RECENT DEVELOPMENTS IN WORKERS’ COMPENSATION AND EMPLOYERS’ LIABILITY LAW

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I. INTRODUCTION

This article summarizes a year of state supreme court workers' compensation cases on a few select issues up to October 2012. The issues addressed include injury, causation, jurisdiction, evidence, discovery, due process right to cross-examine expert, administrative rules, employer liability, exclusive remedy, statute of limitations, effect of retirement, and permanent disability.

II. INJURY

A. Failure of Business as Injury

The New Hampshire Supreme Court held that major depression triggered by the failure of a business is not a compensable injury.1 In Appeal of Raymond Letellier, claimant was the co-founder and manager of a steel business that was destroyed by fire and ultimately went out of business, partially as the result of relocation expenses.2 Immediately before the business closed, he developed hypertension and major depression that some of his doctors attributed to the failed business.3

The court examined the plain language of the statute and reasoned that layoffs, demotions, terminations, and similar actions may be precipitated by a number of factors, including poor performance, insubordination, and economic conditions. Such circumstances were explicitly excluded from the definition of the term “injury” because they were “normal and expected conditions of employment life.”4 The court reasoned that although

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2. Id. at 630–31.
3. Id.
4. See id. at 631–32. Under relevant state law, compensation was not permitted for any “mental injury” caused by “any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer.”
business failures were not specifically included in the statute, the phrase “any similar action” clarified the legislature’s intent that the list was not meant to be exclusive. In addition, the court pointed out that a “business failure necessarily implies some action by the employer; a business cannot fail until the employer shuts the business down.” Thus, the court held that claimant’s injury was excluded from the statutory definition of the term “injury” and was not compensable.

B. Work-Related Consequence

The Florida Supreme Court held that an injury caused by a truck towing away a personal vehicle parked at work did not “arise out of employment.” While repossessing a personal car from a company parking lot, a tow truck driver ran over and injured an inside salesman, who was trying to retrieve personal belongings as the vehicle was being towed away. The parties did not dispute whether the accident occurred in the course and scope of claimant’s employment.

Claimant argued that the injury occurred on the employer’s premises during a paid break and that his supervisor tacitly had permitted his attempt to salvage his belongings. He contended that he had not substantially deviated from his employment. The employer asserted that the phrase “arising out of employment” required that the risks that caused claimant’s accident and resulting injuries be directly work-related. The risk cannot be personal to claimant or “imported” to the workplace.

The court held that claimant was on a purely personal mission and that his accident and injuries did not arise out of his employment. To arise out of work, “the injury must (1) be causally connected to claimant’s employment; (2) have had its origin in some risk incident to or connected with the employment; or (3) flow from the employment as a natural consequence.” Furthermore, if the work “does not contribute to the risk of the accident resulting in the injury, it need not contribute to the cost of the injury.”

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5. Id.
6. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 1070 (citing Fid. & Cas. Co. of N.Y. v. Moore, 196 So. 495, 496 (Fla. 1940)).
16. Id. at 1071.
C. Voluntary Yard Work by Programmer Still AOE/COE

The Oklahoma Supreme Court recently held that a full-time computer programmer who had offered to do yard work at his employer’s request was an employee and not a volunteer. The employee, who had a heart attack while doing the yard work, thus suffered a compensable injury.\(^\text{17}\)

The court found that the worker was a salaried employee “who was working at his employer’s behest,” even if it was not the task for which he was hired.\(^\text{18}\) The fact that he “‘volunteered’ to help his employer does not mean that he became a ‘volunteer,’ as defined in the workers’ compensation act.”\(^\text{19}\)

The court also upheld the trial court’s ruling that the computer programmer’s act was in the course of his employment because he was doing “some act that is necessary for the benefit or interest of his employer.”\(^\text{20}\) The employer had specifically asked employees for help and the task was not a personal mission, so the injury arose out of and in the course of employment.\(^\text{21}\)

