs were not available to claimant at the time referred because he had been under house arrest.

The employer appealed to the Commonwealth Court.

The employer argued that even though claimant was under house arrest, he was able to leave the house for periods of time and could have appeared at one of the job referrals (Texaco) to fill out an application at the scheduled 9:00 a.m. time. Claimant had testified he was permitted to leave his house from 7:30 a.m. to 10:00 a.m., but said he did not think he could fill out an application in enough time and still be home by 10:00 a.m.

The Court noted that whether a claimant must pursue job referrals while in some form of incarceration depends on the terms of the house arrest. In the matter at hand, the Court said, claimant was allowed out briefly to attend to personal needs (grocery shopping etc.). There was no indication, the Court stated, that claimant had permission to attend job



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A Monthly Newsletter

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referrals or to go into a work program. Here, the Court added, claimant was only presented with one job referral during the time frame he was allowed out of the house. Claimant had testified he could not drive there, fill out an application, and be home in time to avoid being in violation of his house arrest. The Court held that the jobs were thus unavailable to claimant.

The employer next argued it had proven claimant had "earning power" under Act 57 of the Workers' Compensation Act (Act) and that it only had to prove claimant could perform substantial gainful employment. However, again, the Court noted that claimant could not leave his house to perform jobs and there was no evidence jobs would be available when his incarceration ended.

The Court upheld the denial of the modification of benefits.

Keys-Pealers, Ltd./Pealer's Flowers v. Workers' Compensation Appeal Board (Bricker); Cmwlt. Ct. of Pa.; Opinion by Judge Pellegrini; Filed January 4, 2005 and designated an Opinion on March 18, 2005.

**DEFENSE PERSPECTIVE**

Regarding the Texaco job, claimant had been requested to appear and fill out an application March 1, 2002 at 9:00 a.m. He called the vocational expert that had referred him the job and told him he could not apply because he was under house arrest.

The WCJ held that claimant did not show good faith. There is no indication as to what findings, if any, the WCJ made with respect to claimant's credibility. There is no indication as to whether the Texaco job would have been available in May, 2002, when the incarceration ended.

It appears, to this writer, that if the WCJ had found claimant not credible with respect to his testimony he could not apply for a Texaco job and be home before 10:00 a.m., and then found that the job would still be available in May, 2002, that benefits should be modified.

**CLAIMANT PERSPECTIVE**

There does not appear to have been any testimony that as of the date that Claimant was fully released from house arrest, any of the positions "referred" to him would have been available. Clearly, Claimant could not have performed any of the jobs in question while under house arrest, given the very restrictive house arrest rules which applied to him. As noted by the Court here, "the terms of the house arrest will determine whether a claimant is required to pursue a proffered position." There will likely be those situations where a house arrest provides an opportunity to work, but not here. This position is consistent with decisions where individuals in a halfway house or an alcohol recovery center are considered incarcerated, and their benefits can be suspended. See, for example, Brinker's International v. WCAB, 721 A.2d 406 (Pa. Cmwlt. 1998). It would appear, at least with respect to general vocational testimony, that where a vocational witness testifies that Claimant has an earning capacity and that work will be available to him within that earning capacity after his release from house arrest, the employer may satisfy their burden of proof on this issue.



**NO COMPENSATION WHERE CLAIMANT ON EMPLOYER'S PROPERTY FOR REASONS PERSONAL TO CLAIMANT**

**CASE SUMMARY**

Claimant worked as a mechanic at the employer's place of business alongside Route 51, a five-lane highway. Because the employer's parking lots were under construction, claimant was instructed to a park across Route 51 in the Kmart parking lot.

On April 7, 1998, claimant parked at the Kmart and crossed

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Route 51. He punched in at work. At approximately 7:45 a.m. he decided to return to his car and retrieve some auto parts for his personal vehicle that he wished to exchange. While crossing Route 51 to get his car, claimant was struck by an automobile and injured.

Claimant filed a Claim Petition for workers' compensation under the Workers' Compensation Act (Act). Ultimately, the Workers' Compensation Judge (WCJ) denied benefits, finding claimant failed to establish he was in the course of employment at the time of injury.

Claimant appealed to the Board. The Board remanded on the grounds that although claimant was not in furtherance of the employer's affairs at the time that claimant was injured, issues remained as to whether the street where claimant was injured was part of the employer's premises as claimant was required to be there by the nature of his employment.

On remand, the WCJ again denied benefits.

Claimant appealed to the Board. The Board affirmed.

Claimant then appealed to the Commonwealth Court.

