**[J-42-2012] [MO: McCaffery, J.]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | |
|---|---|
| PHILIP PAYES, | : No. 50 MAP 2011 |
| Appellant | : Appeal from order of Commonwealth Court entered 10-06-2010 at No. 461 CD 2010 affirming the decision of the Workers' |
| v. | : Compensation Appeal Board dated 2-22-2010 at No. A08-2136. |
| WORKERS' COMPENSATION APPEAL BOARD (COMMONWEALTH OF PA STATE POLICE), | : ARGUED: April 11, 2012 |
| Appellees | |

## DISSENTING OPINION

**MR. JUSTICE EAKIN** **DECIDED: October 30, 2013**

The Commonwealth Court affirmed the denial of appellant's claim for workers' compensation benefits based on a psychic injury resulting from abnormal working conditions. The majority finds this erroneous. I respectfully disagree.[1]

The majority finds the Commonwealth Court "reformulated" the WCJ's factual findings, in particular Finding of Fact No. 13, which established "the existence of an extraordinarily unusual and distressing single work-related event experienced by [a]ppellant, resulting in his disabling mental condition[.]" Majority Slip Op., at 22. The

[1] The "standard of review of a WCAB order 'is limited to determining whether a constitutional violation, an error of law or a violation of Board procedure has occurred and, whether the necessary findings of fact are supported by substantial evidence.'" Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva), 928 A.2d 1006, 1009 (Pa. 2007) (quoting Republic Steel Corporation v. Workmen's Compensation Appeal Board (Petrisek), 640 A.2d 1266, 1268 (Pa. 1994)).

majority also holds the Commonwealth Court erred "by basing its analysis on isolated testimony in order to arrive at a different determination from the WCJ." Id., at 19 (citation omitted). However, the majority misapprehends the content of paragraph 13 of the WCJ's decision, which states:

> State Troopers are not in the normal course of their duties exposed to the circumstances that occurred in this case[:] to wit[,] a mentally disturbed individual running in front of a Trooper's vehicle while he is operating the vehicle, for no apparent reason. Further, what occurred at the point of impact and immediately thereafter are not working conditions which normally occur for State Troopers[: appellant's] attempted but failed resuscitation of the woman he killed on Interstate 81 while vehicular traffic [was] oncoming, waiting for assistance from other troopers.

WCJ Decision, 10/24/08, at 3-4.

The majority construes this paragraph as a factual finding and builds its entire opinion on this conclusion. See Majority Slip Op., at 4-5, 14-17. Paragraph 13 does not merely contain a "factual" finding (i.e., a mentally disturbed individual ran in front of appellant's vehicle while he was operating the vehicle, for no apparent reason, and appellant attempted but failed resuscitation of the individual he struck with his vehicle).[2] It also contains the ultimate determinative legal conclusion that the event was unusual and resulted in an abnormal working condition, which the Commonwealth Court was free to disregard. Lowe v. Workmen's Compensation Appeal Board (Lowe's Auto Sales, Inc.), 619 A.2d 411, 414 (Pa. Cmwlth. 1992) (citation omitted) ("The abnormal working conditions test is a deduction from other facts and is purely the result of legal reasoning: therefore, this [c]ourt may judge the correctness of the decision below and draw its own conclusions upon appellate review.").

The majority notes issues concerning "the existence or non-existence of an abnormal working condition in a workers' compensation mental injury case have been

[2] The mere fact paragraph 13 is within the WCJ's "findings of fact" is not dispositive.

described generally as questions of law," however, "[i]t … may be more accurate to state that the existence of a compensable mental or psychic injury is, for the reviewing court, a mixed question of law and fact." Majority Slip Op., at 8-9 (citation omitted).