III. CAUSATION

A. Superseding Cause

In *Sapko v. Connecticut*, plaintiff sought survivor benefits following the death of her husband from a fatal combination of painkillers that were prescribed for a compensable injury and a drug taken for an unrelated case of major depression.\(^\text{22}\) In a decision that was upheld by the workers’ compensation board, the commissioner found that the “decedent’s compensable work injuries were not the proximate cause of death.”\(^\text{23}\) Plaintiff appealed the decision, arguing that *Barry v. Quality Steel Products, Inc.*\(^\text{24}\), which abrogated “the [superseding] cause doctrine in most tort contexts,” had been incorrectly applied to this case.\(^\text{25}\) The appellate court agreed with plaintiff but noted that this “impropriety was harmless because the record otherwise supported the board’s determination that the commissioner properly had applied the law to the facts in deciding the issue of proximate cause.”\(^\text{26}\) Although the Connecticut Supreme Court found no “impropriety” in the board’s action, it upheld the rest of the appellate

\(^{17}\) Yzer, Inc. v. Rodr, 280 P.3d 323, 326–27 (Okla. 2012).

\(^{18}\) Id. at 326.

\(^{19}\) Id.


\(^{21}\) Rodr, 280 P.3d at 326.

\(^{22}\) 44 A.3d 827 (Conn. 2012).

\(^{23}\) Id.

\(^{24}\) Id. (citing 820 A.2d 258 (Conn. 2003)).

\(^{25}\) Id. at 831.
court’s finding in part and ruled that superseding events, i.e., the drug overdose, broke the “chain of proximate causation” between the decedent’s work injuries and his death. Thus, the court upheld the commission’s decision to deny survivor benefits.26

B. Not a Consequence

The Court of Special Appeals of Maryland held that claimant’s right knee injury, which he suffered when a car backed into him, was not a direct and material result of his job-related injuries to his back and left knee.27 Claimant was hit by a car in his employer’s parking lot while going to physical therapy for a prior work-related injury.28 Although the court found that a “but for” connection existed between the two injuries, it held that claimant’s second injury was not caused by his first injury because the negligent actions of the driver whose car hit claimant were not connected to the first injury at all.29 Only the actions of the driver had a direct and material causal relationship to the claimant’s second injury.30

IV. JURISDICTION

A. Separate Actions

In a case that involved trial courts in two jurisdictions and multiple defendants, the Alabama Supreme Court held that the circuit court deciding a widow’s first action, in which she sought recovery of workers’ compensation benefits, had the “exclusive right to entertain and exercise jurisdiction over [her] issue of death-benefit payments.”31 Claimant’s action arose out of a workplace accident in which her husband was killed while employed by Linden Lumber Co.32 Following his death, claimant filed a complaint against Linden in the Marengo Circuit Court seeking workers’ compensation death benefits.33 When settlement negotiations broke down, she filed suit in another jurisdiction against the third-party administrator for the company’s workers’ compensation program. The Alabama Supreme Court noted that the Marengo County action was still pending when the Wilcox County action was commenced.34 Ultimately, it found that claimant’s alleged right to death benefit payments was the threshold

26. Id.
28. Id. at 680.
29. Id. at 683.
30. Id.
32. Id. at *1.
33. Id.
34. Id.
issue in the Wilcox County action and was “inextricably intertwined with the subrogation aspect” of the initial Marengo County action. Consequently, the Wilcox Circuit Court exceeded its authority in asserting jurisdiction, and the Alabama Supreme Court vacated its decision.

B. Multistate Claims

The Indiana Court of Appeals held that settlement of a workers’ compensation claim under Wisconsin statutes did not bar a claim for benefits in Indiana. Claimant, then a resident of Wisconsin, was hired by First Advantage Corporation d/b/a Omega Insurance Services to perform investigative services wherever Omega transacted business. In 2003, Omega gave claimant two investigative assignments that required him to travel to Indiana, where he caused a head-on collision with another vehicle.

