MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

VOLUME 24 | NO. 7 | JULY 2020

Florida Workers' Compensation

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Linda W. Farrell

The First District Court of Appeal finds, because of its unreasonable delay, the employer failed to provide the alternate physician and competent substantial evidence existed to support the factual finding.

City of Bartow and Commercial Risk Management v. Isidro Flores, DCA#: 18-1927, Decision date: May 29, 2020

The claimant sustained a compensable work injury in 2015 and was authorized to treat with Dr. Henkel, a neurologist. On June 20, 2017, claimant's counsel sent a letter requesting a change within the same specialty. A response was provided by the carrier within five days indicating a date and time of an appointment. The following day, the attorney for the employer acknowledged the request and advised claimant's counsel that the employer was authorizing a different doctor, Dr. Mary Ellen Shriver, and that Dr. Henkel was no longer authorized.

Between June 28 and July 19, the parties communicated regarding the status of the appointment with Dr. Shriver. Then a petition for benefits was filed on July 19, requesting a one-time change, as previously requested on June 20, and named Dr. Koebbe as the alternate physician.

On August 16, 2017, 56 days after receipt of the request, the claimant was advised of an appointment with Dr. Shriver scheduled for September 11 (which is 63 days from the date of the request). The claimant's attorney responded that they would not attend the appointment and advised the employer to refrain from rescheduling until the issue was addressed at a final hearing.

The employer filed a motion for summary final order. The judge denied the motion, finding there were mixed questions of law and fact.

At the final hearing, the claimant stipulated that the employer had timely responded within five days. No witnesses were called, but the employer's attorney asserted that "as an officer of the court," she could establish that her office contacted Dr. Shriver's office on June 23 and that numerous calls were made on June 24 and June 25 to acquire an appointment date. The defense attorney further stated that other calls were made and that the records were sent for review by the doctor and ultimately an appointment was made.

The judge entered a final order, granting the claimant's request for a one-time change of his choice. On a subsequent motion for rehearing and to vacate the final order, a second hearing occurred to address due process arguments. The judge entered an amended final order, which is the subject of this appeal. The judge again ruled in the claimant's favor for authorization of Dr. Koebbe. The judge held, although the employer provided authorization, they failed to timely secure an appointment.

This newsletter is prepared by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects when called upon.

What's Hot in Workers' Comp is published by our firm, which is a defense litigation law firm with 500 attorneys residing in 20 offices in the Commonwealth of Pennsylvania and the states of New Jersey, Delaware, Ohio, Florida and New York. Our firm was founded in 1962 and is headquartered in Philadelphia, Pennsylvania.

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On appeal, the First District Court of Appeal indicated that the issue on appeal was "what satisfies the employer's obligation under section 440.13 (2) (f) to 'provide' an alternate physician or forfeit its right of selection." The issue between the parties stems from the language of the statute, which says the carrier shall authorize an alternative physician who shall not be professionally affiliated with the previous physician within five days after receipt of the request. If the carrier fails to provide a change of physician as requested by the employee, the employer forfeits the right of selection.

The First DCA affirmed the judge, finding, as a result of its unreasonable delay, the employer failed to provide the alternate physician and competent substantial evidence existed to support this factual finding. However, the court certified the following as a question of great public importance:

> Whether an employer's duty to timely furnished medical treatment under section 440.13(2)(f), which includes a claimant's right to a one time change of physician during the course of such treatment pursuant to section (2)(f), is fulfilled solely by timely authorizing an alternate physician to treat the claimant or whether—in order to retain its right of selection after timely authorizing the alternate physician to treat the claimant—the employer must actually provide the claimant an appointment date with the authorized alternate physician?

New Jersey Workers' Compensation

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Dario J. Badalamenti

The New Jersey Supreme Court held that an employer's subrogation reimbursement rights under the New Jersey Workers' Compensation Act are not barred by the Automobile Insurance Cost Reduction Act.

New Jersey Transit Corp. v. Sandra Sanchez, A-68-18/082292 (decided May 12, 2020)

In this *per curiam* decision, the New Jersey Supreme Court affirmed an Appellate Division ruling which found the state's no-fault auto insurance scheme, under the Automobile Insurance Cost Reduction Action, N.J.S.A. 39:6A-1.1 et seq. (AICRA), did not bar an employer from bringing a third-party action under Section 40 of the New Jersey Workers' Compensation Act., 34:15-1 et seq., in order to recoup workers' compensation costs incurred for a work-related motor vehicle accident.

