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School board secures reimbursement for summer wages paid to teacher

Case name: *Pawlewski v. Buffalo Board of Education*, 108 NYWCLR 109 (N.Y. App. Div. 2008).

Ruling: The Appellate Division reversed the Board's finding that the board of education was not entitled to reimbursement under WCL Section 25(4)(a) for wages paid to an injured teacher during the summer session.

What it means: Where an injured teacher receives her full annual wages while she is unable to work, those wages are paid in the same manner as she had received them before her injury, and the payments are consistent with the contractual terms under which the teacher's total annual salary is paid over a period of 10 months, the employer is entitled to reimbursement under WCL Section 25(4)(a) for wages paid to the teacher during the summer recess.

Carrier's late filing nixes reimbursement from Special Disability Fund

Case name: *Krotman v. Berke, Berke & Grill*, 108 NYWCLR 110 (N.Y. App. Div. 2008).

Ruling: The Appellate Division reversed the Board's holding that the workers' compensation carrier's claim for reimbursement from the Special Disability Fund was timely filed.

What it means: The Board's application of one filing date to the claimant's claim for benefits to satisfy Section 28, and its application of another filing date of such claim to satisfy Section 15(8)(f), is arbitrary and capricious and in contravention of previous decisions wherein the Board has denied similarly late claims.

Special Fund fails to block transfer of liability

Case name: *Fuentes v. New York City Housing Authority*, 108 NYWCLR 111 (N.Y. App. Div. 2008).

Ruling: The Appellate Division affirmed the Board's decision transferring liability to the Special Fund For Reopened Cases pursuant to WCL Section 25-a.

What it means: Applicability of WCL Section 25-a is not defeated by the payment to the claimant of benefits for a period beginning two days prior to the application to reopen, when more than five years have passed since the last payment of compensation.

Security guard fails to prove connections between bronchial asthma, workplace environment

Case name: *Mazayoff v. A.C.L. Companies Inc.*, 108 NYWCLR 112 (N.Y. App. Div. 2008).

Ruling: The Appellate Division affirmed the Board's holding that a security guard, who alleged he suffered from bronchial asthma due to his continued exposure to care fumes and extreme temperatures while he worked patrolling the areas outside an apartment building and at a parking lot, did not sustain a causally related injury.

What it means: The court will grant deference to the Board's reasonable resolution of conflicting medical testimony, particularly on the issue of causation. In this case, the Board relied on the testimony of the carrier's two medical professions, who concluded that it could not be determined with medical certainty that the claimant's asthmatic condition was caused by conditions at the workplace.

Employer's provision of medical treatment bars application of WCL § 28 defense

Case name: *General Motors Corp.*, 108 NYWCLR 113 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel affirmed the WCLJ's finding that WCL Section 28 did not bar the employee's claim, filed Nov. 8, 2006, for a lower back injury at work on Oct. 1, 2004, as the employer's medical treatment provided to the claimant constituted an advance payment of compensation, thereby triggering a waiver of the Section 28 defense.

What it means: WCL Section 28 requires that a claim for compensation be filed within two years of the date of accident. However, if the employer makes an advance payment of compensation to the employee, the two year statute of limitations shall not be a defense to untimely claim filing. In this case, the employer provided medical treatment, with an awareness of the accident, injury and potential claim. Therefore, the employer's actions were sufficient to trigger a waiver of a Section 28 defense.

Vineyard worker's fatal heart attack not connected to work

Case name: *Vilardo Vineyard*, 108 NYWCLR 114 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel affirmed the WCLJ's finding that the death of a farm laborer, who was riding a tractor and fertilizing of the employer's vineyards at the time of his unwitnessed death, was not causally related to his employment.

What it means: An autopsy is not required in order to rebut the statutory presumption that an employee's death arose out of the course of his employment. In this case, the medical records and other information considered by the carrier's consulting cardiologist provided a sufficient foundation for his opinion that the decedent's death resulted from severe coronary artery disease and was not related to his employment. This medical opinion constituted substantial evidence sufficient to rebut the statutory presumption.

Employer's testimony dooms teaching assistant's stress claim

Case name: *Victor Central School District*, 108 NYWCLR 115 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel held that a teaching assistant's claim against the school district for work-related stress was disallowed pursuant to WCL Section 2(7).

What it means: Where there is sufficient credible evidence in the record to find that the claimant's mental injury is a direct consequence of a lawful personnel decision taken in good faith by the employer, the claim will be disallowed. In this case, the employer's credible testimony established that the claimant was disciplined for her attendance problems and her failure to perform her required work assignments. As there was sufficient evidence that claimant's stress was brought on by a lawful personnel decision, she was not entitled to benefits.

