[J-9-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

RUSSELL T. PANYKO,	:	No. 37 WAP 2004
	:	
Appellant	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered April 12,
v.	:	2004 at No. 2227CD2003, affirming the
	:	Order of the Workers' Compensation
	:	Appeal Board entered September 17,
WORKERS' COMPENSATION APPEAL BOARD (U.S. AIRWAYS),	:	2003 at No. A02-1763.
	:	
	:	
Appellees	:	ARGUED: March 7, 2005

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: DECEMBER 28, 2005**

The Majority concludes that Russell Panyko (Claimant) satisfied the burden necessary to achieve entitlement to workers' compensation benefits for a heart attack that he experienced on February 5, 1997, after a single routine, non-disciplinary meeting with the company attendance manager. Because I believe that the Majority has expanded the meaning of "work-related injury" to the point that it has, as a judicial body, converted workers' compensation coverage into general group life and health

insurance in contravention of the Workers' Compensation Act (Act),[1] I must respectfully dissent.

Claimant accumulated four occurrences in a twelve-month period, as defined by US Airways (Employer).[2] Employer's attendance control policy provided that, for the fifth occurrence in a twelve-month period, the offending employee was placed on "level one."[3] Because placement on "level one" constituted a form of discipline, Mr. Egan routinely met with employees following the fourth occurrence to address possible problems or correct inaccurate records. These meetings were short, routine, and non-disciplinary in nature for Mr. Egan was the attendance control manager for 1,800 US Air employees. Claimant admitted that he had previously been placed on level one, and indicated that, after an employee reached level three, the Employer could "suspend you or terminate you." (Reproduced Record (R.R.) at 229a.) Claimant forthrightly conceded

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[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1-1041.4; 2502-2626.

[2] An occurrence is defined by the Employer as "any time an employee is not at work when he or she is scheduled to be." (Notes of Testimony (N.T.), January 29, 2002, page 22.) When an employee is absent from his or her work station, the employee's supervisor records an occurrence without specifying the actual reason for that occurrence. When an employee accumulates four occurrences, the attendance control manager is notified of the dates of the occurrences, but not the reasons therefore. (N.T., January 29, 2002, page 27.) Claimant had occurrences for February 19, 1996, March 17 & 18, 1996 (which counted as one occurrence), May 29, 1996, and January 18, 1997. (US Air Employee Contact Report dated February 5, 1997.)

[3] Placement on "level 1" required the employee to meet with attendance control for each subsequent occurrence that took place within the next twelve-month period. (N.T., January 29, 2002, page 9.)

that he had three occurrences, but he was upset and angry that he was being charged with a fourth.[4] (R.R. at 224a.)

Francis B. Perriello (Mr. Perriello), Claimant's immediate supervisor, testified that, when he informed Claimant that morning that his presence at an attendance control meeting was required, Claimant "turned red all over, his entire body just clenched, [and] he was like a coiled spring." (R.R. at 291a.) Mr. Perriello became alarmed at the ferocity of Claimant's anger and possible danger to his health and attempted, unsuccessfully, to calm him down. (R.R. at 291a-292a.) However, Claimant stormed out of Mr. Perriello's office and that was the last he saw Claimant that day. (R.R. at 293a.)

The previous information was provided at a hearing to enable the WCJ to determine, on remand from the Commonwealth Court, whether Claimant had been subjected to "abnormal working conditions." Following a set of hearings, the WCJ found that:

> [C]laimant entered the February 5, 1997 meeting angry and, in his mind, wrongly charged with a fourth attendance occurrence. Mr. Egan, as claimant's superior, reacted to claimant's indignation in a rational fashion, i.e., by threatening disciplinary action. . . . This Judge also finds claimant's representation that Mr. Egan placed his life in danger to be unpersuasive. By claimant's own account, Mr. Egan never physically touched him (other than to shake his hand), threatened physical harm and/or verbally abuse[d] or intimidated him. Mr. Egan also never cursed or used obscene or vulgar language toward claimant."