The Court noted that in Montgomery Hosp. v. Workers' Compensation Appeal Board (Armstrong), 793 A.2d 182 (Pa. Cmwlth. 2002), it recognized that:

[a]n injury may be sustained "in the course of employment" under Section 301(c)(1) of the Act in two distinct situations: (1) where the employee is injured on or off the employer's premises, while actually engaged in the furtherance of the employer's business or affairs; or (2) where the employee, although not actually engaged in the furtherance of the employer's business or affairs, (a) is on the premises occupied or under control of the employer, or upon which the employer's business or affairs are being carried on, (b) is required by the nature of his employment to be present on the employer's premises, and (c) sustains injuries caused by the addition of the premises or by operation of the employer's business or affairs thereon.

In a case in hand, the Court noted, the WCJ found that claimant was instructed by the employer to park in the Kmart lot in crossed Route 51 to get to the employer's shop. However, the Court pointed out, the WCJ further found that, at the time he was injured, claimant was on a mission personal to himself. The WCJ found Route 51 could be considered part of the employer's premises but that, as of the date and time he was struck by the automobile, the nature of his employment did not require claimant to be on Route 51 or in the parking lot.

The Court upheld the denial of benefits.

Frank Wright v. Workers' Compensation Appeal Board (Larpat Muffler, Inc.); Cmwlth. Ct. of Pa.; No. 1584 C.D. 2004; Opinion by Senior Judge Juliante; Filed March 1, 2005.

### ***DEFENSE PERSPECTIVE***

If claimant had been injured crossing the street while going to work at the beginning of the day or while coming from work at the end of the day or if he had been going to or coming from his car during the workday per direction from his employer to retrieve something from his car necessary for work, he probably would have won this case.

Because of the location of his employment, he had to park at the Kmart. However, the reason why he went to his car during the work day was personal to him and not related to his employment.

### ***CLAIMANT PERSPECTIVE***

The Court here distinguished two (2) lines of cases. In Epler v. N.Am Rockwell Corp., 393 A.2d 1163 (1978) the decedent had finished his usual shift and was crossing a street to get to the parking lot where he was required to park his automobile, when he was struck and killed.

The Supreme Court found this death to be compensable as the decedent was in an area where the accident occurred because of his employment. Similarly in PPG Industries, Inc. v. WCAB, 542 A.2d 621 (Pa. Cmwlth. 1988), a Claimant was found to have suffered a compensable injury when, after finishing his shift, he was crossing railroad tracks to get to his car on the employer's parking lot when he was struck by a train. In these two (2) cases, the roadway and railroad tracks were found to be part of the employer's premises.

The other line of cases which the Commonwealth Court relied upon to distinguish the above-noted cases, and to uphold the Appeal Board here, involved claimants who were injured on their lunch hour, one while slipping at her place of employment, and the other when intervening in a violent attack on a co-worker. In both instances, the Court determined that the Claimant was not in the course of her employment when injured, and therefore, not entitled to compensation. See Giebel v. WCAB, 399 A.2d 152 (Pa. Cmwlth. 1979) and Kmart Corp. v. WCAB, 748 A.2d 660 (2000).

Here, therefore, the roadway was indeed part of the employer's premises, but Claimant was not required by his work duties to be on that roadway at the time he was injured. The employer's property can be "expanded", but for an injury to be compensable, Claimant must be on that property for reasons required by the employment.



## **CLAIM PETITION DISMISSED WITH PREJUDICE WHERE CLAIMANT FAILED TO APPEAR AND FOLLOW WCJ ORDERS ON SEVERAL OCCASIONS**

### **CASE SUMMARY**

Claimant, a flight attendant, filed Claim Petitions for alleged injuries he incurred with the employer.

Several hearings were held. Claimant failed to attend IMEs and failed to present medical evidence.

More than one year after the first Claim Petition was filed [and after many warnings were given by the Workers' Compensation Judge (WCJ) to claimant], the WCJ dismissed the Claim Petition with prejudice.

Claimant appealed to the Board. The Board affirmed the dismissal of the Claim Petitions for failure to prosecute, but deleted the "with prejudice" aspect of the WCJ's Order.

The employer then appealed to the Commonwealth Court. The Court noted that the WCJ had made a specific finding of "prejudice" premised upon the passage of time since the filing of the original Petitions and the difficulty of proving work-related causation, given claimant's imminent hip replacement surgery. The Court said the WCJ's findings of prejudice were supported by the record.

The Court concluded that because the WCJ properly found that the ongoing delay caused by claimant was prejudicial to the employer, and because it is within the WCJ's discretion to control his docket by ordering parties to comply with litigation in a timely manner, the Board erred in deleting the words "with prejudice" from the WCJ's Order.