Claimant filed a workers’ compensation claim against Omega in Wisconsin. Although it challenged his petition, Omega negotiated settlement agreements with two of its workers’ compensation carriers for a total lump sum payment of $100,000 to settle the Wisconsin claim. Prior to accepting the settlement agreements in Wisconsin, claimant filed his application with the Indiana Workers’ Compensation Board seeking benefits from Omega for the same accident. The board concluded that claimant’s petition for workers’ compensation was barred by the doctrine of collateral estoppel. The Indiana Court of Appeals reversed the board’s decision, holding that it “[was] not sustainable under the doctrine of collateral estoppel, the laws of the State of Wisconsin, or Supreme Court precedent.” Further, the board’s action “gave no effect to the reservation of rights clauses contained in the settlement agreements.”

V. EVIDENCE

A. Collateral Source

In an action to recover under various tort theories, the Alaska Supreme Court found that the superior court had abused its discretion by admitting

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35. Id. at *7.
36. Id.
38. Id. at 1117.
39. Id.
40. Id. at 1118.
41. Id.
42. Id.
43. Id.
44. Id. at 1122.
45. Id.
evidence of workers’ compensation and Social Security benefits.\textsuperscript{46} Claimant had suffered an above-the-knee amputation of his right leg while operating a large mulching machine at work.\textsuperscript{47} He then sued the owner of the machine and Bowie Industries, Inc., which was the successor to the manufacturer, for tort violations.\textsuperscript{48} Bowie argued that the court should admit evidence of claimant’s receipt of workers’ compensation benefits to show malingering.\textsuperscript{49} The manufacturer asserted that the evidence would show that claimant had not mitigated his damages and explained why he had not returned to work.\textsuperscript{50}

Evidence of workers’ compensation benefits is considered collateral source evidence,\textsuperscript{51} which is excluded “on the theory that such evidence would negatively affect the jury’s judgment of the plaintiff on issues of liability and damages.”\textsuperscript{52} The court relied on case law that suggested that collateral source evidence “is presumptively prejudicial and should be excluded absent a showing that the evidence is more probative than other available evidence.”\textsuperscript{53} The court found readily available evidence on “which the manufacturer could base its claim of malingering or failure to mitigate[,] [i.e.,] documents showing that [claimant] had not followed through with retraining efforts.”\textsuperscript{54}

B. Toxic Exposure

The Kansas Court of Appeals held that evidence did not support a finding that claimant, who had been diagnosed with chemical sensitivity, suffered a permanent and total disability as the result of exposure to chemicals and fumes at work.\textsuperscript{55} Claimant was awarded permanent and total disability benefits more than eleven years after her employment at Russell Stover Candies ended.\textsuperscript{56} Although it was undisputed that her job may have exacerbated a preexisting chemical sensitivity, there was no substantial competent evidence in the record that she suffered a permanent and total disability caused by her work at Russell Stover.\textsuperscript{57}

The court focused on the testimony of one physician because the majority of the workers’ compensation board had relied upon the doctor’s

\textsuperscript{46} Jones v. Bowie Indus., Inc., 282 P.3d 316 (Alaska 2012).
\textsuperscript{47} Id. at 321.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 325.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 326.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{56} Id. at 823.
\textsuperscript{57} Id.
causation opinion. Based on its review of the record, the court found that the doctor had examined claimant in person more than seven years after claimant left Russell Stover. The doctor issued a report almost immediately after the examination in which she diagnosed toxic encephalopathy, peripheral neuropathy, and reactive upper and lower airway disease. After noting that other state appellate and supreme courts had questioned the doctor’s expertise in causation cases, the court characterized her “reasoning as a classic example of post hoc, ergo propter hoc logic that was not helpful in establishing a causal connection between the alleged permanent disability and claimant’s employment.” The court reversed and remanded the board’s decision.

VI. DISCOVERY

In a case of first impression, the Montana Supreme Court found that supervisory review of a district court’s decision was appropriate because normal channels of appeal would have been inadequate in view of the potential for discovery of privileged material. American Zurich Insurance Company sought a writ of supervisory control, arguing that the Thirteenth Judicial District Court proceeded based on a “mistake of law in controlling discovery with respect to matters protected by the attorney-client privilege and the work product doctrine.” The court accepted “review of the petition in this instance because the case presented a purely legal issue for which, if the District Court erred, there would be no adequate remedy on appeal.”

