MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Delaware Workers' Compensation

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Superior Court affirms the Board's decision that claimant met the burden of proof for showing a recurrence of total disability through evidence that he needed regular yearly, week-long hospitalizations, which were found to equate to a worsening of the claimant's condition.

Harvey Hanna Associates v. William Sheehan, (C.A. No. N19A-08-001 CLS - Decided Jun. 5, 2020)

The claimant sustained a compensable work injury to his head and received compensation for total disability from August 5, 2013, through December 11, 2015, when he voluntarily terminated his temporary total disability benefits. Effective July 27, 2016, the claimant began receiving partial disability benefits. In July 2018, the claimant filed a DACD Petition alleging a recurrence of total disability effective January 25, 2018. The employer denied that there had been any change in the claimant's condition after he had signed the agreement to voluntarily terminate his total disability benefits as of December 11, 2015.

The evidence before the Board included testimony of the claimant, his wife, two medical experts on behalf of the claimant and one medical expert on behalf of the employer. The Board stated it was convinced by the claimant's medical experts that he had significant neck and back pain and, more importantly, constant painful headaches that were sometimes completely intractable. Consequently, the Board found that the claimant was not currently capable of regular gainful employment. Further, the Board stated that they found he had met his burden of proving a change in condition since December 11, 2015. The change being that the claimant now was required to get regular yearly, week-long hospitalizations due to the intractable headaches. The Board reasoned that the change in his condition—specifically that he now suffered semi-regular hospitalizations with a need for infusions to treat the intractable headache pain—made it clear that he had proven the recurrence, thus entitling him to total disability benefits.

In its appeal to the Superior Court, the employer argued that the Board committed legal error by applying the wrong standard in finding the recurrence of total disability. The employer contended that the Board needed to evaluate whether the claimant's condition had worsened, but instead, they had focused merely on whether there was a change in the claimant's medical treatment, which was not the appropriate legal standard.

The court set forth the legal standard that, after a claimant voluntarily terminates his benefits, he then bears the burden of establishing the right to additional benefits by showing a recurrence of total disability. The Delaware Supreme Court has defined a recurrence as the return of an impairment without the intervention of a new or

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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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independent accident. If a condition has not changed for the worse, then no recurrence has occurred.

As applied to this case, the court concluded that the Board did not commit legal error when it found the claimant suffered a recurrence of total disability. The court accepted the Board's reasoning that the claimant now required regular yearly, week-long hospitalizations, which was something he had not required prior to terminating his total disability benefits on December 11, 2015. Further, the court found that this new treatment does equate to a worsened condition since the necessity of those hospitalizations shows how the claimant's condition has worsened. Prior to having terminated total disability benefits back in 2015, the claimant was not required to be hospitalized for a week on an annual basis to deal with the intractable headaches. Therefore, the court concluded there was substantial evidence in the record to support the Board's finding that the claimant suffered a recurrence of total disability and no legal error had been committed.

Florida Workers' Compensation

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Linda W. Farrell

Judge finds that it is reasonable and medically necessary for the claimant to be evaluated by a board-certified neurologist.

David Rivera v. The Berkley Group, Inc. d/b/a Vacation Village at Parkway and Zurich American Insurance Company, OJCC# 19-005730, Lakeland District, JCC Arthur; Decision Date: Jun. 30, 2020

The employer authorized a neurologist to examine the claimant per the referral of the authorized treating provider. The claimant petitioned for a board-certified neurologist and refused to treat with the doctor selected by the employer. The employer asserted that board certification was not required by the statute. The claimant presented the only medical evidence, which was the testimony of the authorized treating physician, who opined that it was reasonable and medically necessary for the claimant to be evaluated by a board-certified neurologist. Therefore, the judge granted the petition seeking a board-certified neurologist.

Judge denies employer's drug free workplace and intoxication defenses.

Cerevet Vincent v. 3J & Associates, LLC and Next Level Administrators, LLC, Sunz Insurance, OJCC# 19-028583, West Palm Beach District, JCC Hedler; Decision Date: Jun. 30, 2020

The judge heard the bifurcated issue of the employer's drug free workplace and intoxication defenses. The claimant asserted that the employer did not have "reason to suspect" that he was under the influence and was not permitted to require him to submit to a drug test post-accident. The claimant also argued that the employer had not fully complied with all the statutory requirements to qualify as a drug free workplace. The employer contended that the claimant refused the post-accident drug test. The judge held that, under the circumstances, the employer had not complied and, therefore, was not permitted to require a drug test and that the claimant had not refused (even if the test had been permitted). The judge further concluded that there was no "reason to suspect" under the statute. The defenses of drug free workplace and intoxication were denied.