U.S. Airways and Reliance National c/o Sedgwick Claims Management Services v. Workers' Compensation Appeal Board (McConnell); Cmwlth. Ct. of Pa.; No. 1978 C.D. 2004; Opinion by Judge Cohn Jubelirer; Filed March 17, 2005 .

### **DEFENSE PERSPECTIVE**

This could happen to either party if the judge's timelines are not followed. The employer here was certainly prejudiced by its inability to obtain a timely medical opinion.

### **CLAIMANT PERSPECTIVE**

The Appeal Board deleted the "with prejudice" aspect of the WCJ's Order concluding, essentially, that the three (3) year Statute of Limitations protects the employer from stale claims. Citing previous case law, and most particularly Cipollini v. WCAB, 647 A.2d 608 (Pa. Cmwlth. 1994) petition for allowance of appeal denied, 655 A.2d 992 (Pa. Cmwlth. 1994), the Court here determined that it was proper to dismiss with prejudice a Claim Petition where the Claimant disregarded deadlines imposed by the WCJ.

Here, it seems important, that it was not simply one missed deadline that resulted in the dismissal of this claim. Rather, it was a pattern where numerous Claim Petitions (at least five (5)) were filed, at least five (5) hearings were scheduled, Claimant's counsel, on several occasions, made representations concerning cooperation that Claimant would provide which never occurred, Claimant did not attend IMEs, and specific directives from the WCJ were ignored. This is a case where Claimant had ample opportunity to present her evidence and cooperate and simply failed to do so. This decision should not lead to the conclusion that an explainable missed deadline requires dismissal with prejudice.



## **REQUIREMENT THAT HEARING LOSS CLAIMS BE FILED WITHIN THREE (3) YEARS OF LAST EXPOSURE NOT VIOLATIVE OF EQUAL PROTECTION CLAUSE**

### **CASE SUMMARY**

Claimant filed a Claim Petition on May 15, 2003, alleging he sustained hearing loss due to noise exposure while working for Standard Steel, a company he last worked for on July 31, 1994.

The Workers' Compensation Judge (WCJ) dismissed the Claim Petition, because it was not filed within three years of claimant's last exposure to occupational noise as required by Section 306(c)(8)(viii) of the Workers' Compensation Act (Act).

Claimant appealed to the Board, which affirmed the decision of the WCJ.

Claimant then appealed to the Commonwealth Court.

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Claimant argued that Section 306(c)(8)(viii) violates the Equal Protection clauses of both the Pennsylvania and United States Constitutions by precluding him from applying the discovery rule to his hearing loss claim when the discovery rule is applied to other, similar injuries covered under the Act.

The Court noted that pursuant to Section 315 of the Act, a claimant must file a Claim Petition within three years after the injury occurs or his claim will be barred. However, the Court noted, this three-year statute of limitations does not begin to run until a claimant discovers that his injury is work-related. Prior to the passage of Act 1 of 1995 (Act 1), Act of February 23, 1995, P. L. 1, this discovery rule applied to hearing loss cases, the Court said. However, the Court stated, Section 306(c)(8)(viii), which was enacted as part of Act 1, provides that:

(viii) Whenever an occupational hearing loss caused by long-term exposure to hazardous occupational noise is the basis for compensation or additional compensation, the claim shall be barred unless a petition is filed within three years after the date of last exposure to hazardous occupational noise in the employ of the employer against whom benefits are sought.

77 P.S. § 513(c)(8)(viii) (emphasis added by the Court).

The Court cited cases where it held that the “discovery rule” does not apply to hearing loss cases. See School District of Philadelphia v. Workers' Compensation Appeal Board (Hennegan), 751 A.2d 729 (Pa. Cmwlth. 2000), among others. However, the Court said it had never previously addressed the Equal Protection issue.

The Court noted that the fourteenth Amendment to the United States Constitution provides, in relevant part, as follows:

Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(emphasis added by the Court).

The Court further pointed out that Article 1, Section 26 of the Pennsylvania Constitution provides as follows:

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of a civil right, or discriminate against any person in the exercise of any civil right.

The Court looked to its decision in Guess v. Workmen's Compensation Appeal Board (Linkbelt/FMC Corp.), 466 A.2d 1098 (Pa. Cmwlth. 1983), in which a workers' compensation

claimant argued that Section 301(e) of the Act violated the Equal Protection clause because it provided that partially disabling silicosis was not compensable. In Guess, the Court had stated as follows:

The proper standard of review in analyzing the constitutionality of this classification is the rational basis test. As the right to disability benefits is not a fundamental right, and the class of partially disabled employees is not a suspect class, the strict judicial scrutiny test is inapplicable.