In this case, the adjuster made marginal notes about his conversation with the insurer’s attorney on an evaluation that the attorney had prepared for Zurich. The adjuster than sent the annotated letter to the employer. The court held that because the law barred the employer from participating in the claim adjustment, it was not necessary or appropriate for the insurer to communicate its settlement strategy with the employer. The court declined to apply the common interest doctrine, finding that the parties must share a common legal interest rather than a

58. Id. at 826.
59. Id. at 827.
60. Id. (emphasis in original).
61. Id. at 828.
63. Id. at 243.
64. Id.
65. Id. at 244.
66. Id. at 246.
67. Id. at 247.
commercial or a financial interest for the doctrine to apply. The court found that the doctrine does not extend to communications about a joint business strategy that happens to include litigation and dismissed American Zurich’s request for a supervisory writ.

VII. DUE PROCESS RIGHT TO CROSS-EXAMINE EXPERT

The Supreme Court of Wisconsin held that an employer has no statutory right to cross-examine an independent physician appointed by the Department of Workforce Development. Claimant was hired by Aurora Consolidated Health Care in 1981; after suffering a work-related injury in 2001, he filed a workers’ compensation claim for permanent and total disability. An independent physician examined claimant and provided a written report concluding that his disability was caused by work-related back problems. The doctor responded to Aurora’s questions in writing, but Aurora requested that the matter be remanded for a third time to allow for cross-examination of the physician. The court determined, however, that Wisconsin statute did not provide the employer with a statutory right to cross-examine the department’s physician. It was not clear to the court that “the legislature intended to provide an absolute right to cross-examine the independent physician just because it provided the parties an opportunity to rebut the independent physician’s written report,” especially because the legislature used express language to “provide a [comparable report] . . . in surrounding and closely related statutes.” The court held that due process did not require a right of cross-examination on the facts.

VIII. ADMINISTRATIVE RULES

The West Virginia Supreme Court of Appeals invalidated an administrative regulation that required workers’ compensation claimants to get prior authorization before seeking an initial psychiatric consultation. Claimant, who was a roof bolter, injured his back lifting a wooden pallet; his

68. Id. (citing FSP Stallion 1, LLC v. Luce, 2010 WL 3895914, at *18 (D. Nev. 2010)).
69. Id. at 249.
71. Id. at 829.
72. Id. at 830.
73. Id. at 836 (citing WIS. STAT. ANN. §§ 102.17(1)(g), 102.17(1)(d)).
74. Id. at 834.
existing depression worsened due to the back pain stemming from his
work-related accident. 77 Relying on § 85-20-12.5 of the West Virginia
Code of State Rules, the claims administrator denied his request to add
depression to his claim, in part because Rule 20 indicated that the employer
must authorize the initial psychiatric evaluation and subsequent treatment,
which did not happen in this case. 78

The court found, however, two conflicting regulations in Rule 20.
Section 85-20-12.5(a) requires prior approval by the “commission, insur-
ance commissioner, private carrier, or self-insured employer, whichever is
applicable;” 79 and § 85-20-9.10(g) exempts employees from having to
obtain permission. 80 To resolve the conflict, the court looked to a corre-
sponding regulation contained in Rule 20 (§ 85-20-12.4), which sets forth
a three-step process that claimants must follow to add a psychiatric con-
tion to their claims: (1) claimant’s treating physician must make a refer-
ral to a psychiatrist; (2) after examining claimant, the psychiatrist must
submit a detailed report; and (3) after reviewing the psychiatrist’s report,
the claims administrator must determine whether the psychiatric condi-
tion should be added to the claim as a compensable injury. 81

The court found the three-step process in § 12.4 to be inconsistent
with § 12.5(a), which requires claims administrators to make a psychiatric
treatment decision without having a medical report from the treating phy-
sician or a psychiatric report from the psychiatrist, both of whom have
seen the claimant. 82 Instead, § 12.5(a) requires a claims administrator to
make this determination based only upon a request from the claimant. 83
However, the court found § 9.10(g), which does not require prior author-
ization for an initial psychiatric consultation, to be consistent with the
three-step process set forth in § 12.4. 84

