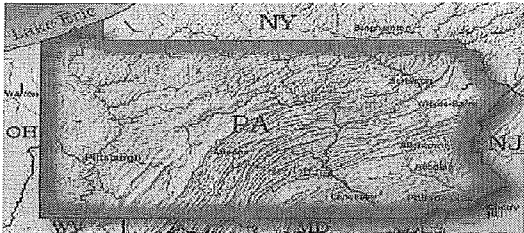


EMPLOYERS' UPDATE
For PENNSYLVANIA and NEW JERSEY
A QUICK – REFERENCE UPDATE FOR RISK
MANAGEMENT AND CLAIMS PROFESSIONALS*

Volume 2 Summer 2007



Published by:

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Workers' Compensation Rate Schedule

\$675.00 Max	\$690.00 Max	\$716.00 Max	\$745.00 Max
01/01/2003	01/01/2004	01/01/2005	01/01/2006
Between \$1,012.45 and 66 2/3% \$506.23	Between \$1,034.48 and 66 2/3% \$517.24	Between \$1,074.00 and 66 2/3% \$537.01	Between \$1,117.44 and 66 2/3% \$558.73
Between \$506.22 and \$337.50 \$375.00	Between \$517.23 and \$345.00 \$383.33	Between \$537.00 and \$358.00 \$397.79	Between \$558.72 and \$372.50 \$413.90
\$374.99 or 90% Less	\$383.32 or 90% Less	\$397.77 or 90% Less	\$413.89 or 90% Less

RECENT WORKERS' COMPENSATION CASES

Featured Case: Ragno v. WCAB (City of Philadelphia), No. 924 C. D. 2006 (01/16/07)

WITHDRAWAL FROM THE LABOR FORCE: AN APPLICATION OF COLLATERAL ESTOPPEL WITH BROAD IMPLICATIONS

A. The Issue and Case.

The Commonwealth Court has published an Opinion that addresses collateral estoppel (the preclusion of the re-litigation of an issue decided at a prior time between the parties) in the context of a prior final judicial finding of withdrawal from the labor force which was then followed by a Petition for Reinstatement. The case is *Frederick Ragno v. WCAB (City of Philadelphia), No. 924 C. D. 2006 (01/16/07)*.

B. Procedural History - Prior Litigation.

Mr. Ragno was a City of Philadelphia firefighter. He sustained a work related back injury in 1986, received benefits, and signed a Final Receipt effective in 1987. Mr. Ragno then filed a Petition that was treated as a Petition to Set Aside Final Receipt, and in a Decision circulated in 1990 the Final Receipt was set aside. In 2000, on the City's Petition for Modification or Suspension, Modification based on job availability at the City was granted by Decision effective from a date in 1995, and Suspension based on retirement granted in that same Decision effective from a date in 1997.

C. Basis for Grant of Suspension.

The grant of Suspension was based on Mr. Ragno's admission of retirement, noting testimony from a Pension Program Administrator indicating that Mr. Ragno was receiving regular pension benefits (i.e., benefits based on age and length of service). The Board and the Commonwealth Court affirmed the Suspension. *Ragno v. WCAB (City of Philadelphia), 896 C. D. 2001 (Filed August 21, 2001), petition for allowance of appeal denied, 793 A.2d 912 (2001)*.

D. Subsequent Petition for Reinstatement and the Judge's Rationale for Granting the Petition.

In 2003, Mr. Ragno then filed a Petition for Reinstatement, asserting a decrease in earning power as a result of the work injury. Mr. Ragno testified that his symptoms had worsened, and his medical expert considered Mr. Ragno "in a practical sense that I don't think that Mr. Ragno is employable". The defense presented a medical opinion that Mr. Ragno could perform the job that formed the basis for the Modification ordered in the 2000 Decision.

This Petition for Reinstatement was granted by the Judge. In terms of the retirement/suspension issue, the Judge reasoned that where there is retirement constituting a withdrawal from the labor force, a claimant who can subsequently establish re-entry into the labor force by seeking employment, or can establish a forced retirement due to the work injury, is entitled to Reinstatement, citing to *Southeastern Pennsylvania Transportation Authority v. WCAB (Henderson), 669 A.2d 911 (Pa., 1995)*. In granting the Reinstatement, the Judge

accepted the claimant's "sincere demeanor" and his medical evidence of the inability to work, in essence finding an ex post facto forced retirement.

E. The Reversal of Reinstatement by the WCAB.

The WCAB reversed this grant of Reinstatement. The WCAB noted that the issue of withdrawal from the labor force had been fully litigated in the context of the Petition for Suspension that was decided in 2000. The WCAB noted Mr. Ragno's testimony before the Judge on the Petition for Reinstatement that he recently applied for work at Wal-Mart and K Mart, considering this testimony "nothing more than an attempt to strengthen weak proofs".

F. Further Appeal of the Issue of Reinstatement to the Commonwealth Court and the Holding in this Case.

On Mr. Ragno's Petition for Review to the Commonwealth Court, he argued that the WCAB Opinion would preclude the undoing of a voluntary retirement even where a claimant is actively seeking employment. The Commonwealth Court affirmed the WCAB on the basis of collateral estoppel, noting that:

- (1) There was a final judgment [in the prior litigation] on the merits as to the issue of withdrawal from the labor force,
- (2) the identity of the parties [in the prior litigation] was the same then as presently,
- (3) the claimant had a full and fair opportunity to litigate the issue in the prior litigation, and
- (4) the determination in the prior litigation was essential to the judgment Suspending benefits.