David Mercogliano, a bus driver with New Jersey Transit, was involved in a motor vehicle accident when the bus he was driving was rear-ended by an automobile driven by Sandra Sanchez. New Jersey Transit's workers' compensation carrier paid benefits to, and on behalf of, Mercogliano for treatment he received for injuries sustained in the motor vehicle accident, as well as for his time out of work. Mercogliano neither sought nor received PIP benefits under his automobile insurance policy in connection with his accident. As Mercogliano chose not to pursue a negligence claim, New Jersey Transit itself initiated a subrogation action under Section 40 of the Act, which gives an employer the right to pursue a third-party action for recovery of workers' compensation benefits paid to, and on behalf of, its employee.

In response to New Jersey Transit's claim, Sanchez moved for summary judgement. Sanchez maintained that, because Mercogliano had elected the verbal threshold option permitted by AICRA and sustained no permanent injury, he was barred from pursuing damages for pain and suffering under AICRA. As such, the defendant argued that New Jersey Transit, as subrogee for Mercogliano, was similarly barred from pursuing a third-party action.

The trial court granted Sanchez's motion for summary judgement and dismissed New Jersey Transit's subrogation action. In the trial court's view, Mercogliano had been fully compensated for his economic damages and, as he was unable to pursue damages for pain and suffering under AICRA, New Jersey Transit did not have an independent right to subrogate against a third party. Therefore, the trial court found New Jersey Transit's subrogation action must be dismissed.

The Appellate Division reversed the trial court, noting the the Workers' Compensation Act is the exclusive remedy for an employee who suffers a work-related injury. As long as the employee's injuries were caused by a third party and not the employer, the Appellate Division reasoned, the Act gives the workers' compensation carrier an absolute right to

seek reimbursement from the tortfeasor for the benefits it has paid to the injured employee, regardless of whether or not the employee has been fully compensated.

In affirming the Appellate Division's ruling, the Supreme Court agreed that New Jersey Transit's subrogation action arose from "economic loss comprised of medical expenses and wage loss, not noneconomic loss," namely, pain and suffering, and rejected the trial court's view that a subrogation claim based on benefits paid for economic loss contravenes AICRA's intent. As the Supreme Court reasoned:

> We discern no evidence that the legislature intended to bar a workers' compensation subrogation claim by virtue of the very benefits that created that claim in the first place. [W]e conclude that Mercogliano suffered an economic loss in the form of medical expenses and lost wages, and that New Jersey Transit paid him benefits for that economic loss. The legislature made clear that when an employee injured in a work-related accident is entitled to benefits under the Workers' Compensation Act, that statute—not AICRA—provides his or her primary source of recovery for medical expenses and lost wages.

The Supreme Court acknowledged that in the event only workers' compensation benefits and PIP benefits are available sources of reimbursement, the so-called "collateral source rule," N.J.S.A. 39:6A-6, places the primary burden on the employer's workers' compensation carrier to compensate an employee injured in the course of employment. However, the Supreme Court noted where both workers' compensation benefits and the proceeds of a tort action have been recovered, the tort recovery is primary under Section 40 of the Act. Accordingly, the Supreme Court found no evidence of conflict between AICRA and the Act which would bar New Jersey Transit's subrogation action.

This decision represents a significant victory on the part of workers' compensation carriers. By unequivocally barring the use of AICRA as an obstacle to subrogation, the Supreme Court's holding preserves an employer's right to reimbursement for medical and indemnity benefits paid to an injured worker as a result of a work-related motor vehicle accident where a third party is at fault. As such, the Supreme Court's ruling demonstrates a clear intent to leave intact one of the workers' compensation carrier's most effective cost-saving tools.

Delaware Workers' Compensation

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Paul V. Tatlow

On the claimant's Petition to Determine Additional Compensation Due, the Board finds that the claimant is not entitled to either partial or total disability benefits where the evidence shows he abandoned his job and thereby voluntarily removed himself from the labor market.

Jeffrey Legg v. Shureline Construction, IAB Hearing No. 1472667; Decided Mar. 2, 2020

The claimant suffered a work-related left knee injury on January 12, 2018, while working for the employer as a lead man in its steel and iron construction business. The employer paid for medical treatment, including left knee surgery the claimant underwent on April 10, 2019. However, the employer did not pay any wage loss benefits. The case was before the Board on the claimant's DACD petition, seeking payment for partial disability from April 1, 2018, to April 9, 2019; ongoing partial disability since July 20, 2019; and a period of total disability benefits from April 10, 2019, through July 19, 2019.