Although claimant may not have fully understood the contents or purpose of the employer's W.C. claims forms, he made a false statement when he provided a fictitious social security number, thus his claim was denied.

Miguel Hernandez v. Southeast Personnel Leasing and Packard Claims Administration, OJCC# 20-000606, Lakeland District, JCC Arthur; Decision Date: Jun. 30, 2020

In this misrepresentation case, the employer sent the claimant a form to complete at the onset of his claim. In return, the claimant provided a false social security number on the fraud statement and completed an authorization for the release of medical information and a work force innovation release form. The employer then asserted fraud and denied all benefits. The judge concluded that, while the claimant may not have fully understood the contents or purpose of the forms, he made a false statement when he provided the fictitious social security number and did so for the purpose of obtaining workers' compensation benefits. The claimant was barred from receiving any benefits.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division affirms a judge of compensation's granting of petitioner's motion for reconsideration vacating a prior order that had approved settlement to reconstruct petitioner's average weekly wage.

Esperanza Calero v. Target Corp., Docket No. A-2650-18T3 (App. Div., Decided Jun. 10, 2020)

In this *per curiam* decision, the Appellate Division upheld a judge of compensation's ruling that vacated a prior order approving settlement for the purposes of reconstructing an employee's wages. The Appellate Division rejected the employer's argument that the judge improperly revisited the prior compensation award and found that the employer presented no evidence at a hearing on the matter to justify voiding the judge's order for reconstruction of wages.

The petitioner sustained a work-related injury. On August 24, 2016, the petitioner's claim was settled amicably via an order approving settlement, signed by both the petitioner and the employer's counsel, with a stipulated weekly wage of $276.17. The settlement was placed on the record before the judge, and with the petitioner's consent, an order approving settlement was approved and signed by the judge.

In December 2016, after securing new counsel, the petitioner filed a motion for reconsideration as to the August 24, 2016, order approving settlement. In her motion, she argued that her wages were calculated incorrectly at the time the earlier order was entered, and she submitted wage statements demonstrating her wages were higher than reflected in the order. Citing *Katsoris v. S. Jersey Publ'g Co.*, 131 N.J. 535 (1993), the petitioner contended that her wages should be reconstructed based upon full-time wages because she suffered a permanent injury while working, which prevented her from continuing to work full time. She specifically sought to vacate the earlier order and asked that her wages be reconstructed based on a 40-hour week.

At an initial hearing held on July 11, 2018, the judge granted the petitioner's application. In his oral decision, the judge cited Rule 4:50-1(a), "which involves mistake, inadvertent surprise or excusable neglect." The judge concluded that prior counsel's mistake provided a basis for revisiting the issue of wage reconstruction and that the employer, despite its claims to the contrary, would suffer no prejudice in revisiting this issue. The judge accordingly vacated part of the settlement order approving settlement with respect to the average weekly wage and scheduled a hearing limited to "whether or not the wages were accurately calculated at the time the settlement was entered."

On September 12, 2018, the judge conducted a hearing for the purpose of taking testimony on the issue of wage reconstruction. The petitioner testified that she was originally hired on a full-time basis at a rate of $11.50 per hour. Although she considered herself a full-time employee, she conceded that her hours varied from more than 40 hours per week to approximately 20 hours per week and that her hours were solely at the employer's discretion. Despite these fluctuations, however, the petitioner testified that most of the time she worked more than 40 hours per week and that she was always available to work a 40-hour week. Although she attempted to work some hours after being injured, eventually she could not, and her hours were continually reduced until there was no longer any work for her to perform. The employer produced neither testimony nor documents in response to any of the petitioner's contentions.