The Commonwealth Court cited to the *Henderson, supra.*, case, as did the Judge in 2000, for the proposition that wage loss benefits can continue after retirement if a claimant establishes:

- (1) The seeking of employment after retirement, or
- (2) a forced retirement due to the work injury.

The Court noted that a claimant must establish being forced out of the entire labor market to show a forced retirement. *County of Allegheny Department of Public Works v. WCAB (Weis)*, 872 A.2d 263 (Pa. Cmwlth., 2005). The Court here held that Mr. Ragno failed to establish in the prior litigation that he was forced out of the entire labor market and was now estopped from doing so. Referring to the other option of establishing the seeking of employment after retirement, the Court "agrees with the Board that Claimant's applications at Wal-Mart and K Mart are 'nothing more than an attempt to strengthen weak proofs'"

G. Implications.

This case raises issues that may have broad implication for all litigants involved in change in status Petitions, where collateral estoppel may trump a purported change in status; as well as in the area of good and bad faith in the specific context of job availability or referrals, where employment applications alone may be insufficient to establish bad faith even absent evidence of sabotage.

Other Recent Cases of Interest:

1. Hearing Loss.
Allegheny Ludlum Corporation v. WCAB (Hines), 913 A.2d 345 (Pa. Cmwlth., 12/19/06).

HEARING PROTECTION DEVICES NOT FOR CONSIDERATION: In a claim for occupational hearing loss, causation and percentage impairment can be addressed distinctly with inconsistencies resolved on the basis of a credibility determination. The use of hearing protection devices is not for consideration in determining exposure to occupational noise.

The Judge granted benefits for bilateral hearing loss. The employer appealed, arguing against the percentage assigned for the loss, the competence of the claimant's medical testimony, and whether the Judge should have considered the effects of hearing protection.

The Commonwealth Court held it permissible to accept the opinion of one expert as to causation and another expert as to the percentage loss. The expert accepted on causation was mistaken as to the number of hours a day the claimant worked - the expert assumed eight hours a day, but the work hours were actually seven hours a day. The Court held that the opinion as to causation was not eroded by this erroneous assumption as there being no evidence that this discrepancy had any impact on the issue of causation. Finally, the Court held that exposure to occupational noise is to be measured without the use of hearing protection devices, citing to *Meadville Forging v. WCAB (Artman)*, 747 A.2d 958 (Pa. Cmwlth., 2000). *Helvetia Coal Co. v. WCAB (Learn)*, 913 A.2d 326 (Pa. Cmwlth., 12/15/06).

CAUSATION IS AN AFFIRMATIVE DEFENSE: A late answer precludes consideration of causation, an affirmative defense.

The WCJ denied benefits, accepting the employer's medical evidence opining that the hearing loss was not the result of long term exposure to hazardous occupational noise. The WCAB reversed, holding that the claimant did not have the burden of proving causation once hearing loss was established, but rather a lack of causation was part of the employer's affirmative burden of proof. There was a late Answer to the Claim Petition. The Commonwealth Court affirmed the WCAB grant of benefits, reasoning that the employer was precluded from raising the affirmative defense of causation and therefore a lack of causation was improperly considered by the WCJ in denying benefits. *PIAD Precision Casting v. WCAB (Bosco)*, No. 379 C. D. 2006, 2007 Pa. Commw. LEXIS 194 (04/27/07).

2. Course and Scope.

START OF WORK SHIFT: A claimant is furthering the business of the employer when in a location mandated by the employer within 30 minutes of the start of a work shift; an injury resulting from a criminal act, absent personal animus, does not bar compensability.

Fatal claim benefits were granted to widow after husband was killed by a drunk driver while husband was walking on a public sidewalk [the Court holding ownership or lack thereof irrelevant to its analysis] toward a plant gate to report for his work shift. On the employer's appeal, arguing a lack of furtherance of the employer's business and a public policy exclusion of compensation stemming from criminal acts, the Court noted that husband was walking toward his clocking in area less than 30 minutes prior to the start of his shift. It was Company policy that employees clock in this way, rather than walking through the Plant - an alternate route to the clocking in area - and there is legal precedent (*Fashion Hosiery Shops v. WCAB*, 423 A.2d 792 (Pa. Cmwlth., 1980)) for the thirty minute window for furthering the employer's business prior to the start of the work shift. The public policy argument that would absolve the employer from liability as the result of a criminal act was dismissed by the Court on the basis of a lack of personal animus.

5. Work Availability - Self Employment

Where a claimant has acknowledged work related impairing residual and is self employed, requiring an imputed earning capacity, the earning capacity must be based on expert opinion of available earnings in the impaired state regardless of whether the job is being fully performed. In the absence of such credible evidence, temporary total disability benefits should otherwise be modified by business profits, not gross revenue.

Mr. Trimmer sustained a recognized work injury with acknowledged impairing residual. He returned to work as a self-employed garage supervisor. The time of injury employer sought modification of wage loss benefits.

The Law Offices of Thomas J. Wagner defends carriers, employers and self insured entities in Pennsylvania and New Jersey Workers' Compensation litigation and in litigation involving employers' rights.

* Note: The Update is intended to inform of new developments. It is not intended as advice on legal strategies or substitute for legal assistance and consultation. Legal strategies, duties and obligations vary according to the facts involved.

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