The only medical evidence presented was the deposition of Dr. Pilkington, the claimant's treating surgeon, who performed a left knee arthroscopy of the claimant on April 10, 2019, that included removing part of a torn meniscus and stabilizing torn cartilage. Dr. Pilkington failed to issue physician's reports regarding the claimant's disability status, but he did testify that from the time of the work injury up until the surgery, the claimant was able to perform sedentary-duty work and that after the surgery, the claimant had a period of total disability for approximately three months and, thereafter, was capable of working in a sedentary- to light-duty capacity.

The claimant, who is 61 years old, testified that in March 2018, which was after the work injury but prior to the knee surgery, he received a letter from the employer firing him for missing work. He conceded thereafter he

did not apply for any work on his own. The claimant testified that he did not believe he could work in the steel industry or do any work at all, even at a desk, because he was in too much pain. The employer presented evidence from its Human Resources Director that they never received any "no work" notes or restrictions, other than one note from a Dr. Helou a few days after the work injury. The Human Resources Director further testified that the claimant last worked on March 8, 2018. He simply stopped showing up for work, and efforts to contact the claimant were unsuccessful. The claimant was sent a letter from the Human Resources Director on March 30, 2018, terminating his employment because he had not shown up for work, called out sick or supplied any disability notes.

The Board framed the issue as whether the claimant was entitled to disability benefits or whether he had voluntarily removed himself from the workforce. The Board concluded that he had not met his burden of proof and was, therefore, not entitled to either total or partial disability benefits. In assessing whether the claimant had voluntarily removed himself from the workforce, the Board noted that the absence of a job search by the claimant is an appropriate factor to consider, but it is not dispositive as a matter of law since each case is fact specific.

The Board noted that the claimant had abandoned his job with the employer, did not thereafter look for alternate employment and, being 61 years old, was of retirement age. The Board concluded that the claimant was physically capable of doing his job with the employer and that he abandoned the job before any restrictions were imposed on him by any of his treating doctors. The reasoning of the Board was that the claimant had failed to comply with his primary burden to make reasonable efforts to secure suitable employment. The claimant's removal from the workforce was not because of the work injury, because, even before and after abandoning his job with the employer, he was physically capable of working yet had made no reasonable efforts to find another job and gave no reasonable explanation as to why he did not do so. Given this evidence, the Board concluded that the claimant's choice to withdraw from the workforce was for personal reasons rather than due to the work injury. Since the claimant had voluntarily removed himself from the workforce prior to his knee surgery, the Board found that he was not entitled to any wage loss benefits, including total or partial disability.

Pennsylvania Workers' Compensation

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Francis X. Wickersham

An employer's payment of medical expenses under a Medical Only Temporary Notice of Compensation Payable does not toll the Act's statute of limitations when the payments were not made in lieu of compensation.

Janeen Dickerson v. WCAB (A Second Chance, Inc.); 1218 C.D. 2019; filed Apr. 15, 2020; Judge McCullough

The claimant was injured in a work-related motor vehicle accident on May 15, 2014. The employer issued a Medical Only Notice of Temporary Compensation Payable on June 4, 2014. On July 31, 2014, it issued a Notice Stopping Temporary Compensation and a Notice of Workers' Compensation Denial. The employer then paid medical bills incurred as of August 12, 2014, but only for treatment rendered prior to the issuance of the Notice Stopping Temporary Compensation and Notice of Workers' Compensation Denial. On June 5, 2017, the claimant filed a claim petition.

The workers' compensation judge dismissed the claim petition, concluding is was time barred and that the medical bill the employer paid on August 12, 2014, did not toll the three-year statute of limitations. The claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal to the Commonwealth Court, the claimant argued that the employer's payment of work-related medical bills tolled the three-year statute of limitations under § 315 of the Act. The court disagreed and dismissed the claimant's appeal, holding payment of medical expenses may toll the § 315 statute of limitations where those payments were made "in lieu of" workers' compensation benefits. According to the court, the controlling question is the intent of the employer. The court noted the employer issued a Medical Only Notice of Temporary Compensation Payable, paid only medical expenses, did not pay wage loss benefits and denied liability on the basis the injury was not work-related.

Because *Protz II* is not fully retroactive, a claimant must file for reinstatement within three years of the most recent payment of compensation or have had a case in active litigation at the time the Supreme Court

issued its *Protz II* decision in order for the reinstatement to be viable.

