

## PENNSYLVANIA SUPREME COURT DECISIONS WEIGH IN ON PSYCHIC INJURIES AND JOB AVAILABILITY

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### **Pennsylvania Supreme Court holds that a Pennsylvania state trooper who struck and killed a woman with his patrol car was entitled to benefits for a psychic injury due to abnormal working conditions.**

*Payes v. WCAB (Commonwealth of Pennsylvania State Police)*; 50 MAP 2011; decided October 30, 2013; Mr. Justice McCaffery.

The claimant, a trooper for the Pennsylvania State Police, was driving his patrol car early on a dark morning when a woman, dressed all in black, suddenly ran in front of his vehicle and was struck by the car. The claimant immediately pulled the car into the traffic lane and rushed to help the woman. Although the claimant tried mouth-to-mouth resuscitation and diverted oncoming traffic, the woman was pronounced dead at the scene. Later, it was discovered that she suffered from a mental illness and had been seen by several drivers walking up and down the area next to the highway where the incident occurred.

The claimant attempted to return to work but was not able to do so because of recurring feelings of anxiousness and stress. The claimant filed a claim petition alleging that he suffered from Post-Traumatic Stress Disorder as a result of the incident.

The claim petition was granted by the Workers' Compensation Judge, who found that the claimant had proven a mental injury arising from a work-related mental stimulus. The judge further found that, although state troopers may expect to be involved in violent situations, this particular one was very unusual. Consequently, the judge found that this was an abnormal working condition.

However, the judge's decision was reversed by the Appeal Board, and their decision was affirmed by the Commonwealth Court. In its opinion, the court stated, "Indeed, it is not beyond the realm of possibility for an officer to have to take someone's life."

The court also said that, although the events may have been unusual, they were not so much more stressful and abnormal than the already stressful nature of the claimant's job.

The Pennsylvania Supreme Court reversed the Commonwealth Court's decision and held that the claimant was entitled to benefits for a mental injury caused by abnormal working conditions. Noting that psychic injury cases are "highly fact sensitive," the Court pointed out that this does not mean that an abnormal working conditions analysis ends when it is established that a claimant generically belongs to a profession that involves certain levels of stress. According to the Supreme Court, the Commonwealth Court erred by not accepting the well-supported facts found by the judge establishing the existence of an extraordinarily unusual and distressing single work event experienced by the claimant, resulting in his disabled mental condition. In the Court's view, such an event constituted an abnormal working condition as a matter of law. II

### **The Pennsylvania Supreme Court holds that an employer's burden of proof when seeking a modification of benefits based on a labor market survey requires showing the existence of open jobs the claimant is capable of filling, not simply the existence of jobs that are already filled.**

*Phoenixville Hospital v. WCAB (Shoap)*, 32 EAP 2011; decided November 21, 2013; Mr. Justice McCaffery

In this case, the claimant sustained a work-related injury to her left shoulder. The claimant received physical therapy, and three surgeries were performed on the shoulder. The employer later filed a modification petition based on the results of two labor market surveys.

During the course of litigating the modification petition, the claimant testified that she applied for the positions that were listed in the labor market surveys, but no offers of employment were made to the claimant. The claimant also testified that she did her own job search, but did not apply for any positions she had found on her own.

The judge dismissed the employer's petition and found that the claimant had made a good faith effort in following up on the jobs that were referred to her by the employer. In its appeal to the Appeal Board, the employer argued that the judge had improperly incorporated into his legal analysis the "good faith" component of *Kachinski v. WCAB (Vepco Const. Co.)*, 532 A.3d 374 (Pa. 1987). According to the employer, the claimant's good faith effort in applying for the jobs was simply not relevant.

The Board disagreed with the employer and affirmed the judge's decision. However, the Commonwealth Court reversed. According to the Commonwealth Court, the critical question was whether the jobs were open and available at the time the labor market survey was performed, not when the claimant applied for the jobs in the labor market survey.

The Pennsylvania Supreme Court reversed the Commonwealth Court's decision and remanded the case for additional findings. The Court recognized that under §306 (b) of the Act, an employer is not required to show that the claimant was offered a job in order to

establish the claimant's earning power. Nevertheless, considering that it must be shown that substantial gainful employment exists, the jobs identified by an employer's expert witness that the claimant is "capable of performing" must be those jobs that are actually open and potentially available, not simply jobs that are already filled with existing employees. In other words, §306 (b) requires a showing of the existence of meaningful opportunities for the claimant to obtain employment and, thus, a claimant must have wide latitude to present evidence regarding his or her experience with applying for jobs identified by the employer's expert witness. ||



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