

JPI

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Fighting for Workers' Rights
Winter 2014

"PHANTOM JOBS" NOT SUFFICIENT TO REDUCE INJURED WORKERS' BENEFITS



A recent decision of the Pennsylvania Supreme Court will make it harder for employers to prove jobs are "available" to injured employees. In *Phoenixville Hospital v. W.C.A.B. (Shoap)*, the Pennsylvania Supreme Court, in a 4-2 decision, ruled an employer must do more than just present a vocational expert's labor market survey to reduce an injured worker's benefits.

In this case, the employee (claimant) sustained a work-related shoulder injury, and her treatment included three surgeries. Approximately four years after she began receiving wage loss benefits, the employer filed a Modification Petition alleging that jobs were available within her physical restrictions based on two labor market surveys. After receiving the employer's labor market surveys, the employee applied for the jobs and actually received telephone interviews with two of the potential employers. However, she was not offered a job with any of the employers. Although the workers' compensation judge concluded the employee was physically capable of working, he determined that her employer did not

establish its right to modify benefits because the employee had made a "good faith", though unsuccessful, effort to secure the jobs identified in the labor market surveys.

On appeal, the workers' compensation judge's decision was affirmed by the Workers' Compensation Appeal Board. However, upon further appeal, the Commonwealth Court reversed the judge's decision. According to the Commonwealth Court, the critical question was whether the jobs identified by the employer in the labor market surveys were open and available to someone having claimant's physical limitations and other qualifications at the time the labor market surveys were prepared.

The Pennsylvania Supreme Court rejected this rationale and instead concluded that, in order to reduce or suspend an injured worker's wage loss benefits, the employer must prove the existence of meaningful employment opportunities. According to the Supreme Court, in order for the term "substantial gainful employment which

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For more than 75 years, the attorneys of Jubelirer, Pass & Intrieri have served as trusted allies for those we represent.

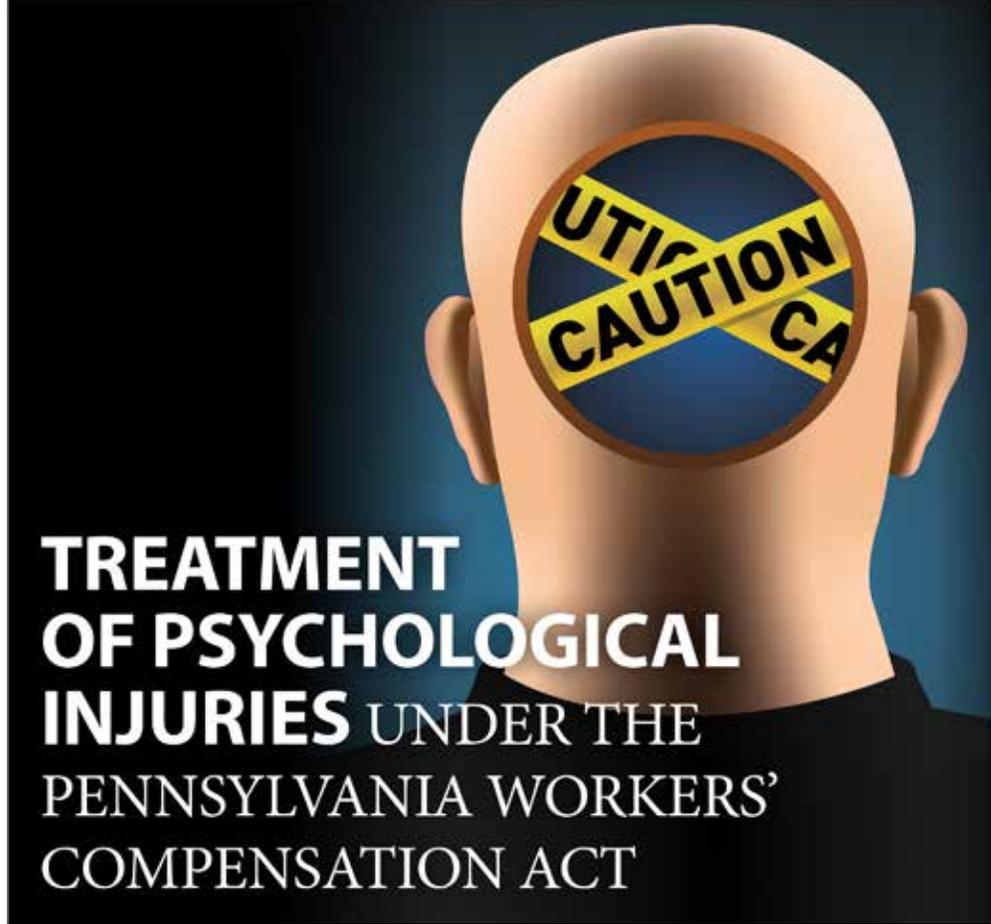
- Labor and Employment Law
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- Civil Litigation

Jubelirer, Pass & Intrieri has served as legal counsel for more than 80 local and national labor organizations in various industries in both the public and private sectors. The lawyers at JPI have represented working people and their families in a variety of legal proceedings.