Id. at 1101

In the matter hand, the Court said, the rational basis test would also apply, as the right to hearing loss benefits, is not a fundamental right and employees with hearing loss are not a suspect class.

With regard to the rational basis test, the Court said that it stated in Guess, supra, that:

... to pass constitutional muster under the rational basis test, the Act's classification must bear a reasonable relationship to a legitimate state objective. See Stevenson v. Industrial Commission, 190 Colo. 234, 545 P.2d 712 (1976); Gauthier v. Campbell, Wyant, and Cannon Foundry Co., 360 Mich. 510, 104 N.W. 2d 182 (1960).

The Court said there are many reasons why it is reasonable to apply the discovery rule to other injuries, such as occupational diseases, and not to apply the discovery rule to hearing loss cases. The Court noted that the symptoms of a disease may not show up and it may not be apparent that such symptoms are work-related until many years after the exposure to the disease causing substance. Because the injury to the ears stops with the last day of exposure to the hazardous noise, the Court said, the Legislature acted within its powers in establishing three years after the last exposure as a sufficiently long duration of time to give claimant a reasonable opportunity to assert a claim.

The Court held that claimant's right to equal protection was not violated.

James J. McIlroy v. Workers' Compensation Appeal Board (Standard Steel); Cmwlth. Ct. of Pa.; No. 1048 C.D. 2004; Opinion by Senior Judge Flaherty; Filed March 11, 2005.

### ***DEFENSE PERSPECTIVE***

When you are not dealing with a suspect class, it is nearly impossible to win Equal Protection cases. The Court just has to come up with some reasonable reasons for the law. In hearing loss cases, unlike with some other injuries or diseases, claimant should have noticeable (to him or her) symptoms early on. Also, as the Court did note, to allow a claimant such

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as this to proceed with the Claim Petition nine years after he quit working could be unfair to the employer.

### ***CLAIMANT PERSPECTIVE***

Indeed, as suggested by the Defense Perspective, it is highly unlikely that a legislative enactment will be overturned on Equal Protection grounds, when the standard of review is the rational basis test. The Pennsylvania Supreme Court, in Guess, quoted language from United States Supreme Court decisions on this issue stating:

“...In the social welfare area ‘[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.’ ...Moreover, if the classification has reasonable basis, ‘it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.’”

Here, the Court detailed reasons distinguishing hearing loss cases from occupational disease type claims, as well as expressing concerns over the long delay between last exposure and the filing of the claim here, noting that additional factors could very well have affected Claimant’s hearing during that period of time.



## **REIMBURSEMENT FROM SUPERSEDEAS FUND DOES NOT INCLUDE LITIGATION COSTS, ATTORNEY’S FEES OR INTEREST**

### ***CASE SUMMARY***

Claimant filed a Claim Petition alleging he became disabled due to a work injury that occurred April 16, 1993. His claim was granted by a Workers’ Compensation Judge (WCJ) on November 6, 1995.

The employer appealed to the Board. The Board affirmed the WCJ’s decision.

The employer appealed to the Commonwealth Court. The Court affirmed the award.

The employer then appealed to the Supreme Court of Pennsylvania.

On November 7, 2000, the Supreme Court of Pennsylvania reversed the award.

The employer had paid just over \$189,000.00 in indemnity and medical, \$52,578.21 for litigation costs and fees, and \$134,144.97 in interest.

The employer filed an Application for Supersedeas Fund Reimbursement with the Bureau of Workers’ Compensation.

The Bureau denied the request for reimbursement of costs and fees, asserting those items are not “compensation” under Section 443 of the Workers’ Compensation Act (Act). The Bureau further asserted the employer was not entitled to reimbursement of interest paid on the compensation amounts.

The matter went to a WCJ. The WCJ decided the matter in favor of the Bureau and did not award the costs, fees and interest.

The employer appealed to the Board. The Board affirmed the WCJ’s decision.

The employer then appealed to the Commonwealth Court.

The employer first argued that the WCJ lacked subject matter jurisdiction because there had been no employer-employee relationship in this case (claimant was held by the Supreme Court not to be an “employee” under the Act).

The Court noted that when the Claim Petition was litigated, the subject matter jurisdiction was undisputed by the parties.

The Court said that the Supreme Court’s ultimate reversal on the substantive employer-employee relationship does not retroactively divest the WCJ of subject matter jurisdiction. The Court further noted that under Section 443 of the Act, application for Supersedeas Fund Reimbursement is made to the state and then assigned to a WCJ. The Court said the WCJ here clearly had statutory jurisdiction to hear and decide the application for reimbursement.