Ultimately, the court found § 12.5(a) to be unreasonable because it
required claimants to demonstrate the need for psychiatric care before
being seen by a psychiatrist. 85 The court also held that the three-step pro-
cess outlined in § 12.4 must be followed when claimants seek to add a
psychiatric disorder as a compensable injury. 86

77. Id. at 754.
78. Id.
80. Id. § 85-20-9.10(g).
81. Hale, 724 S.E.2d at 754.
82. Id.
83. Id. at 757.
84. Id.
85. Id.
86. Id.
IX. EMPLOYER LIABILITY

A. Project Owner

In a negligence action filed against a municipality and a general contractor, the Alaska Supreme Court held that the Workers’ Compensation Act shields municipalities from tort actions stemming from workplace-related injuries. Claimant was injured at a job site owned by the Municipality of Anchorage while working for a subcontractor on the project. The subcontractor initially paid workers’ compensation benefits but denied further benefits after six weeks, alleging that claimant’s intoxication was the proximate cause of the accident. Claimant did nothing to further his workers’ compensation case but instead sued the general contractor and the municipality for negligence.

The Alaska Supreme Court reviewed de novo the superior court’s grant of summary judgment on the basis of the exclusive remedy provision of the workers’ compensation act. Claimant argued that the exclusive remedy provision did not apply because the municipality should be classified as a “contract-awarding entity” rather than as a “project owner.” However, on the basis of statutory interpretation, the court found that nothing in the legislative history or the language of the project owner provision suggested that the legislature meant to exclude the state and its political subdivisions from the definition of “project owner.”

The court also addressed the issue of exclusivity. Claimant had argued that construing amendments to the workers’ compensation act as not allowing him to sue the municipality and the general contractor would violate his due process rights. However, the court found that his claims would not be ripe for adjudication because he had failed to exhaust his claim before the workers’ compensation board before making a constitutional challenge to the statute.

B. Uninsured Employer Liable for Wrongful Death

The Missouri Supreme Court held that claimants could bring a wrongful death action against an uninsured employer even though they obtained a

88. Id. at 638.
89. Id.
90. Id.
91. Id.
92. Id. at 640.
93. Id at 642.
94. Id. at 644.
95. Id.
96. Id.
workers’ compensation award against the statutory employer. Claimants were dependents of an employee who died in an accident involving a tractor-trailer that was owned by an operator “who did not carry worker’s compensation insurance, even though he was legally required to do so.” At the time of the accident, the vehicle was under contract with DOT Transportation. An administrative law judge determined that DOT was the deceased’s statutory employer and ordered it to pay death and funeral benefits.

Claimants also filed a wrongful death action against the owner of the vehicle and the surviving driver. After the entry of the workers’ compensation award, DOT Transportation intervened in the wrongful death action. The circuit court granted summary judgment in favor of defendants, finding that the wrongful death action was barred because claimants had made an election of remedies when they obtained a workers’ compensation award against DOT. Both parties appealed.

The court found that the plain language of Missouri Revised Statutes § 287.280.1 provided that claimants “may elect” to file a civil suit against an uninsured employer. The court also held that there was no issue of an “impermissible double recovery” because any recovery by claimants in the civil action would be subject to DOT’s subrogation rights.

X. EXCLUSIVE REMEDY

A. Exclusive Remedy Bars Civil Claim for Loss of Consortium

The California Supreme Court held that a loss of consortium claim for a nonfatal power press injury was barred by workers’ compensation exclusivity. The court found that the fundamental condition of workers’ compensation and exclusivity is that the compensation sought is for an injury to an employee. However, limited statutory exceptions, one of which involves power presses, authorize claimants to seek to augment the workers’ compensation benefits by bringing an action at law for damages against employers.
In LeFiell Manufacturing Co. v. Superior Court, claimant was injured while operating a power press without a point-of-operation guard. He then brought a civil suit against his employer under the power press exception, which included a claim for loss of consortium on behalf of his spouse. However, the California Workers’ Compensation Act expressly limits standing under the power press exception to employees or their surviving dependents. Thus, under settled principles of workers’ compensation law, the exclusivity rule was found to bar a dependent spouse’s claim for loss of consortium.