Patricia Weidenhammer v. WCAB (Albright College); 546 C.D. 2019; filed May 14, 2020; President Judge Leavitt

The claimant sustained a work injury on November 9, 2001. In 2003, she was awarded total disability benefits. On April 5, 2004, the employer requested an impairment rating evaluation. On May 5, 2004, an IRE was performed and a whole-body impairment of 36% was found. The claimant's disability status was automatically adjusted from total to partial as of March 26, 2004. The claimant's 500 weeks of partial disability benefits was exhausted on December 3, 2013, and she received her last payment of compensation. On October 17, 2017, she filed a petition to reinstate benefits on the basis that the Pennsylvania Supreme Court declared § 306(a.2) of the Act unconstitutional in *Protz v. WCAB (Derry Area School District)*, 161 A.3d 827 (Pa. 2017)(*Protz II*).

The workers' compensation judge denied the reinstatement petition, concluding that under § 413(a) of the Act, a reinstatement petition must be filed within three years of the date of the most recent compensation payment and the claimant filed her petition almost four years from her last payment. The judge also concluded that *Protz II* only affected those claimants with a case in active litigation, which the claimant did not. The Appeal Board affirmed the workers' compensation judge.

The claimant appealed to the Commonwealth Court and argued that *Protz II* rendered the IRE provisions as void *ab initio*; thus, she was entitled to a reinstatement of benefits. The court, though, found that the claimant's statutory right to total disability compensation had been extinguished at the point in time that she filed her reinstatement petition. According to the court, allowing the claimant to resuscitate her right to disability compensation violated § 413(a). Although the court acknowledged that *Protz II* may have voided § 306 (a.2) *ab initio*, they did not think the Pennsylvania Supreme Court intended *Protz II* to be given full retroactive effect or to nullify the statute of repose in § 413(a).

A fee agreement between a claimant and an attorney that says claimant's counsel is entitled to a 20% fee from any benefits awarded includes an award of medical expenses.

Robert Neves v. WCAB (American Airlines); 1431 C.D. 2018; filed May 14, 2020; President Judge Leavitt

In his claim petition, the claimant alleged that he suffered a work-related heart attack. The workers' compensation judge granted the petition and specifically found that the claimant's counsel was entitled to "20 percent of any benefits awarded to be paid as counsel fees" under the fee agreement. The judge's decision was then appealed by the employer and the claimant. Subsequently, the claimant filed review and penalty petitions, alleging the employer refused to pay for medical treatment related to his work injury and withheld payment of counsel fees on benefits awarded from a hospital. In support of the claim for counsel fees, counsel submitted the fee agreement which stated that the claimant agreed to pay his attorney a sum equal to 20% of whatever may be recovered from said claim. The claimant also submitted into evidence an affidavit which said he understood that the fee agreement applied to past due medical expenses as well as any wage loss benefits. The affidavit further said that the claimant understood that providers may seek the balance of the 20% of the bill from him should they be dissatisfied with the 80% they will receive.

The parties entered into a Compromise and Release Agreement, which settled the penalty petition but allowed the review petition to proceed. The workers' compensation judge denied the review petition, holding that counsel was not entitled to an attorney fee of 20% of the claimant's medical compensation. In doing so, the judge held that the petition was barred by the doctrine of *res judicata* since the claimant did not preserve that issue when filing the original appeal of the workers' compensation judge's decision granting the claim petition. Additionally, the judge held that the claimant failed to establish the counsel fee was reasonable. The claimant appealed to the Appeal Board, which affirmed.

The Commonwealth Court, however, reversed the underlying decisions. According to the court, under § 442 of the Act, the counsel fee should be calculated against the entire award, without regard for whether the award was for medical or indemnity compensation. Secondly, the terms of the fee agreement govern, and the claimant must establish that the parties intended that the counsel fee be applied to the entire award, including medical compensation. The court additionally held that § 442 of the Act does not require that a 20% counsel fee on a medical compensation award be shown as reasonable as the section lacks the *quantum meruit* analysis that is set forth in § 440 (b).

A suspension of claimant's benefits is proper where claimant establishes through his testimony that he has removed himself from the work force to be the primary caregiver for his children.

Phillips Respironics v. WCAB (Mica); 1317 C.D. 2019; filed May 22, 2020; Judge Covey

The claimant sustained a work-related injury to his left shoulder on June 1, 2015. The employer issued a Medical

Only Notice of Temporary Compensation Payable which, thereafter, converted to a Notice of Compensation Payable. The claimant then filed a claim petition, seeking wage loss benefits as of Augusta 3, 2015, and ongoing. The employer filed a termination petition, alleging the claimant was fully recovered.