On January 16, 2019, the judge issued his oral decision in which he indicated that he based his findings of fact on the petitioner's uncontroverted testimony and found that she was a full-time hourly employee, hired at the rate of approximately $11.50 per hour. He determined that, based on *Katsoris*, "there [was] credible evidence in this case of a permanent impact on future full-time wage-earning capacity in order to reconstruct . . . [Calero's] wages." He granted the petitioner's motion, reconstructed her wages to reflect a weekly wage of $460 per week, and ordered the employer to reimburse her for the incremental increase in her prior permanency award resulting from her increased reconstructed wage. This appeal ensued.

In affirming the judge of compensation's order, the Appellate Division revisited the holding in *Katsoris*, 131 N.J. at 543, in which the Supreme Court established a two-step process for determining if reconstruction of wages is appropriate. First the judge must determine if a petitioner,

at the time her injuries were sustained, "worked fewer than the customary number of days constituting an ordinary week in the character of the work involved." The judge must then consider whether the petitioner's disability "represents a loss of earning capacity or has an impact on probable future earnings." Thus, the Appellate Division reasoned, the critical inquiry is whether the petitioner demonstrated her injuries have disabled her with respect to her earning capacity in contemporary or future full-time employment. Applying the guiding principles of *Katsoris*, the Appellate Division concluded that it could not "think of a more fitting scenario, given the facts of this case, that calls out for wage reconstruction."

The Appellate Division's ruling here is not particularly surprising in that the employer produced neither testimony nor documentary evidence in response to any of the petitioner's contentions. That notwithstanding, it is important to note that wage reconstruction is not triggered simply by stating that one has not returned to full-time employment following an injury. The court is required to consider an employee's physical capabilities both at work and outside of work. If evidence is presented that the employee can, in fact, do full-time work based on the physical activities she is engaged in at home or in her leisure time, then wage reconstruction is not appropriate under the law.

Pennsylvania Workers' Compensation

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Workers' Compensation Office of Adjudication adjusts their policy for conducting live hearings in Pennsylvania.

As counties in Pennsylvania began entering the "green" phase at the end of June, the Workers' Compensation Office of Adjudication (WCOA) adjusted their policy for conducting hearings in Pennsylvania. During the complete shutdown quarantine, workers' compensation hearings continued being held, albeit telephonically and on video platforms. Now, however, live hearings are being conducted by judges, but with an emphasis on safety, distance and sanitary measures.

The WCOA's policy makes it clear that in-person hearings will only be held in limited situations. Essentially, the judge has the discretion to determine if live testimony from a witness will be necessary to assess credibility. A judge can determine that a live hearing will be held on his or her own motion, or a party can make a request for one. Such a request should include a justification and the opposing party's position on it.

As for logistics, the WCOA says that in-person events will be limited to one judge in the office per day, each event shall include no more than 10 persons (including the judge), hearing room chairs and tables will be spaced six feet apart, and sanitizing products will be available to all attendees. There will be 15-minute intervals between events to allow for cleaning. All attendees will be required to wear a mask. Any attendee refusing to wear a mask will not be permitted in the hearing room and directed to leave.

Side Bar

The assessment of a witness's credibility by a judge is a vital part of any litigated case. If the credibility of a claimant is significantly questionable, consideration should be given to requesting a live hearing for the claimant's testimony. If a request for a live proceeding is denied, consider requesting a video hearing, so at least the claimant can be seen by the judge. The same factors should be contemplated with respect to any fact witnesses who may be testifying in a case.

News

Congratulations to **Heather Byrer Carbone** (Jacksonville, FL) for her recent recertification by The Florida Bar in Workers' Compensation. Board Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys in workers' compensation.

Kelly Scifres (Jacksonville, FL) authored the article "Tips for Avoiding Stop-Work Orders" which appeared in the *Jacksonville Daily Record*.

Bob Fitzgerald (Mount Laurel, NJ) authored "Workers' Comp Update: The NJ Supreme Court One Again Affirms an Employers' Subrogation Rights" for the *New Jersey Defense Magazine*. ▶

