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Workers Compensation

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WORKERS' COMPENSATION

BOYD v. MERRIT, No. 17061, slip op. (W. Va. July 3, 1986).

Emergency Rules—Subsequent Legislative Rules—Workers' Compensation

In this case, the Commissioner awarded claimant 5% permanent partial disability due to occupational pneumoconiosis (OP), which claimant protested. He then submitted another medical exam report to the Commissioner which indicated 15-20% pulmonary impairment. Before the protest hearing, the Commissioner adopted emergency administrative rules governing the adjustment of results of blood gas studies according to the altitude at which the studies were done. Applying this rule to the claimant's data confirmed the Board's initial finding. Claimant protests the applicability and validity of the emergency rules. Since claimant's appeal was filed, the Legislature has modified the emergency rules and adopted a legislative rule on the subject.

The issues in this case were: (1) Whether the Commissioner may apply emergency rules for evaluating the results of blood gas studies to OP claims pending at the time the rules were promulgated; and (2) whether the court is competent to evaluate the scientific validity of the emergency or legislative rules.

The court held that when the Commissioner promulgates an emergency rule affecting the award a claimant is entitled to, and the legislature subsequently enacts a more liberal legislative rule superseding the emergency rule, the Appeal Board must, under the liberality rule, apply the legislative rule to all pending claims. The supreme court does not sit as a superlegislature to pass on the political, social, economic, or scientific merits of statutes pertaining to proper subjects of legislation. In the absence of any constitutional infirmities, the emergency and legislative rules are valid.

DAVIS v. WORKERS' COMPENSATION COMM'R, No. 17469, slip op. (W. Va. July 11, 1986).

Burden of Proof—Employment-related Injury

In this action, the claimant began to experience pain in his left leg after making numerous trips up and down several flights of stairs at work. He wrapped his leg in an Ace bandage and continued to work for five weeks before seeing a doctor. The doctor diagnosed the condition as "old ruptured quadriceps muscles," as claimant had experienced prior problems with his leg as early as 1968, unrelated to his employment. Claimant had previously filed a claim for workers' compensation benefits because he was off work due to back problems. His doctor told him that the use of the Ace bandage contributed to his back pain.

The major issue was whether the claimant demonstrated that his injuries arose in the course of and resulting from his employment.

The court held that, given the medical diagnosis of “old ruptured quadriceps muscles” and the fact that the claimant neither filed an application for benefits nor sought medical attention for some five weeks after his injury, but instead worked for this period of time, and given the fact that the claimant actually missed work due to a back condition rather than his leg condition, the Appeal Board reasonably concluded that the claimant did not prove he sustained an injury resulting from employment.

DELLER v. NAYMICK, 342 S.E.2d 73 (W. Va. 1985).

Co-employee Immunity from Tort Liability

In this case, the employee suffered a job-related knee injury and was treated at the company dispensary by a salaried doctor who also had a small private practice and worked part-time for another manufacturer. After the employee received workers’ compensation benefits for the injury, he sued the doctor for malpractice, alleging that the doctor had aggravated his knee injury by reusing a hypodermic syringe in treatment. The doctor had his own medical malpractice insurance and the employer had liability insurance but both policies excluded coverage when workers’ compensation is applicable to compensate the injured person. The doctor filed a motion to dismiss based upon the alleged immunity from suit provided by West Virginia Code section 23-2-6a.

The trial court certified two questions to the West Virginia Supreme Court of Appeals: (1) Whether a full-time salaried doctor employed by a subscriber to the Workers’ Compensation Fund or by a self-insured employer is subject to a co-employee’s medical malpractice action because of the “dual capacity” doctrine, despite the provisions of West Virginia Code section 23-2-6a; and (2) whether the immunity from tort liability provided by these code provisions is inapplicable to the extent that the doctor employed by a subscriber to the Workers’ Compensation Fund or by a self-insured employer is covered by liability insurance.

The court held that: (1) A full-time, salaried doctor employed by a subscriber to the Workers’ Compensation Fund or by a self-insured employer is immune from tort liability to a co-employee under West Virginia Code section 23-2-6a and the so-called “dual capacity” doctrine does not except such a doctor from such immunity; and (2) the immunity from tort liability provided by West Virginia Code section 23-2-6a, is not waived to the extent that liability insurance coverage is available.