(Decision of WCJ dated June 25, 2002, Findings of Fact 15(f), (g).) Thus, the WCJ concluded that Claimant suffered a "subjective reaction to normal working conditions."

[4] Claimant was upset that he was being charged for the occurrence on May 29, 1996, when he appeared for work, as scheduled, but was transported to the hospital with chest pains.

(R.R. at 316a.) Remarkably, the Majority would turn this routine attendance control meeting into a physical injury.

The Majority maintains that a claimant should not be required to meet the abnormal working conditions standard delineated in Davis v. Workmen's Compensation Appeal Board (Swarthmore Borough), 751 A.2d 168 (Pa. 2000), when the claimant "suffers a purely physical injury such as a heart attack." (Slip Op. at 7.) The Majority, however, eliminates the crucial element of causation required by the Act. The Act mandates that an employer compensate an employee for injuries "arising in the course of his employment and related thereto." 77 P.S. § 411(1). It also states that "all injuries caused by the condition of the premises or by the operation of the employer's business" are included. Id. In common parlance, the work injury must be caused by the working conditions. Consequently, the Act makes a distinction between injuries that are work related and those that simply occur at work. Today, the Majority has blurred the distinction between a work-related heart attack and a heart attack that occurs at work.

Physical Causation v. Mental Causation

We have never before defied the requirements of the Act and ignored causation and work-relatedness to find that the injury and resulting disability are compensable. This Court has indicated that the term "injury" is to be interpreted according to its common and approved usage. Pawlosky v. Workmen's Comp. Appeal Bd., 525 A.2d 1204, 1209 (Pa. 1987). In that case, the Court noted the broad definition of "injury" as set forth in Creighan v. Firemen's Relief & Pension Fund Board, 155 A.2d 844 (Pa. 1959). "[I]n common speech the word 'injury,' as applied to personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain, or a lessened facility of the natural use of any bodily activity or capability." Id. at

847 (citation omitted). The term "injury" "is more commonly used to express . . . the effect on the recipient in the way of hurt or damage, and we do not doubt at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by anyone." Id. at 847 (emphasis in original and supplied). Thus, the clear focus of the definition of the term "injury" is on the effect, i.e., the disorder or symptoms suffered by the claimant, in this case, a heart attack.

However, work-related injuries do not occur in a vacuum. In order to meet the requirements of the Act, the injury must be caused by the condition of the premises or the operation of the employer's business, i.e., the working conditions. We have identified the types of stimuli that produce various classes of work injuries. There are four categories of injuries: (1) physical stimulus causing physical injury (physical/physical); (2) psychological stimulus causing physical injury (mental/physical); (3) physical stimulus causing psychic injury (physical/mental); and (4) psychological stimulus causing psychic injury (mental/mental). The causative agent for the injury must reside within the employment scenario. In the instant matter, Claimant's complete description of his physical injury depicts it as a "minor heart attack/aggravation of existing heart condition." He alleges that the causative element occurred during "a confrontation with a personnel supervisor at [Claimant's] place of employment." The causative element was a mental one, not a physical one, so we are faced with the mental/physical classification. Accordingly, I believe that the facts of this case must be viewed within the parameters of a mental insult causing a physical injury.

Psychic Insult Causing Physical Injury

We have traditionally required that, to recover workers' compensation benefits for a psychic injury, a claimant must prove by objective evidence that: (1) he suffered a

psychic insult; (2) the psychic insult produced an injury; and (3) the injury is other than a subjective reaction to normal working conditions. Martin v. Ketchum, Inc., 568 A.2d 159 (Pa. 1990). This approach recognized the highly subjective nature of psychic insults and required that the occurrence of the injury and its causal relationship to the claimant's employment be adequately established.