B. Civil Immunity of Constructive Joint Employers

As a matter of first impression, the Connecticut Supreme Court held that a district animal control officer was an employee of the towns served by the district for purposes of the exclusivity provision of the Connecticut Workers’ Compensation Act. The officer brought a workers’ compensation action against the district animal control when she slipped and fell while performing her duties. She also brought negligence and nuisance claims against the towns that established the district animal control.

The Connecticut Supreme Court agreed with the trial court’s conclusion that the district board was analogous to a municipal board of education. The court had previously held “that members of a local board of education are officers of the town they serve and that the persons employed by them in the performance of their statutory functions are employees of the town.” Just as local boards of education exercise their authority on behalf of the municipalities they serve, for worker’s compensation purposes, the members of the animal district board exercise their authority on behalf of the towns that formed the district.

The court was not persuaded by claimant’s argument that the structure of the district animal control “reflects policy choices that . . . are inconsistent with a finding that the towns were [the] plaintiff’s employer.” The court noted that the district board carried out its duties pursuant to law and the municipal animal control district agreement.

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109. Id.
110. Id.
111. Id. at 546.
113. Id. at 270.
114. Id.
115. Id. at 272.
116. Id. at 272–73; see Mase v. Meriden, 316 A.2d 754 (Conn. 1972); Wallingford v. Bd. of Educ., 210 A.2d 446 (Conn. 1965).
117. Id. at 277; see CONN. GEN. STAT. ANN. § 7-330.
118. Rettig, 41 A.3d at 278.
119. Id. at 272.
board carried out its duties “solely on behalf of the defendant towns.” Therefore, for purposes of the exclusivity provision, the court found the animal control officer to be an employee of the towns served by the district.

C. Civil Immunity Despite Lack of Insurance

The Virginia Supreme Court held that a subcontractor and its employees are entitled to the protection of the exclusive remedy protection of the Workers’ Compensation Act regardless of whether they have insurance. In *David White Crane Service v. Howell*, an employee of the general contractor allegedly was injured by the negligence of an employee of a subcontractor that carried no workers’ compensation insurance. The injured employee brought suit against the uninsured subcontractor and the allegedly negligent employee.

The court noted that an injured employee in Virginia may have a common law action against a third-party tortfeasor for “accidental injuries sustained while working for his employer, but only if the third-party tortfeasor is a ‘stranger to the work.’” In *Howell*, however, claimant and the subcontractor were working on the same project and “both were engaged in the trade, business and occupation of . . . the general contractor.” As a result, the court found the parties to this action to be co-employees. Thus, the subcontractor and its employee were entitled to immunity from common law actions.

The court then considered whether the subcontractor forfeited exclusivity protection by failing to carry the required insurance. The court had previously determined that because the legislative purpose is to bring within the Act all those who are engaged in the work that is a part of the owner’s or general contractor’s trade, business or occupation, such statutory co-employees are entitled to the exclusivity protections of the Act. The injured worker’s sole remedy for job-related injuries caused by statutory co-employees is a claim against his own statutory employer for an award of workers’ compensation benefits.

120. Id.
121. Id.
123. *Id.* at 574.
124. *Id.*
125. *Id.* at 575.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 576.
130. *Id.*
Claimant made a full recovery of workers’ compensation benefits under the Act. Permitting him to file suit against his co-workers not only “contravenes the exclusivity provisions of the Act but also would, if successful, result in a double recovery for a single injury.” Thus, the employers were entitled to the exclusivity protection provided by the Act despite their lack of workers’ compensation insurance, and the circuit court erred in denying the employer’s plea in bar.