JPI has a well-established track record protecting and enforcing workers' rights. Our attorneys are honored to have been named among Pennsylvania Super Lawyers, Pittsburgh's Top-Rated Lawyers, and Best Lawyers in America. JPI has been designated as a Top-Tier Law Firm by *U.S. News & World Report*.

Let us serve
you and
your family.





TREATMENT OF PSYCHOLOGICAL INJURIES UNDER THE PENNSYLVANIA WORKERS' COMPENSATION ACT

Under the Pennsylvania Workers' Compensation Act, psychological injuries are divided into three distinct categories, each one carrying its own burden of proof. The first is a mental condition that occurs during or after a physical event. An example of a physical/mental claim would be an individual suffering a severe physical injury, such as a hand amputation, and then developing depression as a result of the injury. The second is a mental condition that manifests itself in a physical way. An example of a mental/physical claim would be severe work stress manifested by a physical injury, such as a heart attack or bleeding ulcers. The third type is purely psychological trauma resulting in a mental condition, which is commonly known as a mental/mental injury.

For the past 20 years, the governing legal case law precedents have made mental/mental injury claims unwinnable absent the existence of abnormal working conditions. The definition of "abnormal" has grown steadily more limited and excluded even extremely odd and bizarre working environments. For example, in *Derrico v. W.C.A.B. (City of Philadelphia)*, the Commonwealth Court held that a traffic court judge who threw objects, cursed, shredded a doctor's excuse and stated her office was being spied on did not

create an abnormal working environment as to warrant workers' compensation benefits for a staff member who claimed she was mentally stressed by the judge's behavior.

It was even more difficult to obtain benefits for police officers and other particularly stressful occupations because almost nothing those individuals experienced was abnormal. However, a recent Pennsylvania Supreme Court decision may have relaxed some of the harsher precedent. In *Payes v. W.C.A.B. (State Police)*, a Pennsylvania state trooper who had struck and killed a woman suffering from mental illness, who ran in front of his patrol car on the highway in what appeared to be "a suicide by cop" incident, was awarded benefits. Immediately after the accident, the state trooper attempted to provide assistance to the woman, and went so far as to give mouth-to-mouth resuscitation to her while she was bleeding from the mouth. The injured woman was ultimately pronounced dead at the scene. The officer remained out of work for several months, and then attempted to return to work, but after three days was forced to stop due to recurring feelings of anxiousness and stress. In the course of the litigation, the state trooper presented the testimony of a psychiatrist and psychologist to support his contention that

he was suffering from post-traumatic stress disorder. The State presented the testimony of another psychiatrist who testified the trooper was fully recovered and his current disability was attributable to a pre-existing psychiatric condition.

The workers' compensation judge granted the Claim Petition noting that, although police officers are often expected to encounter violent situations in the course of their jobs, this particular work-related mental stimulus was not one normally encountered by or expected of state troopers. In particular, the workers' compensation judge concluded that an individual darting in front of the patrol vehicle and the officer's attempts to save the woman's life were not normal for a state trooper but instead were "extraordinary and unusual events."

The state police appealed the decision to the Workers' Compensation Appeal Board, which reversed the judge's decision. According to the Appeal Board, the incident was not an "abnormal working condition" given the nature of the trooper's "stressful and perilous profession". According to the Appeal Board, encounters involving fatalities were a foreseeable part of the job. The rationale of the Appeal Board has been the basis for most of the denials in mental/mental claims. The trooper appealed the claim to the Commonwealth Court, which affirmed the decision of the Appeal Board. Upon further appeal to the Pennsylvania Supreme Court, the claimant prevailed. The Pennsylvania Supreme Court noted the concept of "abnormal working conditions" must be analyzed on a case-by-case basis. The analysis does not end simply by determining that an injured worker "generically belongs to a profession that involves certain levels or types of stress." When a claimant suffers from an actual and recognizable mental condition stemming from an unusually traumatic event at work, not normally endured in the particular profession, an award of compensation is appropriate. If the injury arises from a single incident, the analysis rests on whether that incident alone was abnormal.

In conclusion, it will still be difficult to prove entitlement to compensation as a result of a mental/mental claim since proof of abnormal working conditions will still be required. However, in instances where a single traumatic event serves as the "abnormal working condition", success is possible if (1) the claimant's psychological injury has been objectively verified by expert testimony; (2) it can be traced to an identifiable source (such as the case before the Pennsylvania Supreme Court where the woman attempted to commit "suicide by cop"); and (3) the incident alone is deemed abnormal.