As recognized by the Majority, in the early years of workers' compensation litigation, the 1915 Act limited recovery exclusively to an accident resulting in physical injuries, generally requiring some violence to the body. Early workers' compensation tribunals perceived some difficulty with this definition and developed two doctrines meant to cover injuries that were obviously work related, but fell outside actual violence to the body. Those doctrines were styled as the doctrines of "unusual strain" and "unusual pathological result." These doctrines enabled early jurists to circumvent the requirement for an actual accident where, although no accident occurred, the injury was clearly related to the individual's employment. The accident in the case of the "unusual strain" doctrine was supplied by finding that the injuries were the result of excessive exertion by a worker while performing a task atypical to his employment. See, e.g., Skroki v. Crucible Steel Co., 141 A. 480 (Pa. 1928) (finding that heart attack was "accident" that occurred because of overexertion in a hot room); Hilt v. Roslyn Volunteer Fire Co., 281 A.2d 873, 875 (Pa. 1971) (denying benefits pursuant to "unusual strain" doctrine for firefighter who suffered from a heart attack by "doing an occasional act involving sustained muscular effort, though the work is not hard"). In the case of the "unusual pathological result" doctrine, benefits were awarded by finding that the accident occurred because there was an extraordinary effect of work performed in the usual fashion. Hinkle v. H.J. Heinz Co., 337 A.2d 907 (Pa. 1975) (mechanic in can-making factory suffered "accident" by sustaining unexpected loss of hearing performing

his normal job); Parks v. Miller Printing Mach. Co., 9 A.2d 742, 744 (Pa. 1939) ("accident resides in the extraordinary nature of the effect rather than in the cause"); Lane v. Horn & Hardart Baking Co., 104 A. 615 (Pa. 1918) (casualty attributable solely to the unexpected and violent effect of heat upon the physical structure properly held to be an accident). These doctrines ultimately metamorphed into the abnormal working conditions standard we established in Martin to review mental insults.

In 1972, the General Assembly amended the Workers' Compensation Act to include all work-related injuries, including occupational diseases. However, tribunals concerned with workers' compensation matters continued to require an elevated standard to distinguish normal workplace occurrences from those that were compensable work-related injuries. See, e.g., Haverford Twp. v. Workmen's Comp. Appeal Bd. (Angstadt), 545 A.2d 971 (Pa. Cmwlth. 1988) (decedent's heart attack precipitated by excessively stressful demands of employer, unusually stressful work environment, and series of abnormal, stressful incidents at work); American St. Gobain Corp. v. Workmen's Comp. Appeal Bd. (Kordalski), 314 A.2d 40 (Pa. Cmwlth. 1974) (holding that accident may not be inferred from the fact that employee sustained a heart attack as a result of exertion necessary for performance of usual duties and work is done in same quantity and manor as performed in the past).

In Workmen's Compensation Appeal Board v. Bernard S. Pincus Co., 388 A.2d 659 (Pa. 1978), we appeared to lower the standard, when in fact we essentially applied the "unusual pathological result" doctrine to find that heart attacks were compensable work injuries due to the damage to the internal tissues of the workers' hearts. Many cases cited to the decision of this Court in Krawchuk v. Philadelphia Electric Co., 439 A.2d 627 (Pa. 1981), for the proposition that, where employment stress produced a

heart attack, the claimant only had to show that the injury was related to his employment. However, no challenge was mounted in Krawchuk as to the work-relatedness of the heart attack or the existence of a mental insult. The only issue there was whether the claimant could be compensated for the death of her husband when he was working on behalf of his employer in his own home. The determination that Krawchuk's heart attack and death were compensable was based on the finding that he experienced "unusual stress, strain[,] and exertion" in his employment that directly resulted in his fatal coronary attack and that he was working in furtherance of his employer's interests at the time of his death.

