[J-69-99]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TRIANGLE BUILDING CENTER AND KEMPER INSURANCE COMPANY	:	189 M.D. Appeal Dkt. 1998
v.	:	Appeal from the Order of the Commonwealth Court entered May 21, 1998 at 145 C.D. 1997 reversing and remanding the decision of the W.C.A.B. entered December 17, 1996 at A94-0939
WORKERS' COMPENSATION APPEAL BOARD (LINCH)	:	
APPEAL OF: MALCOLM R. LINCH	:	ARGUED: April 27, 1999

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: February 24, 2000**

This Court granted allocatur limited to the issue of whether Malcolm R. Linch (Claimant) met the requirement of Section 309(e) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 582(e), which provides in relevant part: "Where the employe is working under concurrent contracts with two or more employers, his wages from all such employers shall be considered as earned from the employer liable for the compensation." I respectfully dissent from the majority's conclusion that Claimant's temporary layoff did not preclude a determination that he was concurrently employed for the purpose of the average weekly wage calculation.

Claimant recognizes that the Commonwealth Court has held that a claimant must actually be working for two or more employers at the time of his injury in order for his

workers' compensation benefits to be determined according to Section 309(e). In Freeman v. Workmen's Compensation Appeal Board (C.J. Langenfelder & Son), 107 Pa. Cmwlth. 138, 527 A.2d 1100, appeal denied, 517 Pa. 600, 535 A.2d 1058 (1987), the claimant sustained an injury at C.J. Langenfelder & Son two weeks after losing his job at A.J. Picone, which went out of business. The Commonwealth Court noted that Section 309(e) is written in the present tense ("Where the employe is working under concurrent contracts . . . .), thus rendering it inapplicable to claimants who had previously worked for concurrent employers. In Mengel v. Workmen's Compensation Appeal Board (Boyer's IGA, Inc.), 118 Pa. Cmwlth. 582, 545 A.2d 992 (1988), the claimant was laid off from her job at Foltz Trucking in September 1984, when the company went out of business. She began collecting unemployment compensation benefits, but continued working at her second job at Boyer's Supermarket. On February 1, 1985, she was injured while working at Boyer's. The Commonwealth Court affirmed the Board's decision that the claimant was not concurrently employed, and therefore ineligible to have her workers' compensation benefits calculated pursuant to Section 309(e). Moreover, the court noted that the Act does not provide that the receipt of unemployment compensation is deemed to constitute concurrent employment.

Claimant asserts that the Commonwealth Court correctly decided Freeman and Mengel because in those cases the alleged concurrent employer had gone out of business, thus precluding the possibility of a continuing employment relationship. However, in the instant matter, although Claimant was receiving unemployment compensation benefits, he was required to call R&J on a daily basis to find out if work was available. Otherwise, R&J would have considered him to have voluntarily quit. He argues that if R&J no longer employed him during the layoff, there would have been no employment from which to quit.

It is Claimant's position that the receipt of unemployment compensation benefits is one factor to be considered in determining whether an injured employee has concurrent employment pursuant to Section 309(e). He suggests that each case must be decided in light of the individual circumstances presented. Here, on the date of injury, Claimant was on temporary layoff from a full-time position that he had held for seven years. He was required to call R&J every day as a condition of maintaining his employment contract. Furthermore, it is undisputed that his loss of income from R&J after May 31, 1990, was not the result of adverse economic conditions (i.e. plant closing), but was a direct result of the work-related injury he sustained at Triangle. Because of these factors, Claimant asserts that he was concurrently employed on the date of injury.

I disagree with Claimant that the Commonwealth Court's decisions in Freeman and Mengel were based on the employers having permanently closed their businesses. Not only are the Commonwealth Court's decisions silent as to the relevance of this fact, but both clearly set forth their reliance on the specific language of Section 309(e), which refers to the calculation of benefits, "where the employe is working under concurrent contracts with two or more employers." As Triangle notes, Section 104 of the Act, 77 P.S. § 22, states:

> The term "employe" as used in the Act is to be synonymous with servant, and includes--All natural persons who perform services for another for valuable consideration . . . .

As of January 31, 1990, the date of his injury, Claimant did not meet the definition of "employee" because for more than two months he had not performed services for R&J for valuable consideration. Furthermore, Section 4(l)(1) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, as amended, 43 P.S. §753(l)(1) defines "employment" as:

> all personal service performed for remuneration by an individual under contract of hire, express or implied, written or oral, including service in interstate commerce and service as an officer of a corporation.

When Claimant was injured while working at Triangle, it is clear that he was not receiving remuneration from R&J. Nor can it be argued that his calling R&J to ask about the possibility of work constitutes a personal service.

I agree with Triangle that the focus of the inquiry must be whether a claimant is working for the second employer at the time of his injury. Shifting the focus to the relationship between claimant and the second employer, or to whether the second employer's inability to offer work to the claimant is temporary or permanent, creates administrative complexities and deviates from the plain language of Section 309(e). The Commonwealth Court properly held that Claimant was not concurrently employed because his receipt of unemployment compensation benefits establishes that he was not working for R&J at the time of his injury. Accordingly, the determination not to calculate Claimant's workers compensation benefits according to Section 309(e) is correct.

For these reasons, I would affirm the Order of the Commonwealth Court.

Messrs. Justice Zappala and Castille join this dissenting opinion.