For more, go to jpilaw.com/about-jpi/practice-overview.html

JPI NEWS *and Events*

JPI WELCOMES NEW ASSOCIATE, **AMANDA BUNDICK**

Amanda Bundick grew up in Boonsboro, Md., an only child to hard-working parents, Arthur and Carmen. Amanda's father, a past officer in the Utility Workers Union of America, Local 102, took Amanda to rallies, pickets and protests when she was very young. Amanda realized as she grew up that there was something very wrong in this country. Whether the masses wanted to face it or not, class warfare was alive and well. Sadly, working people were losing.

While in high school, Amanda's plan began to formulate: she would go to college, become an attorney, and then kick ass for the working class. Amanda attended Washington & Jefferson College on scholarship, receiving Bachelor of Arts degrees in both political science and English with a concentration in professional writing. After graduating from college a year early, Amanda went to the University of Pittsburgh School of Law on scholarship.

JPI hired Amanda after her first year of law school as a law clerk, and she stayed on for that summer and the following school year. Amanda received a Peggy Browning Fund Fellowship to work at the United Steelworkers for the summer of 2012, and promptly returned to JPI at the end of her ten weeks. To learn ERISA better, she worked as a Certified Legal Intern in the Health Law Clinic at Pitt Law, handling social security



disability cases and mediating and successfully settling an ERISA long-term disability case. Amanda was chosen by Pitt Law's Dean and faculty to receive the National Association of Women Lawyers Outstanding Law Student Award. She clerked for JPI until she graduated,

passed the Pennsylvania Bar exam, and then became an associate attorney for JPI in the fall of 2013. Amanda specializes in union-side labor law, employee benefit work (ERISA), and workers' compensation. 

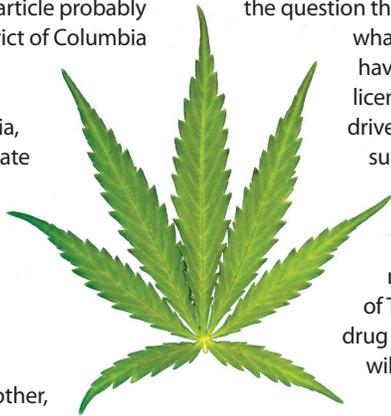


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LET'S TALK ABOUT POT FOR A MINUTE, SHALL WE?

As some of you reading this article probably know, 20 states and the District of Columbia have enacted laws legalizing marijuana in some form. However, so far only California, Colorado and Washington State have legalized marijuana for recreational use, while the others permit the use of marijuana for medical purposes only.

With some states legalizing marijuana in one form or another,



the question that is now frequently asked is what impact does state legalization have on my commercial driver's license (CDL) as a pilot, school bus driver, truck driver, train engineer, subway operator and ship captain, among others.

State initiatives will have no bearing on the Department of Transportation's regulated drug testing program. Marijuana will remain an unauthorized drug for both recreational

and medical purposes for truck drivers under the U.S. Department of Transportation's drug and alcohol testing regulation. Despite the recent legalization of recreational marijuana use in Colorado and Washington state, DOT regulations continue to prohibit all uses of marijuana, including medical. Consequently, DOT medical review officers will not verify a drug test as negative for an employee even when a state has legalized marijuana for recreational use. Furthermore, DOT medical review officers will not verify a drug test as negative even if a physician has recommended "medical marijuana" for an employee when a state has legalized such use.

In the end, according to the DOT, it remains unacceptable for any safety sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana. 



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"PHANTOM JOBS" NOT SUFFICIENT *(continued from page 1)*

exists" to be meaningful, it must include more than the mere existence of jobs compatible with the claimant's restrictions that happen to be open at the time they were discovered by the employer's expert witness. Instead, the potential jobs identified by the employer's expert witness *must* remain open until the claimant is given a reasonable opportunity to apply for them.

This Supreme Court decision is critically important for injured workers because the governing precedent from the Commonwealth Court permitted employers to modify wage loss benefits merely by producing expert testimony that jobs within the injured worker's geographical area were suitable based upon the worker's physical restrictions, past work history, and education. Workers' compensation lawyers often referred to these jobs as "phantom jobs" because the jobs were no longer open when claimant received the labor market survey. Prior to this Supreme Court decision, proving that the potential jobs were no longer open when claimant received the labor market survey was irrelevant.

As soon as an injured worker has been notified that the insurance carrier has retained a vocational expert, he or she should immediately obtain the services of a lawyer. The injured worker must work with their lawyer and contact each prospective employer. The injured worker must also submit timely applications for employment, attend interviews, and ask questions during the interview process. In that way, the injured worker and counsel can obtain evidence to convince the workers' compensation judge that the potential jobs identified by the employer's vocational expert are not representative of employment opportunities which actually exist for injured workers. 