Outcomes

Tony Natale (Philadelphia, PA) successfully prosecuted a termination petition and petition to review a Utilization Review determination on behalf of a Philadelphia-based transportation authority. The case has direct impact on the workers' compensation system since the termination petition dealt with the issue of a "piecemeal" full recovery—a petition seemingly banned by recent case law. The UR review petition dealt with the systemic flaws in the UR process, which resulted in a collateral attack on a previous judge's decision regarding reasonableness and necessity of medical treatment. The judge opined that the claimant fully recovered from a work-related knee injury and post-injury surgery, despite part of the meniscus in the knee now being missing. Tony successfully argued that the missing piece of meniscus did not functionally impair the injured worker. Moreover, Tony convinced the court that a partial termination of benefits is proper in this scenario because the original petition was filed only to the claimant's knee injury and extricated itself from any additional compensable injuries. The judge also agreed that the UR determination issued in the matter collaterally attacked a previous judge's decision on the issue of reasonableness of chiropractic treatment. The decision exposed the problem of final decisions of the judge on reasonableness of medical treatment being attacked by the UR process when an injured worker switches treating providers or files new prospective reviews.

Tony Natale (Philadelphia, PA) successfully prosecuted suspension and termination petitions and defended a claim petition for a local mushroom distribution company. The claimant sustained a work injury when he slipped and fell during the course and scope of his employment. He returned to work in a light-duty capacity and then abandoned the job shortly thereafter. He filed a claim petition to add concussion, neck and low back injuries. Testimony of fact witnesses proved the claimant abandoned his job in bad faith, while medical testimony proved the claimant to be fully recovered from his accepted injuries. Cross examination of the claimant's medical expert demonstrated the expert's lack of knowledge as to the facts of the claim and mechanics of the injury. It was further established through the cross examination of the claimant that he lacked any credibility regarding allegations of the head, neck or low back injuries. The suspension and termination petitions were granted, and the allegations of head/concussion, neck and back injuries were dismissed.

Michael Duffy (King of Prussia, PA) recently won a case where the judge's interlocutory order awarding benefits was appealed. The Appeal Board found that the notice stopping compensation and the notice of denial were not proper as the employer did not stop and deny the Temporary Notice of Compensation Payable within five days of the last payment of benefits. The Board found that: (1) we could appeal the interlocutory order because the order was essentially a final adjudication; and (2) the notice stopping and notice of denial were proper because it was within 90 days of the issuance of the Temporary Notice of Compensation Payable.

Lori Strauss (Philadelphia, PA) successfully argued before the Appeal Board, which affirmed the dismissal of a claim petition against our client, an international hotel chain. Prior counsel for the co-defendant had previously agreed that they were the correct employer, and the original claim petition against our client was dismissed. Thereafter, the co-defendant retained new counsel, who filed a joinder petition against our client. Lori argued the joinder petition should be dismissed based, in part, upon principles of *res judicata* and collateral estoppel. The judge agreed. The co-defendant

Outcomes (cont.)

appealed, and the Appeal Board affirmed the dismissal.

Ashley Eldridge (Philadelphia, PA) and **Audrey Copeland** (King of Prussia, PA) successfully defended an appeal filed by a co-defendant before the Commonwealth Court. A claim petition was preliminarily filed against an uninsured employer, the UEGF, our client and a second insurance carrier. Litigation proceeded on a variety of legal issues, and while the claimant was able to prove an entitlement to workers' compensation benefits, the primary issue was identifying the liable defendant. Ashley successfully defended the claim petition, and liability was imputed onto the other insurance carrier as the "borrowing employer." The carrier appealed, arguing that our client was liable, although the Board upheld the underlying determination. An appeal was taken up to the Commonwealth Court, who affirmed the Appeal Board, finding that the other insurance carrier was liable for workers' compensation benefits.

Shannon Fellin (Harrisburg, PA) secured a favorable decision where a claimant alleged injuries to his back, neck and shoulder while pulling back a hand-cart to avoid hitting a co-worker. The claimant was initially disabled by the panel doctor, then later released full duty. The claimant's attorney then referred him to a specialist, who turned out to be a rheumatologist with a workers' compensation/personal injury practice on the side. The claimant's medical expert testified that the claimant had been totally disabled for more than one year as a result of a multitude of strains, sprains, irritation, radiculopathy and possible tears. In response, Shannon presented the panel provider, who testified to a full recovery and a release to full duty. Shannon also presented three employer representatives regarding lack of notice, job availability and the claimant's limited attempt at light-duty. Ultimately, the judge found the panel doctor and all employer witnesses to be credible. The judge specifically rejected the testimony of the claimant on every issue. The claim and penalty petitions were denied.