In Martin, this Court clarified the law on this issue by explicitly stating that the proper standard for reviewing psychic insults is whether they result from other than subjective reactions to normal working conditions. Subsequent courts reasoned that a psychic stimulus that produced an effect other than a subjective reaction to normal working conditions must be caused by abnormal working conditions. Since Martin, this Court has issued at least nine additional Opinions on the standard for granting benefits in cases of psychic insults, all of which require a finding that the precipitating cause of the injury is other than a subjective reaction to normal working conditions. See Volterano v. Workmen's Comp. Appeal Bd. (Traveler's Ins.), 639 A.2d 453 (Pa. 1994) (mental/mental); Romanies v. Workmen's Comp. Appeal Bd. (Borough of Leesport), 644 A.2d 1164 (Pa. 1994) (mental/mental); Wilson v. Workmen's Comp. Appeal Bd. (Aluminum Co. of America), 669 A.2d 338 (Pa. 1996) (mental/mental); Phila. Newspapers, Inc. v. Workmen's Comp. Appeal Bd. (Guaracino), 675 A.2d 1213 (Pa. 1996) (mental/mental); Hershey Chocolate Co. v. Workmen's Comp. Appeal Bd. (Lasher), 682 A.2d 1257 (Pa. 1996) (mental/mental); Pa. Human Relations Comm'n v. Workmen's Comp. Appeal Bd. (Blecker), 683 A.2d 262 (Pa. 1996) (mental/mental);

Ryan v. Workmen's Comp. Appeal Bd. (Cmty. Health Servs.), 707 A.2d 1130 (Pa. 1998) (mental/mental); Davis v. Workmen's Comp. Appeal Bd. (Swarthmore Borough), 751 A.2d 168 (Pa. 2000) (mental/mental with physical symptoms); and Phila. v. Civil Serv. Comm'n, 772 A.2d 962 (Pa. 2001) (mental/mental). Although the Majority attempts to define the instant matter solely in terms of the physical injury, the mental element, which supplies the causation that is required by the Act, should not be swept aside as insignificant. It makes no sense to evaluate psychic insult on different planes depending on whether the resulting injury is mental or physical. I remain convinced that all psychic insults should be evaluated in the same manner. I cannot agree with the position of the Majority that, in "mental/physical" cases, the claimant must only show distinct identifiable physical injuries and present unequivocal medical testimony that connects the physical disability to the workplace in order to receive benefits. The flaw in this reasoning is that it circumvents the causative link between the physical injury and employment that the Act requires. Pursuant to this theory, any employee who gets sick at work will be entitled to workers' compensation benefits. For example, an employee who gets a migraine headache because a work deadline is approaching can claim a work-related injury. One who has a stroke at his or her work desk can claim a work-related injury. Finally, one who has a heart attack after a routine, non-disciplinary meeting at work can claim a work-related injury.

It is well established that a claimant in a workers' compensation case has the burden to prove all the statutory elements that comprise a compensable injury by a preponderance of the evidence. Inglis House v. Workmen's Comp. Appeal Bd. (Reedy), 634 A.2d 592 (Pa. 1993). This includes establishing the cause of the condition for which compensation is claimed and proving that the injury arose out of and in the course of employment. To meet the preponderance standard, the claimant must

present evidence that leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence. However, nothing in the Act requires that the evidence be liberally construed in a claimant's favor when determining whether an injured worker has met his or her burden of proof.

I believe that a claimant must also prove that the injury occurred either because of a work-connected risk or because the employment placed the claimant at a risk of exposure exceeding that of the general public. When working conditions create a higher-than-normal degree of stress, and that stress contributes to an employee's injury, only then has the necessary causation been established. Subjective, perceived, or imagined employment events do not supply the causative element that mandates liability for an employer. It is critical to maintain the same standards by which we judge psychic insults regardless of whether they spawn psychic injuries or physical ones. Removing the causative mental insult from the analysis will result in an employer becoming subject to workers compensation liability for terminating a worker,[5] promoting an employee,[6] reassigning an employee,[7] giving a performance evaluation,[8] or a single incident of egregious supervisory behavior.[9]

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[5] Erie Bolt Co. v. Workers' Comp. Appeal Bd. (Elderkin), 777 A.2d 1169 (Pa. Cmwlth. 1998), rev'd per curiam, 753 A.2d 1289 (Pa. 2000) (fatal heart attack on learning of termination).