The Court then looked to see if the employer was, aside from indemnity and medical paid, entitled to be reimbursed the litigation costs and attorneys’ fees paid.

The Court noted that Section 443(a) of the Act provides as follows:

(a) If, in any case in which a supersedeas has been requested and denied under the provisions of Section 413 or Section 430, payments of compensation are made as a result thereof and upon the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable, the insurer who was made such payments shall be reimbursed therefore ....

(b) There is hereby established a special fund in the State Treasury, separate and apart from all public moneys or funds of this Commonwealth, to be known as the

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Workmen's Compensation Supersedeas Fund. The purpose of this fund shall be to provide moneys for payments pursuant to subsection (a), to include reimbursement to the Commonwealth for any such payments made from general revenues....

The Court stated that in the context of reimbursement from the Supersedeas Fund, the term "compensation" includes both wage loss benefits and medical expenses. See Temple University and INA/Cigna v. Workers' Compensation Appeal Board (Parson and Supersedeas Fund), 753 A.2d 289 (Pa. Cmwlth. 2000), cited by the Court.

The Court said the WCJ and Board properly determined the employer was not entitled to reimbursement of attorneys' fees and costs.

The employer asserted that because Section 440(a) of the Act provides for the reimbursement of litigation costs and attorneys' fees to an employee, then an employer/insurer is also entitled to such reimbursement. The Court said the intent of Section 440(a) was not to allow for reimbursement to employers/insurers.

The employer then argued it should be reimbursed for the interest lost on the overpayment of compensation made to claimant.

Citing Laundry Owners Mutual Liability Insurance Association (Stop-n-Go Food Stores) v. Workmen's Compensation Appeal Board (Herpak), 537 Pa. 367, 644 A.2d 697 (1994), the Court noted that Section 406.1 of the Act provides that interest be paid to claimants on delayed compensation. However, Section 443, the Court said, contains no such provision. The Court in Laundry Owners and in the matter at hand said that if it were to hold as the employer requested, that it receive reimbursement of interest paid, it would have to judicially create an amendment to Section 443. The Court said it could not do so.

The Court thus upheld the decision below.

Universal Am-Can Ltd. and AIG Claim Services, Inc. v. Workers' Compensation Appeal Board (Minteer); Cmwlth. Ct. of Pa.; No. 1487 C.D. 2004; Opinion by Judge McGinley; Filed March 16, 2005.

### ***DEFENSE PERSPECTIVE***

This is a decision that should be of interest to claimants as well as defendants as the outcome is so grossly unfair it could lead to further changes to the Act.

Here is a case where claimant walks away with over \$300,000.00 (indemnity and interest) and his counsel received over \$50,000.00 (fees and costs), monies to which they were not entitled. Yet, the employer is out nearly \$200,000.00 in

monies it should never have had to pay because those monies do not meet the compensation definition.

By the way, Section 443 does not mention the word "medical," yet the Court has held many times that "medical" is part of compensation and reimbursement under Section 443, for medical paid is allowed. In the case at hand, however, the Court states its hands are tied and is up to the Legislature to make a change.

### ***CLAIMANT PERSPECTIVE***

Give me a break. Calling this decision "grossly unfair" in light of the underlying litigation as well as the clear wording of the statute is a "gross" exaggeration. In the underlying litigation, the primary issue was whether or not Claimant was an independent contractor. The WCJ, Appeal Board and the Commonwealth Court all determined that Claimant was an employee, not an independent contractor. It was only a 4-3 decision from the Pennsylvania Court which overturned those assessments. One wonders why the employer/carrier here would make no effort to return Claimant to employment from 1993 until the Supreme Court decision in late 2000, and at the same time, spend more than \$50,000.00 in litigation costs. This is a decision that the employer/insurer made here, and it does not merit any sympathy. The wording of the statute, so frequently urged by employers to be followed, does not call for reimbursement of counsel fees or interest: the wording is clear on these issues. Concern over future legislation is something that the Workers' Compensation Bar must always be mindful of, but if inequities are the driving force for change, then can we anticipate some cost of living increase for Claimants, or possibly retraining?

Interestingly, the employer/insurer argued that the WCJ lacked jurisdiction to rule on the claim for reimbursement brought here. Logically, the Commonwealth Court rejected that argument, but noted an interesting dilemma had it accepted that argument, where would the employer/insurer go to obtain a ruling on its application for reimbursement, where the only authority for reimbursement from the Supersedeas Fund comes from the Workers' Compensation Act?