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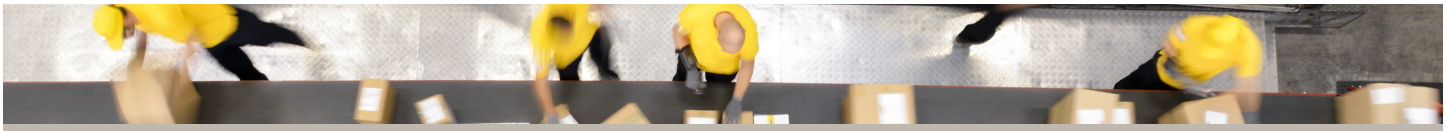

NOVEMBER LEGAL UPDATES: WORKERS' COMPENSATION

U.S. AIRWAYS, INC. AND SEDGWICK CLAIMS MANAGEMENT SERVICES INC. VS. WCAB (BOCKELMAN)

Matter

The Claimant, a flight attendant with the U.S. Airways, sustained an injury to her foot and ankle during a slip and fall while loading her belongings into an airport shuttle. The Claimant used a Division of Aviation shuttle bus to transport herself from a parking lot to the airport terminal. The City of Philadelphia controlled the parking lot and shuttle bus, and U.S. Airways did not pay for or own the parking lot or shuttle bus. Further, U.S. Airways did not require Claimant or any of its employees to use the parking lot or shuttle service. Claimant filed a Claim Petition through which she sought benefits for the foot and ankle injury. U.S. Airways challenged the Claim Petition by asserting that the Claimant was not within the course of her employment when the injury occurred.

During the litigation before the workers' compensation judge, the Claimant produced a Collective Bargaining Agreement between the Claimant's union and U.S. Airways which stated that U.S. Airways was responsible for providing free or reimbursed parking for flight attendants at their domicile airports. In response, U.S. Airways presented documentary evidence and testimony from its director of planning administration. The director of planning administration for U.S. Airways testified that the lot that the Claimant was shuttling to and from was used by all airport employees and that the Collective Bargaining Agreement did not apply to flight attendants domiciled in Philadelphia because the Division of Aviation provided free parking for airport employees in Philadelphia. The workers' compensation judge granted Claimant's Claim Petition

Resolution

The WCAB upheld the workers' compensation judge's decision. U.S. Airways subsequently appealed the WCAB Decision to the Commonwealth Court, who affirmed the WCAB and WCJ's Decision that Claimant's Claim Petition was properly granted. U.S. Airways subsequently appealed the Commonwealth Court's Decision to the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania affirmed the Commonwealth Court's Decision. In affirming the Commonwealth Court's Decision, the Supreme Court of Pennsylvania noted that while the Claimant was no longer furthering U.S. Airways' business at the time of the work incident, the Claimant was acting within the course and scope of her employment.

The Supreme Court of Pennsylvania also noted that premises that are not owned or occupied by an employer but remain an integral part of the employer's workplace and/or constitute a reasonable means of ingress or egress from the employer's workplace constitute an employer's premises for purposes of determining whether an employee was within the course of her employment.

As a result, the Court noted that because of U.S. Airways' business relationship with the airport, U.S. Airways was clearly aware that the Division of Aviation would make employee parking available to the airline's employees, and that airport parking and shuttle services were integral to an airport employee's use of the facilities that were owned, in fact, by U.S. Airways.

Take Away

This case is highly important with respect to matters where an employee is not on property owned by an employer, and sustains an injury during the time in which he or she is leaving or reporting to work. Some Pennsylvania case law indicates that facilities not owned by an employer do not constitute an employer's premises to the extent that an employee was injured within the course and scope of his or her employment. However, the Supreme Court has now made it clear that an analysis of how integral a piece of unowned property is to an employer's owned premises and/or business is necessary when determining whether a Claimant is acting within the scope of employment when injured.

FEDCHEM, LLC VS. WCAB (WESTCOE)

Matter

Employer filed a Modification Petition after completing a Labor Market Survey/Earning Power Assessment. During the course of the litigation before the workers' compensation judge, the Employer presented testimony from its vocational expert and a medical expert who reviewed the job descriptions provided by their vocational expert. In opposition to the Modification Petition, the Claimant relied on medical testimony from his treating physician and testimony from his own vocational expert.

The workers' compensation judge credited the testimony of Claimant and his medical expert. However, the workers' compensation judge did not address the testimony of either vocational expert, nor did the workers' compensation judge offer a decision as to whether the job descriptions from the Labor Market Survey/Earning Power Assessment provided to both medical experts were accurate. Rather, the workers' compensation judge's decision focused on whether the jobs contained within the Labor Market Survey/Earning Power Assessment were open and available. The judge specifically found that the Claimant was never afforded the opportunity to perform the job duties contained within the Labor Market Survey/Earning Power Assessment because the Claimant was never offered any of the jobs contained within the Assessment.

The employer appealed the workers' compensation judge's decision to the Workers' Compensation Appeal Board. The Workers' Compensation Appeal Board agreed with the employer, finding the workers' compensation judge erred by not addressing the testimony of the vocational experts and that the matter would normally warrant a remand. However, the Workers' Compensation Appeal Board reasoned that the Claimant's own testimony that he did not have the skills or experience to perform the jobs contained within the Labor Market Survey/Earning Power Assessment, which were credited by the workers' compensation judge, constituted enough evidence to show that the Employer failed to meets its burden of showing that jobs were available within Claimant's skill, education, and work experience.