HANNAH v. WORKERS’ COMPENSATION COMM’R, 346 S.E.2d 757 (W. Va. 1986).

Definition of “Hazard”—Timely Application for Benefits

The claimant retired after working 34 years with a coal company; the majority of those years were spent working underground, while the last four to five years

he worked above ground as a radio dispatcher. Approximately 16 months after retiring, he filed a claim for workers' compensation benefits due to noise-induced hearing loss. The Commissioner determined the claim to be compensable and the employer protested. At the protest hearing, the claimant testified that although he became aware of his hearing problem some eight or nine years earlier, during his recent service as a dispatcher he was also exposed to substantial noise from the radio equipment. The Commissioner then rejected the application on grounds contained in West Virginia Code section 23-4-15: (1) The claim was filed over three years from the date of last exposure to hazards of the occupational disease; and (2) the claim was filed over three years from the time the claimant had knowledge that he was suffering from the occupational disease.

The controlling question in this case was whether the evidence of industrial noise exposure during the claimant's latter employment as a radio dispatcher constituted a sufficient showing of a "hazard" as that term is used in the Workers' Compensation Act, and thus whether the claim was timely filed.

The court held that in a claim for noise-induced occupational hearing loss, a "hazard" as contemplated by the Workers' Compensation Act, exists in any work environment where unusual or excessive noise is shown to be present. Appellant created a sufficient prima facie case of a noise hazard, unrebutted by the employer, to support the legal conclusion that his application was timely under West Virginia Code section 23-4-15 since it was filed within three years of the last date of hazardous exposure.

NELSON v. MERRITT, 345 S.E.2d 785 (W. Va. 1986).

Medical Exams—Speedy Processing of Claims—Workers' Compensation

This case involved six consolidated claims challenging the court's earlier decision in *Brogan v. Workers' Compensation Comm'r*, 327 S.E.2d 694 (W. Va. 1984) concerning the number of medical exams permitted to develop a claimant's case and the exchange of medical reports without an evidentiary hearing, and complaining of long delays in claim processing. This mandamus action was to compel the Commissioner to amend procedural rules.

The issues in this case were: (1) Whether the claimant was entitled to more than one medical exam to develop evidence for claims in litigation; (2) whether the procedural requirements relating to the prompt exchange of medical reports, notice of objection, and requests to examine the medical expert prior to any evidentiary hearing were properly construed from the statute; (3) whether the Commissioner's procedural rules and practices on granting continuances and supplemental hearings were conducive to speedy processing of claims.

The West Virginia Supreme Court of Appeals held that: (1) Where a Workers' Compensation claim is in litigation, both the employer and claimant are entitled to a reasonable number of medical exams, and *Brogan* is modified accordingly;

(2) Workers' Compensation statutes should be construed liberally to avoid needless delays. They require the prompt exchange of medical reports without waiting for an evidentiary hearing. Further, parties shall object in writing as to the admissibility of a report and state their request for cross-examining the medical expert promptly; and (3) no continuances should be granted in a compensation case except where good cause is shown.

ROUSE v. WORKERS' COMPENSATION COMM'R, 342 S.E.2d 229 (W. Va. 1986).

Liability for Payment—Separability of Claims—Workers' Compensation

In this case, a widow's husband was granted a permanent total disability award in 1939, paid by the Workers' Compensation Fund and chargeable to the employer's account. Employer became self-insured in 1974, and after husband's death in 1983, widow filed for dependents' death benefits.

The issues were: (1) Whether the lump sum award of death benefits to the widow was separate from the husband's original disability award and therefore a new award, and (2) whether the Workers' Compensation Fund or the employer should pay the award.

The court held that: (1) The lump sum award for death benefits pursuant to West Virginia Code section 23-4-10(e) is a new and separate award, distinct from the injured employee's claim for disability benefits; and (2) the employer is responsible for paying the death benefits award because Rule 4.02(b) of the West Virginia Workers' Compensation Fund Rules and Regulations requires a self-insured employer to pay all awards made after the date of self-insurance even if the claim arose prior to that date.