XI. STATUTE OF LIMITATIONS

The Connecticut Supreme Court in *Brymer v. Town of Clinton* reversed the finding of a workers’ compensation commissioner regarding the tolling of the statute of limitations on a police officer’s claim for benefits for hypertension. A thirteen-year veteran of the Clinton Police Force was diagnosed with diabetes in 2000 by an endocrinologist who told him to “keep an eye on his blood pressure.” Under treatment by his primary care physician, claimant’s blood pressure readings fluctuated between 2001 and 2003, when he suffered chest pains and was diagnosed with hypertension. His doctor prescribed medication and found that he was medically unable to return to work for three months. The workers’ compensation commissioner denied benefits on the basis that the one-year statute of limitations had started tolling in 2000. Claimant appealed.

The court stayed the appeal pending its decision in *Ciarelli v. Town of Hamden*, in which it held that “the one-year limitation period for claims under the statute providing benefits for police officers disabled by hypertension begins to run only when an employee is informed by a medical professional that he has been diagnosed with hypertension.” Noting the factual similarity between the two cases, the *Brymer* court said that it was “left with a definite and firm conviction that the commissioner incorrectly concluded that [the endocrinologist] formally diagnosed the plaintiff with hypertension in 2000 and so informed the plaintiff of that diagnosis.” The decision of the workers’ compensation board was reversed and remanded.

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131. Id.
132. Id.
133. Id.
134. 31 A.3d 353 (Conn. 2011).
135. Id. at 356.
136. Id.
137. Id.
138. 8 A.3d 1093 (2010).
139. Id. at 1116.
140. *Brymer*, 31 A.3d at 360.
141. Id.
XII. EFFECT OF RETIREMENT

A. Bar to Benefits

The Delaware Supreme Court affirmed the superior court’s decision to deny total disability benefits to a retired nurse who ultimately had a total knee replacement in 2008 as the result of a work-related accident that occurred fourteen years earlier.\(^{142}\) Although the Industrial Accident Board (IAB) awarded medical costs, attorney fees, and medical witness costs to claimant, it denied her claim for total disability compensation.\(^{143}\) Based on her own “undisputed testimony” and repeated assertions to her doctor, the IAB concluded that claimant had voluntarily retired because of an unrelated back injury.\(^{144}\)

Claimant argued that she was entitled to benefits because the total disability compensation statute does not expressly state that a worker’s voluntary retirement precludes an award of those benefits.\(^{145}\) The court had previously recognized that “voluntary retirement is only one factor to consider in determining whether an employee is entitled to disability benefits under Delaware law.”\(^{146}\) Further, the court stated that employees may collect disability benefits even after voluntarily retiring as long as they do not intend to remove themselves from the job market altogether.\(^{147}\) However, when employees do not look for any work or contemplate working after retiring, they are not eligible for workers’ compensation benefits.\(^{148}\) The record contained sufficient evidence to support the IAB’s factual findings that claimant had voluntarily left the job market without seeking reemployment.\(^{149}\) The court upheld the superior court’s decision and denied total disability compensation benefits.\(^{150}\)

B. Presumption of Retirement

In a case involving the presumption of retirement, the Supreme Judicial Court of Maine found that hearing officers have an affirmative duty to issue findings in order to provide claimants with the opportunity to rebut them.\(^{151}\) In Downing v. Department of Transportation, claimant suffered a gradual injury in 2004, which was diagnosed as preexisting spinal

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143. Id.
144. Id. at 1289.
145. Id.
146. Hirneisen v. Champlain Cable Corp., 892 A.2d 1056, 1060 (Del. 2006).
147. Jackson, 23 A.3d at 1291.
148. Id.
149. Id.
150. Id.
151. Downing v. Dep’t of Transp., 34 A.3d 1150 (Me. 2012).
stenosis that was aggravated by his job. He retired in July 2004 but rescinded his application one month later and started working again, initially on a part-time basis, until March 2005, when he finally retired and starting drawing his pension. After working part-time as a janitor for a local YMCA for six months, he had spinal fusion surgery in December 2009.

