

**THE COMMONWEALTH COURT HOLDS THAT SIMPLY BECAUSE
AN ATTACK BY A SUPERVISOR APPEARED TO BE SEXUAL
HARASSMENT, THAT MAY NOT BE TRUE AND, AS SUCH, THE
CLAIMANT WAS ENTITLED TO AN AWARD OF BENEFITS**

I. INTRODUCTION

The Commonwealth Court has reversed the Workers' Compensation Judge and Workers' Compensation Appeal Board and held that an attack, which they looked at more as "horseplay", did not necessarily rise to a level of sexual harassment to bring it within the "personal animus" exception of the Act which would exculpate the employer from liability.

II. STATEMENT OF FACTS

The claimant, a 49 year old male, began working with the employer as a laborer/warehouse picker. During a lunch break in the employee lunch room on June 26, 2003, the claimant's assistant supervisor approached and made a sexual comment to the claimant. He said "that I should rub something on your head, and directed to his penis". The supervisor walked over to the claimant and rubbed his head; the claimant gently pushed the supervisor away and said he should stop playing; the supervisor then grabbed the claimant and slammed him on his table, grabbed his testicles and laid on top of him; and after the incident they went their separate ways. Later, the supervisor told the claimant "Look man, I didn't mean to hurt you, man. I like you". The claimant filed a Claim Petition alleging that he suffered an injury to his lower back, left testicle and right leg as a result of the incident. The employer filed a Denial and alleged that the incident occurred for personal reasons and was not related to the claimant's employment.

The Workers' Compensation Judge denied the petition and found that based upon the claimant's admission that the incident had nothing to do with his employment, but rather was personal in nature and since the supervisor had been engaging in sexual harassment of the claimant since shortly after he began working there, that the employer had met its burden as to the "personal animosity defense" and denied benefits. The claimant appealed.

III. REVIEW OF APPELLATE DECISIONS

The Workers' Compensation Appeal Board affirmed the Judge's decision concluding that the claimant's testimony constituted substantial competent evidence to support a finding that the incident involved an act of sexual harassment. The Board further stated that the employer rebutted the presumption of coverage under the Act inasmuch as any sexual harassment that the claimant suffered was personal rather than work related and, therefore, his resulting injury is not compensable under Section 301(c)(1).

The Commonwealth Court, however, reversed. They cited the claimant's testimony that the supervisor had made similar comments in the past and it had been "in a joking way" and "just playing around". They also cited the testimony that the supervisor came to the claimant and said "Look man I didn't mean to hurt, man. I like you". They felt that the Board and the Judge overlooked the fact that the employer's burden was not met as to the crucial element of the personal animus defense, namely, that the assailant intended to injure the employee. Thus, in this case, since the supervisor did not intend to injure the employee and there was no evidence of record to establish that there was provocation or that supervisor set out to injure the employee, that the claimant was entitled to benefits.

IV. ANALYSIS AND RECOMMENDATIONS

It certainly seems that this court determined the situation to be more "horseplay" which many times is found compensable under the Workers' Compensation Act. The employer has the burden of proof that the attack was personal in nature and, as such, in this case, the Commonwealth Court felt that since the supervisor did not intend to hurt the claimant that the employer could not meet its burden of proof. These cases are very fact dependent.

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For further questions or a complete copy of the opinion of Samuel Edwards v. W.C.A.B. (Value-Plus, Inc.), please contact me or any of the other members of our Workers' Compensation Practice Group and we would be happy to provide you with answers to your questions or a copy of the opinion. A list of our practice group attorneys, their direct dial telephone numbers and their e-mail addresses are listed below.

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