SANSOM v. WORKERS' COMPENSATION COMM'R, 346 S.E.2d 63 (W. Va. 1986).

Burden of Proof—Employment-related Injury

The claimant worked for twenty-nine years as a bottle inspector, which required lifting heavy cartons of bottles onto and from a conveyor. She was diagnosed as suffering from tenosynovitis of the wrists and her doctor placed both of her wrists in casts, causing her to miss work for seven weeks. She filed for Workers' Compensation benefits and the Commissioner awarded her temporary total disability. Her employer protested, claiming that she had injured her right wrist the year before when she stumbled out of her car. The Commissioner then set aside her prior ruling and denied the claim.

The main issue was whether the claimant had demonstrated that her wrist condition was a personal injury received in the course of and resulting from her employment.

The court held that the claimant had met her burden of proof with respect to the causal connection between her tenosynovitis and her employment as a bottle inspector on an assembly line, as competent medical evidence was introduced establishing this link. Any connection between the car incident and claimant's condition was pure conjecture.

TANNER v. WORKERS' COMPENSATION COMM'R, 345 S.E.2d 29 (W. Va. 1986).

Death Benefits—Employer Not a Subscriber—Workers' Compensation

In this case, a widow's claim for dependents' death benefits was rejected because her deceased husband's employer had never subscribed to the Workers' Compensation Fund. When the decedent died in 1980, West Virginia Code section 23-2-5 provided that no employee should be denied Workers' Compensation benefits because an employer required to subscribe had failed to do so.

The main issue was whether the widow was entitled to dependents' benefits when her deceased husband's employer had never subscribed to the Workers' Compensation Fund, and the husband's last employment exposure was prior to the year the statute was amended to provide benefits when an employer was not in the Fund.

The court held that: (1) The Workers' Compensation statute in effect at the time of the injured employee's death is the one which governs dependents' claims for death benefits; and (2) under the provisions of West Virginia Code section 23-2-5, no employee or dependent of a deceased employee whose employer is required to subscribe to the Workers' Compensation Fund can be denied benefits because such employer failed to subscribe to the Fund.

UNITED MINE WORKERS OF AMERICA v. MERRITT, No. 17077, slip op. (W. Va. June 26, 1986).

Challenges to Administrative Procedures—Workers' Compensation

Petitioners in this case challenged various aspects of the operation of the Workers' Compensation Fund.

The issues were: (1) Whether the Commissioner was required to give more specific and detailed reasons for denying a claim; (2) whether the Commissioner was required to give specific reasons for denying petitions to reopen a claim; (3) whether existing Workers' Compensation procedures improperly tolerate abuse by employers of the nonmedical hearings for delay purposes; (4) whether the Commissioner improperly refused to release communication between the Fund and an accountant as requested under the Freedom of Information Act; and (5) whether the Commissioner must pay the cost of pulmonary rehabilitation programs for all claimants found to be suffering from some degree of occupational pneumoconiosis (OP).

The court held that: (1) Neither the notice provisions of West Virginia Code section 23-5-1 (Supp. 1986) nor procedural due process considerations require that the Commissioner do more in denying a claim than give the claimant notice of the reasons for denial and advise him or her of the time within which an objection must be made; (2) when the decision to deny the claim is based on the employer's report, the Commissioner must provide a copy of the report along with the order denying the claim; the amended statute, West Virginia Code section 23-5-16, provides that the Commissioner's notice of denial to reopen a claim must state the reasons and afford the claimant an opportunity for an evidentiary hearing instead of appeal; (3) West Virginia Code section 23-4-15(b), provides that the claimant's medical exam before the OP Board is not to be delayed by objections to nonmedical issues; (4) since the circuit court has not had an opportunity to evaluate the legality of the Commissioner's refusal to release the requested material, mandamus is improper; (5) medical facts concerning whether pulmonary rehabilitation is reasonably required treatment for all OP victims is not sufficiently developed to decide the issue or to demonstrate a clear legal right to the relief sought.

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