The issue before the court was “whether, when the retiree presumption applies, an employee may nevertheless be entitled to workers’ compensation benefits for a discrete period after retirement upon proof that the employee was unable to perform suitable work for that period.” Claimant had argued at the workers’ compensation hearing that “even if he were subject to the retirement presumption, he was still eligible for workers’ compensation benefits during the time period leading up to his back surgery and the subsequent recovery period.” The court acknowledged that under Maine statute, retired employees may “rebut the presumption of retirement for a limited period of time.” However, the hearing officer did not issue findings of fact as requested by claimant, leaving the court with inadequate information on which to base its proceedings. The court “vacated the decision in part and remanded for further proceedings.”

XIII. PERMANENT DISABILITY

The Wyoming Supreme Court found that an injured construction worker was entitled to permanent total disability under the “odd lot” doctrine, which allows a claimant who is not actually permanently totally disabled to be eligible for permanent total disability benefits because his disability and other factors make him de facto unemployable. Claimants must make a prima facie case demonstrating that (1) they are no longer capable of working at the job in which they were employed at the time of the injury; and (2) they are qualified for odd lot treatment by the degree of obvious physical impairment coupled with other facts, such as mental

152. Id. at 1152.
153. Id.
154. Id.
155. Id. at 1152–53.
156. Id. at 1152.
157. Id.
158. Id.
159. WYO. STAT. ANN. § 27-14-102(a)(xvi).
160. McMasters v. State of Wyoming, 271 P.3d 422 (Wyo. 2012). Permanent total disability is defined in Wyoming by statute as “the loss of use of the body as a whole or any permanent injury certified under WYO. STAT. ANN. § 27-14-496, which primarily incapacitates the employee from performing work in any gainful occupation for which he is reasonably suited by experience or training.”
capacity, education, training, or age. 161 Once the prima facie case is established, the burden shifts to the Wyoming Workers’ Safety and Compensation Division to show that light work of the special nature that claimant could perform is available. 162

In McMasters v. State of Wyoming, claimant fractured his vertebrae after falling nine feet on the job site where he was employed as an HVAC journeyman. 163 Except for two weeks in 2004, claimant did not work and instead received medical evaluations and treatment by a number of medical providers and other specialists for the next six years. In 2008, he filed an application for permanent total disability, which was denied two years later “due to a preexisting psychological condition and a poor effort to find work.” 164

The court found no dispute as to the first prong of the odd lot test: “All of the physicians who examined McMasters agreed that physically he was restricted to light or sedentary duty, and the Division acknowledged in its brief that ‘McMasters made a showing that he can no longer work in the HVAC field.’ ” 165 Turning to the second prong, the court cited the testimony of several physicians and therapists who treated claimant, including the division’s own expert, “who opined that . . . ‘[t]he combination of problems in this gentleman probably make him unsuitable for any employment.’ ” 166

Because claimant had clearly established his prima facie case, the division had the burden of proving available light work of a special nature that he could perform. 167 The court found that the vocational specialist’s report was insufficient to meet that burden. 168 The division had also suggested that McMaster could be retrained based on his age, his one college semester after the injury, and the possibility of improvement through his

161. City of Casper v. Bowdish, 713 P.2d 763, 765 (Wyo. 1986). The second prong requires demonstration of reasonable efforts to find work after reaching maximum medical improvement or being so completely disabled that any effort to find work would be futile. Id. at 766. The odd lot claimant need not show that he is incapable of doing any work at all to be entitled to permanent total disability benefits. Workers’ Safety & Comp. Div. v. Pickens, 134 P.3d 1231 (Wyo. 2006).
162. The court had already adopted the rule from 2 Larson, Workmen’s Compensation Law § 57.61 that after claimant’s prima facie showing, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to claimant. It should not be enough to show claimant is physically capable of performing light work and adding a presumption that light work is available. Schepanovich v. U.S. Steel Corp., 669 P.2d 522, 528 (Wyo. 1983).
163. McMasters, 271 P.3d 422.
164. Id. at 424.
165. Id. at 438.
166. Id.
167. Id.
168. Id.
ongoing treatment—factors that the court found to be unreliable.\textsuperscript{169} With respect to his ability to be retrained, the court had already held that the odd lot doctrine did not encompass any obligation to enter a training program to improve one’s chances of returning to work.\textsuperscript{170} The court remanded to the district court for an order to the commission to award permanent total disability benefits to claimant.