[6] Hershey Chocolate Co. v. Workmen's Comp. Appeal Bd. (Lasher), 682 A.2d 1257 (Pa. 1996) (depression caused by increased workload following promotion).

[7] Wilson v. Workmen's Comp. Appeal Bd. (Aluminum Co. of Am.), 669 A.2d 338 (Pa. 1996) (depression caused by employee's subjective perception that reassignment to temporary job is demeaning).

It is interesting that the Superior Court was once faced with a situation similar to that in the present case. Elisha Hoffman (Hoffman), a train engineer, died following a heated argument with his foreman after arriving late for work one morning. The court explained:

> The argument lasted five or ten minutes and was accompanied by provocative epithets by the foreman and some gesticulations by Hoffman. At the conclusion of the argument Hoffman mounted his "loky" engine, on which he was employed as engineer, ran it about 1,000 or 1,500 feet, stopped to take a drink of coffee, and either dismounted or fell from the engine and died a few minutes thereafter. No assault was made upon him by the foreman. No blow was struck, or attempted to be struck, by either of them. Neither threatened the other with any show of force. Hoffman was white with anger when he mounted the engine; and he died from [myocardial infarction], he was suffering from chronic myocarditis--undoubtedly induced by the intensity of his own emotions. But there was no compensable accident within the meaning of the Workmen's Compensation Act.

Hoffman v. Rhoads Constr. Co., 172 A. 33, 33 (Pa. Super. 1934). The court opined that "purely subjective emotions, the result of anger, grief, joy, or other mental feeling, if unaccompanied by physical force or exertion, cannot be made the basis of a compensable accident." Id. at 33-34.

I believe that a better approach is to require that a claimant show exposure to a greater degree of emotional stress than experienced by his or her peers, the general working public, or his work environment to demonstrate a compensable injury. This

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[8] Pennsylvania Human Relations Commission et al. v. Workmen's Comp. Appeal Bd. (Blecker), 683 A.2d 262 (Pa. 1996) (suffered adjustment reaction with anxiety after receiving performance review).

[9] Philadelphia Newspapers, Inc. v. Workmen's Compensation Appeal Board, 675 A.2d 1213 (Pa. 1996) (depression caused by subjective reaction to single incident of supervisory criticism).

approach is fairer to a claimant and fairer to the employer. Rather than applying different standards without justification, it treats all psychic insults consistently regardless of whether they result in mental or physical injury.

CONCLUSION

There is no dispute that Claimant experienced a myocardial infarction. The only question before the WCJ was whether Claimant's heart attack was work related. Within that context, there is no evidence that Claimant experienced a period of employment with stress either greater than that experienced by his peers or the general public, or greater than that experienced within his normal employment. In fact, the evidence established that he was subjected to the same routine, non-disciplinary meeting as at least five other people that day. Claimant's subjective reaction began more than an hour before the meeting actually took place when his supervisor informed him that he was required to meet with the attendance control manager. As the testimony of his supervisor demonstrated, Claimant "turned red all over, his entire body just clenched, [and] he was like a coiled spring." (R.R. at 291a.) This meeting was both routine and non-disciplinary and cannot justifiably be seen as a psychic insult of such magnitude as to cause Claimant's heart attack. We have previously observed that "the work environment is a microcosm of society. It is not a shelter from rude behavior, obscene language, incivility, or stress." Phila. Newspapers, 675 A.2d at 1219. Hence, if there were any outside stimulus that can be said to have caused Claimant's injury, it was his subjective reaction to a routine event, if anything, which caused his injury. Accordingly, I believe that the WCJ properly concluded that Claimant suffered a "subjective reaction to normal working conditions" and therefore, the decision of the WCJ should be

reinstated. In this case, Claimant did not suffer a work-related heart attack; he suffered a heart attack at work.