Working out during lunch break isn't within custodian's scope of employment

Case name: *Washingtonville Central Sch. Dist.*, 108 NYWCLR 116 (N.Y. W.C.B., Panel 2008).

Ruling: A New York Workers' Compensation Appeal Board panel upheld the Workers' Compensation Law Judge's decision, denying a school custodian's claim for benefits. The custodian's injury was sustained outside the scope of his employment.

What it means: To be entitled to compensation for a work-related injury, an employee must demonstrate that his injury occurred while he was acting in the scope of his employment. Courts consider activities that are strictly personal in nature to be outside the scope of employment and, therefore, not compensable. In this case, a school custodian was injured while using the employer's weight room during his lunch break. The employer avoided liability by demonstrating that the custodian was pursuing a personal activity, not acting in the scope of his employment when the accident occurred.

Doctor's report establishes timely filing for repetitive stress injury

Case name: *Rochester City School District*, 108 NYWCLR 117 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel held that the WCLJ properly established the claim of a programmer analyst, who contended that he sustained bilateral hand and wrist injuries due to repetitive stress of typing at the computer keyboard.

What it means: The date of first diagnosis may be considered as a date of disablement. Other possible dates include the date of diagnosis that the condition is work related, the date of first treatment, the date of first lost time from work, the date the claimant was told to stop work by his doctor, or the date the claimant first suffered diminution of earnings. In this case, the Board panel agreed with the WCLJ that the proper date of disablement was the date the claimant's condition was determined to be work related.

WCL covers dishwasher's instinctive reaction to coworker's horseplay

Case name: *Kayuta Drive-In Inc.*, 108 NYWCLR 118 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel affirmed the WCLJ's holding that the claimant's injury, sustained when he accidentally cut his finger on a knife held by a coworker, arose out of and in the course of employment.

What it means: Where the claimant is not the instigator, he did not actively engage in horseplay, his actions were an attempt to bring a stop to the coworker's behavior, and the claimant was injured in the course of this attempt, the claimant's actions in swinging his hand to prevent the coworker from continuing the horseplay is reasonable.

Mover establishes his claim for work-related heart attack

Case name: *McCollisters Transportation*, 108 NYWCLR 119 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel affirmed the WCLJ's decision establishing the case for a driver/mover who suffered a heart attack while driving a truck from Poughkeepsie, New York to Hartford, Connecticut.

What it means: Heart injuries brought on by the overexertion in the course of daily work is compensable even though a preexisting pathology may have been a contributing factor. In this case, the Board relied on the testimony of the treating doctor, who opined that the claimant's work activities on the day before, and the day of, the heart attack more likely than not contributed to his injury. It was within the Board's province to credit this testimony and find the claimant established his claim.

Carrier banned from offering video surveillance evidence

Case name: *SMB Administration LLC*, 108 NYWCLR 120 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel found the WCLJ properly precluded the State Insurance Fund from offering video surveillance into evidence as the Fund did not inform the claimant of the existence of the surveillance evidence prior to the claimant testifying.

What it means: An employer/carrier does not have a duty to provide a claimant a copy of its investigative materials until after the testimony of the claimant is completed. However, this rule does require that the claimant must be fully informed of the existence of any surveillance tapes, films, or investigative reports which the employer intends

to use at trial prior to the claimant's testimony or deposition.

State Insurance Fund assessed penalty for filing frivolous appeal

Case name: *NY Acorn Housing*, 108 NYWCLR 121 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel affirmed the WCLJ's decision establishing the case of a porter who was fatally stabbed in the chest and neck while he was working in the basement of the building.

What it means: Where the decedent died at work during his work day, there is no contrary evidence, and the carrier fails to timely request an adjournment to produce evidence or to timely file a C-7 form, the claimant is not required to produce evidence that the decedent's death arose out of the course of employment and the carrier is barred from pleading that the death did not arise out of the course of employment.

Employee wins reimbursement for hospital bed

Case name: *Newburgh Auto Auction*, 108 NYWCLR 122 (N.Y. W.C.B., Panel 2008).

Ruling: A Board panel held that sufficient credible evidence existed to warrant the WCLJ's finding that a requested electrical hospital bed was medically necessary.

What it means: A doctor's testimony that an electrical hospital bed will assist the claimant's causally related back condition and with her sleeping is sufficient evidence to support the finding that the bed is medically necessary and covered under the WCL.