The majority is revisiting the applicable standard of review; a matter settled by this Court. In Wilson v. Workmen's Compensation Appeal Board (Aluminum Company of America), 669 A.2d 338 (Pa. 1996), this Court held:

> The question of whether specific working conditions amount to abnormal working conditions has been variously described as "a mixed question of law and fact," Parson v. Workmen's Compensation Appeal Board, [ ] 642 A.2d 579 ([Pa. Cmwlth.] 1994), or as one of law, Archer v. Workmen's Compensation Appeal Board, [ ] 587 A.2d 901 ([Pa. Cmwlth.] 1991).
>
> We recognize that psychic injury cases are highly fact-sensitive and for actual work conditions to be considered abnormal, they must be considered in the context of the specific employment. Volterano [v. Workmen's Compensation Appeal Board, 639 A.2d 453, 458 (Pa. 1994)]. Where, as here, the Board has taken no additional testimony, appellate review of the referee's findings of fact regarding the claimant's employment is limited to a determination of whether the findings are supported by the evidence as a whole and will be overturned only if arbitrary and capricious. Bethenergy Mines v. Workmen's Compensation Appeal Board, [ ] 612 A.2d 434 ([Pa] 1992). Whether the facts as found by the referee support a conclusion that the claimant has been exposed to abnormal working conditions is a question of law, however, that is reviewable on appeal.

Id., at 343. Similarly, in Davis v. Workmen's Compensation Appeal Board (Swarthmore Borough), 751 A.2d 168 (Pa. 2000), we held:

> Appellate review of the workers' compensation judge's findings of fact is limited to a determination of whether the findings are supported by the evidence as a whole. Where no additional testimony is taken before the Board, the findings will be overturned only if arbitrary or capricious. Whether the findings of fact support a conclusion that the claimant has been exposed to abnormal working conditions is a question of law, however, that is fully reviewable on appeal.

Id., at 174 (citation omitted). More recently, in RAG (Cyprus) Emerald Resources, L.P. v. Workers' Compensation Appeal Board (Hopton), 912 A.2d 1278 (Pa. 2007), we held:

> The Commonwealth Court referred to the determination of whether working conditions are abnormal as a mixed question of fact and law. While we repeatedly have held that the ultimate determination of whether the employee established "abnormal working conditions" is a question of law fully reviewable on appeal, we have also acknowledged that psychic injury cases are highly fact-sensitive and for actual working conditions to be considered abnormal, they must be considered in the context of specific employment. Such a fact-sensitive inquiry requires deference to the fact-finding functions of the WCJ and, accordingly, we limit our review of those factual findings to determining whether they are supported by the evidence and overturn them only if they are arbitrary and capricious.

Id., at 1284 n.6 (internal citations and quotations marks omitted). We also added:

> Conversely, the determination of whether those factual findings establish abnormal working conditions under Martin [v. Ketchum, Inc., 568 A.2d 159 (Pa. 1990)] is a question of law, fully reviewable on appeal. [Davis, at 174.] Consequently, our review of the present case requires, pursuant to this standard, a two-prong examination. First, we must decide whether the Commonwealth Court abused its discretion by substituting its factual findings for those made by the WCJ and supported by the record, and second, whether the findings of fact support the legal conclusion that [c]laimant's injury was the result of an abnormal working condition.

Id., at 1286. Therefore, while the analysis can be articulated as a two-step process, a review of the factual findings and then the legal conclusions, "the determination of whether those factual findings establish abnormal working conditions … is a question of law, fully reviewable on appeal." Id. (citation omitted).

The instant WCJ's factual findings are not disputed, much less reformulated by the Commonwealth Court. The Commonwealth Court, instead, found the WCJ's factual findings were legally insufficient to establish abnormal working conditions. Such assessment, which was within the scope of the Commonwealth Court's review, is a question of law, not of fact or, as the majority holds, a mixed question.