Resolution

The Commonwealth Court addressed two issues raised by the employer on appeal. The Court first addressed the employer's contention that the workers' compensation judge erred by finding that the Claimant had to be offered a job contained within the Labor Market Survey/Earning Power Assessment in order for the Labor Market Survey/Earning Power Assessment to be valid. The Commonwealth Court found that the workers' compensation judge did, in fact, err and that the employer did not have to show that the Claimant was offered a job contained within the Assessment in order to meet its burden of proof.

Second, the Commonwealth Court addressed the issue as to whether the workers' compensation judge should have assessed the opinions of the vocational experts. The Commonwealth Court held that the judge erred and lacked the foundation for accepting Claimant's testimony that he was not vocationally or physically able to do any of the identified jobs without addressing the opinions of both vocational experts. The Commonwealth Court also noted that the vocational experts offered completely different accounts about the physical and vocational requirements of each job position contained within the Assessment, and this conflict needed to be addressed by the workers' compensation judge. As a result, the Workers' Compensation Appeal Board vacated the Decision of the Workers' Compensation Appeal Board and remanded the matter to the Board for further evaluation.

Take Away

This matter is important as it reiterates the fact that an employee does not have to be offered a job contained within a Labor Market Survey for an employer to meet its burden of proof in showing that an employee's benefits should be modified. Additionally, this case illustrates how the workers' compensation judge must evaluate the expert evidence when there was a conflict in the evidence, and an employee's testimony regarding his or her vocational abilities is not a sufficient basis, on its own, to deny a Modification Petition based on Labor Market Survey/Earning Power Assessment when conflicting vocational opinions exist.

PENNSYLVANIA AFL-CIO, BY ITS TRUSTEES AD LEDUM, RICHARD W. BLOOMINGDALE AND FRANK SNYDER, PETITIONS, VS. COMMONWEALTH OF PENNSYLVANIA, GOVERNOR TOM WOLF, IN HIS OFFICIAL CAPACITY; W. GERARD OLEKSIAK, SECRETARY OF THE DEPARTMENT OF LABOR AND INDUSTRY, IN HIS OFFICIAL CAPACITY.

Matter

The Commonwealth Court of Pennsylvania heard this matter to determine whether the AFL-CIO was entitled to injunctive relief, as a result, their allegation that amendments to the Pennsylvania Workers' Compensation Act involving impairment rating evaluations was unconstitutional delegation of legislative authority. This is a post Protz II decision through which the Commonwealth Court ultimately concluded that the Pennsylvania AFL-CIO had not stated a legally sufficient claim under Article II Section 1 of the Pennsylvania Constitution. Ultimately, the Commonwealth Court sustained preliminary objections set forth by the Commonwealth of Pennsylvania in the matter, and upheld the validity of Section 306(a)(3) of the Pennsylvania Workers' Compensation Act.

Legal Analysis

The Pennsylvania AFL-CIO filed a Petition to Review through which it alleges that the new standards surrounding Impairment Rating Evaluations (IREs) that require the use of the Sixth Edition, Second Printing, of the American Medical Associations Guide to the Evaluation of Permanent Impairment violated Article II Section 1 of the Pennsylvania Constitution. The PA AFL-CIO argued that section 306(a)(3) violated the Pennsylvania Constitution because the provision delegates the general assembly's legislative function to the American Medical Association, which is a private entity.

The Pennsylvania AFL-CIO further averred that nothing in Section 306(a)(3) requires that the American Medical Association hold hearings, accept public comments, or explain the grounds for its methodology and reasoning, and as a result could not be subjected to judicial review. Additionally, the PA AFL-CIO challenged the Pennsylvania General Assembly's delegation of its legislative authority to the American Medical Association to the extent that the American Medical Association is shielded from political accountability that would normally be associated with the General Assembly.

In response to the PA AFL-CIO's assertion, the Commonwealth of Pennsylvania filed preliminary objections in the nature of a demurer asserting that the matter should be dismissed because the AFL-CIO's position was legally insufficient. The Commonwealth of Pennsylvania specifically contended that there was no improper delegation to the American Medical Association because physicians performing IREs are limited to using standards set forth in the Sixth Edition, Second Printing of the AMA Guidelines—regardless of whether future editions are printed or changes made to the future editions.

Resolution

The Commonwealth Court determined that the AFL-CIO's position regarding delegation was not applicable to the present matter because the Pennsylvania General Assembly did not delegate decision making to the American Medical Association. Rather, the General Assembly adopted standards that limit the American Medical Association's discretion by not allowing future standards or editions of the American Medical Association Guidelines to apply to impairment rating evaluations.

The Commonwealth Court specifically noted that by confining the use of AMA guidelines to the Sixth Edition, Second Printing eliminated the delegation issues addressed in Protz II. The Commonwealth Court further noted that the non-delegation doctrine does not prohibit the General Assembly from adopting as its own particular set of standards, which are already in existence at the time of adoption.

Further, the Commonwealth Court noted that the process for which the American Medical Association develops its own standards has little bearing on the General Assembly's actions in adopting the American Medical Association's guidelines because the guidelines already existed at the time of adoption. As a result, the standards adopted by the General Assembly were not "unseen"—or unknown—to the General Assembly at the time of its implementation of section 306(a)(3).

Take Away

This decision by the Commonwealth Court of Pennsylvania is significant because workers' compensation judges have denied petitions to compel Impairment Rating Evaluations based on the non-delegation arguments raised by the Pennsylvania AFL-CIO in this case. While not all judges have used the non-delegation argument to deny petitions to compel Impairment Rating Evaluations, this decision provides employers with strong legal precedent to argue against non-delegation arguments raised by claimants' counsels when litigating petitions to compel IREs.