The workers' compensation judge granted the claim petition and dismissed the termination petition but suspended the claimant's benefits because the claimant failed to meet his burden of proving his work injury forced him out of the entire labor market. Both the employer and the claimant appealed to the Appeal Board, which reversed the suspension of the claimant's wage loss benefits.

In its appeal to the Commonwealth Court, the employer argued the evidence established that the claimant removed himself from the work force. In reviewing the evidentiary record, the Commonwealth Court found the claimant unequivocally testified that he stopped looking for work, in part, due to his shoulder condition and, in part, due to the economics of his personal situation. They noted the claimant acknowledged there was work he could do, but chose not to pursue, because of personal financial considerations. Consequently, the employer was not required to present evidence of available work within the claimant's restrictions or to provide expert testimony regarding the claimant's earning power. The court, therefore, reversed the Appeal Board and held the suspension of benefits was proper, based on the claimant's testimony that he chose not to find work within his restrictions and which he was capable of performing in order to become the primary caregiver for his children.

News

Michele Punturi (Philadelphia, PA) presented "Survivor: Workers' Compensation Edition" for the CLM *Workers' Compensation and Retail, Restaurant & Hospitality Conference*, which was held virtually. Michele spoke with a panel of employers and claims professionals as they discussed ways to mitigate exposure and bolster defenses with strategic risk management and claims management tactics that result in favorable resolution and immunity from litigation.

Three attorneys from the Workers' Compensation Department have been selected to the 2020 edition of *Pennsylvania Super Lawyers* magazine. **Niki Ingram** (Philadelphia, PA) was named a Super Lawyer for the 15th straight year. Pennsylvania Rising Stars include **Raphael Duran** and **Ashley Eldridge** (Philadelphia, PA). A Thomson Reuters business, Super Lawyers is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Each year, no more than five percent of the lawyers in the state are selected for this honor. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. A description of the selection methodology can be found at http://www.superlawyers.com/about/selection_process.html.

Heather Carbone (Jacksonville, FL) authored the article "COVID-19 and Workers' Compensation Claims: How Can a Person Prove They Contracted the Illness on the Job?" The article appeared in the *Jacksonville Daily Record*. Click here to read the full article. **Heather,** along with Kimberly Simmons, director of Safety and Claims Management at Fidelity National Financial Inc., co-authored "Be Kind and Keep It Simple: Managing Litigated Workers' Compensation Claims Through Advocacy and Empathy," which was published in *CLM Magazine*, June 2020. Click here to read this full article.

Frank Wickersham (King of Prussia, PA) authored "Medical Marijuana: Reasonable and Necessary Medical Care for Injured Workers?," which appeared in *The Legal Intelligencer*'s Cannabis Law Supplement. Click here to read the article.

Outcomes

Tony Natale (Philadelphia, PA) successfully defended a large Philadelphia-based law firm in the litigation of a claim petition alleging post-concussion syndrome. The claimant slipped and fell at work, injuring his head and neck. The carrier accepted a contusion injury. The claimant alleged multiple additional injuries including cognitive maladies, memory loss, speech problems, vision convergence, photophobia, cranial nerve injuries and balance issues. The claimant testified while wearing sunglasses due to his alleged photophobia condition. Thirteen hours of surveillance video disputed the claimant's alleged symptoms (including his need for sunglasses). Prior health records revealed the claimant to be treating for his alleged cognitive problems before the work incident ever took place. The claimant's first treating neurologist records supported the claimant's symptoms to be non-anatomical. The carrier's IME physician found the claimant to have suffered non-disabling contusion injuries which resolved. The judge found in favor of the employer and carrier, ruling that the claimant's injuries were limited to contusions and had fully resolved. The claimant appealed the case to the Workers' Compensation Appeal Board, arguing the judge capriciously disregarded the evidence. The Board held the claimant's appeal was a veiled collateral attack on the workers' compensation judge's credibility determinations and affirmed the judge. At issue were potential life-time indemnity benefit payments and over $1 million of medical expenses.