The majority discounts other "factual" portions of the WCJ's decision, which specifically acknowledges troopers "are exposed to vehicle accidents, mayhem, bodily

injuries, death, murder, and violent acts in the normal course of their duties." WCJ Decision, 10/24/08, at 3. Additionally, the majority gives much weight to the WCJ's abnormal working condition determination, which is based only on appellant's testimony that he "never once imagined that something like this could happen." Payes v. Workers' Compensation Appeal Board (Commonwealth of PA/State Police), 5 A.3d 855, 857 (Pa. Cmwlth. 2010) (citation omitted). Such testimony alone is insufficient to establish an abnormal working condition. See Martin, at 164-65 (citing Russella v. Workmen's Compensation Appeal Board (National Foam Systems, Inc.), 497 A.2d 290, 292 (Pa. Cmwlth. 1985) (claimant cannot rely solely upon his own account of working environment to sustain his burden of proving injury caused by abnormal working condition)). The expert testimony the WCJ relied upon merely stated appellant's injury (PTSD) was related to the event. However, "even if a claimant adequately identifies actual (not merely perceived or imagined) employment events which have precipitated psychiatric injury, the claimant must still prove the events to be abnormal before he can recover." Wilson, at 344 (citations omitted). As the Commonwealth Court held, appellant's testimony was insufficient to do so. See Martin, at 164 (citation omitted).

The injury at issue, in fact, did not result from abnormal working conditions. As noted, the determination of whether there are abnormal working conditions is a reviewable question of law which must be addressed objectively, considering the specific line of employment, not the employee's subjective reaction to the event or condition. See Davis, at 176-77; Hershey Chocolate Co. v. Commonwealth, 682 A.2d 1257, 1260 (Pa. 1996) (citation omitted); Wilson, at 343-44; Volterano, at 458.

Appellant is a Pennsylvania State Trooper. Law enforcement officers potentially face life-and-death situations every day. Confrontations, injuries, blood, death, and other frightening events are unfortunate, but necessarily a daily part of their work. While the specifics of every event they may face obviously cannot be anticipated, the fact there will be such events is certainly foreseeable. One cannot undertake this most honorable profession without that understanding, and it is that understanding that causes us to hold them in such high regard.

As the Commonwealth Court noted, appellant, as a police officer, "can be expected to be witness to horrible tragedy. This includes, as acknowledged by [appellant], responding to motor vehicle accidents in an emergency capacity. Undoubtedly, in doing so, he may be subjected to traumatic visuals such as injured children, maimed adults, and, unfortunately, death." Payes, at 861. Situations like the instant one, although traumatic, are simply not extraordinary or abnormal for police officers. See City of Philadelphia v. Civil Service Commission of The City of Philadelphia, 772 A.2d 962, 969 (Pa. 2001); Davis, at 177; City of Philadelphia v. Workers' Compensation Appeal Board (Brasten), 728 A.2d 938, 942 (Pa. 1999) (equally divided court).

The fact appellant never thought an event "like this" could happen, see Payes, at 857, or that "he never thought he would be involved in someone's death," id., at 859, does not make the event an abnormal working condition. See Wilson, at 344 (citing Martin, at 164) ("'[A]bnormal working conditions,' describes the requirement that the claimant prove that the psychic injury is in fact a work-related injury. The requirement is an objective one, rather than subjective. Thus, a claimant may not recover benefits for psychic

injuries that arise from subjective reactions to normal working conditions."). Absent sufficient objective evidence the event constituted an abnormal working condition, appellant's experience of the event constitutes no more than a subjective reaction. See id.

Finally, the majority notes "the abnormal-working-conditions analysis [does not end] when it [ ] establishe[s] that the claimant generically belongs to a profession that involves certain levels or types of stress." Majority Slip Op., at 19. While I agree job title alone is not dispositive of the issue, we should not fail to appreciate the determination that an injury results from abnormal working conditions crucially depends on the job performed, for "what may be normal for a police officer will not be normal for an office worker." RAG, at 1288 (citation omitted).

It would be gratifying to award benefits here, for the triggering event was unquestionably traumatic, but trauma is not the test for psychic injury. In my opinion, considering the limited evidence and relevant case law, the Commonwealth Court committed no error when it concluded the injury did not result from abnormal working conditions. Therefore, I respectfully dissent.