Michael Duffy (King of Prussia, PA) recently won a case on appeal, reversing the judge's decision. The carrier issued a Notice of Temporary Compensation Payable, agreeing to pay both indemnity and medical benefits for a lumbar strain allegedly sustained by the claimant. The 90-day period began on April 22, 2018 and ended July 20, 2018. On June 21, 2018, the claimant filed a claim petition for workers' compensation benefits, alleging a low back injury. On July 17, 2018, the carrier issued a Notice Stopping Temporary Compensation Payable stopping benefits as of June 5, 2018, and a Notice of Compensation Denial. Thereafter, the claimant filed a petition for penalties, averring the carrier violated the Act by failing to stop benefits within five days of receipt of the last payment of benefits. Accordingly, the NTCP converted to a Notice of Compensation Payable (NCP). The judge ordered the carrier to reinstate disability benefits due to its failure to stop the claimant's benefits within five days of the last payment. The carrier appealed, arguing that the Interlocutory Order was a final adjudication, merely labeled as "Interlocutory." The carrier argued, because the judge's order drastically altered the procedure and burdens of the litigation, it was a final adjudication and the carrier had a right to appeal. The carrier further argued that, even when a defendant fails to file a Notice Stopping within five days after the last payment but does so within the 90-day NTCP timeframe, the NTCP does not convert to an NCP. Nevertheless, the Board agreed that the Interlocutory Order was, in fact, a final adjudication and reversed the judge's order. The Board found that the NTCP was properly stopped and denied within the 90-day NTCP timeframe, so it did not convert to an NCP.

Robin Romano (Philadelphia, PA) was successful in having a petition for penalties dismissed. The penalty petition alleged the employer failed to provide proper notice of two Utilization Review Requests and Determinations, which found the treatment of Dr. Palmaccio was neither reasonable nor necessary, and therefore, the claimant had no opportunity to file petitions to review these Utilizations Review Determinations. The judge found that the claimant failed to establish that he is entitled to a penalty or that the employer violated the Act. The judge also found not credible or persuasive the claimant's argument that the carrier should have known the claimant was no longer using the post office box, despite the claimant never having advised the carrier while admitting that he continued to receive other correspondence from the carrier.

Judd Woytek (Allentown, PA) obtained dismissal of a claim petition based upon lack of coverage for the claimant, who was a corporate officer. The claimant suffered injuries, including a degloving of the right leg and a crush injury of the right foot and ankle, as the result of being partially run over by a truck. As a corporate officer of the employer, the claimant was specifically excluded from coverage under the policy of insurance issued by our client. After the judge indicated at a hearing that the documentary evidence presented clearly showed the claimant was excluded from coverage, the claimant agreed to a dismissal of the claim petition.

In another case handled by **Judd**, he obtained a dismissal of a claim petition where the claimant failed to proceed with his medical evidence in a timely fashion. Claimant alleged bilateral carpal tunnel syndrome and aggravation of primary osteoarthritis of his left thumb.

Outcomes (cont.)

He failed to provide notice of the alleged injury to the employer until after his employment had been terminated. The claimant testified in support of his claim petition, then failed to present medical evidence in a timely fashion. Although the judge granted the claimant two extensions of time, he dismissed the claim petition without prejudice due to the claimant's failure to present any medical evidence.

Finally, **Judd** successfully litigated a modification petition before the judge based upon a labor market survey and earning power assessment. As a result, the claimant's benefits were significantly reduced. The claimant then appealed to the Appeal Board, which affirmed, dismissing the claimant's arguments that the evidence did not support a modification of benefits. The Appeal Board affirmed the judge's decision in its entirety based upon Judd's argument that the judge's decision was supported by substantial competent evidence.

Ben Durstein (Wilmington, DE) successfully defended claimant's petition for a recurrence of total disability benefits as of April 5, 2019. Claimant relied on the medical expert testimony of her treating physician who performed ketamine infusions and stellate ganglion injections to treat her complex regional pain syndrome diagnosis. The employer's medical expert was found to be more persuasive than claimant's expert. The Board reasoned that there had been little change in claimant's condition from when she had gone on temporary partial disability and that she remained able to work in some capacity. Both doctors testified that the right upper extremity is the primary site of her CRPS and that the right lower extremity was affected to a lesser extent. Although claimant's expert testified there had been a spread to the left upper extremity, it was not an accepted body part. Even if it were considered, there were no restrictions from any doctor regarding same.

The Board found claimant's expert's opinion did not support a recurrence as of that date. The Board noted the employer's expert agreed with significant restrictions on the claimant for her condition, but these did not preclude her from working.

The claimant also presented an employability argument based on the testimony of a vocational rehabilitation expert. The Board was not convinced by claimant's vocational expert's testimony that claimant was unemployable with the restrictions from either doctor.

The Board denied the claimant's petition. ▸