MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

VOLUME 24 | NO. 10 | OCTOBER 2020

Delaware Workers' Compensation

By Paul V. Tatlow, Esquire | 302.552.4035 | pvtatlow@mdwcg.com

Paul V. Tatlow

The Board has the power to enforce an agreement to settle that is reached by commutation, despite the claimant passing away prior to execution of the commutation documents and their approval by the Board.

Kari-Ann Jones v. Universal Health Services Inc., (IAB Hearing No. 1412276 – Decided Aug. 24, 2020)

This case came before the Board on a motion filed by claimant's counsel to enforce a commutation agreement between the parties. The claimant had a compensable work injury on April 6, 2014, to her right upper extremity. She received compensation for temporary total disability and underwent several surgical procedures. A DACD Petition, filed on behalf of the claimant to include the cervical spine as part of the accepted injuries, was denied. The employer was later successful in having the claimant's compensation benefits reduced to partial disability status.

In early 2020, counsel for both parties entered settlement negotiations. Eventually, on May 26, 2020, counsel agreed to resolve the case by way of full and final commutation for $40,000. However, a few days later, on June 1, 2020, the claimant and her husband were tragically killed in a motor vehicle accident, leaving behind three minor children. Since the commutation documents had not yet been executed nor approved by the Board, the employer took the position that it was not enforceable.

On the claimant's motion to enforce the agreement, the Board relied on the 1998 Delaware Supreme Court case of *Anchor Motor Freight v. Ciabattoni*, where the court found that the parties had reached a meeting of the minds as to an agreement for future compensation even though the claimant had died before the agreement was formally approved by the Board. The Supreme Court held that the Board still had the authority to approve the agreement, reasoning that it did not serve the purposes of the Act to allow the employer to avoid their commitment based on the fortuity of the claimant dying before the Board acted.

Although the agreement in *Ciabattoni* did not technically involve a commutation, in this matter, the Board, nevertheless, found that it was applicable to this case. The Board's analysis stated that the first issue is whether the parties reached a meeting of the minds. The Board concluded that they clearly had done so since both counsel had agreed to a full and final commutation for $40,000, with the added requirement that the employer would continue paying partial disability benefits up until the date of approval by the Board. The second issue is whether the commutation was in the best interests of the claimant. In analyzing this issue, the

Board stated that the proper question is whether the agreement reached when the claimant was still alive was in her best interests. They concluded that it was since the claimant was only on partial disability benefits, her permanency claim had been resolved, and her cervical spine condition had been determined to be not work related.

Based on the foregoing analysis, the Board held that the commutation agreement was enforceable; there was clearly a meeting of the minds and it was in the best interests of the claimant. Therefore, the Board granted the claimant's motion to enforce the agreement and directed the parties to prepare the necessary legal documents for submission to the Board.

Florida Workers' Compensation

By Linda W. Farrell, Esquire | 904.358.4224 | lwfarrell@mdwcg.com

Linda W. Farrell

Court finds that failure to object on specificity grounds, where specificity would show ripeness, waives challenge to ripeness. IME opinions are admissible and can support claim for specific medical benefits.

Mary Thompson v. Escambia County School Board/Escambia County School District, No. 1D19-4063, Decision date: Aug. 17, 2020

The claimant appealed an order from Judge Winn denying right knee surgery. After suffering a hard fall at work, the claimant was diagnosed with right knee chondromalacia and meniscal tear. The authorized treating provider opined that she was not a surgical candidate and that her condition was pre-existing. The claimant then obtained an independent medical examination. The IME physician opined that the claimant's work accident was the major contributing cause of her condition, which required surgery. The judge accepted the IME doctor's opinion. However, he also ruled that the claim for surgery was premature because no authorized treating provider had recommended surgery. The First District Court of Appeal held that the judge erred in two ways. First, the employer waived objections on the grounds of ripeness and specificity by not asserting that defense or moving to dismiss the claim. Second, IME opinions are admissible and can support claims for specific medical benefits.

Disability must be established to a reasonable degree of medical certainty based on objective relevant medical findings. A judge may reject in whole or part uncontroverted testimony that he or she does not believe.

Francois Guerlande v. Delray Beach Fairfield Inn and Suites/Travelers Insurance, No. 1D19-2104, Decision date: Aug. 8, 2020

The claimant appealed the judge's denial of temporary indemnity benefits for a specific period. The day after the work accident, the claimant was seen at an urgent care facility and given restrictions. A week later, she was seen again and was released without any work restrictions. At the second visit, she denied an injection offered to her and was told that she could return if her condition worsened or she wanted the injection. Twelve days later, she elected to proceed with the injection and was given restrictions again. She received temporary indemnity benefits for the period prior to and after the intervening 12-day period.

The claimant argued she had restrictions during the 12-day period or that these restrictions were medically justified. The judge found to the contrary. The evidence revealed that the first authorized treating physician opined that full-duty work may cause discomfort but no harm, while a second authorized treating physician later opined that it was appropriate to have lifted the work restrictions under the circumstances.

The claimant told the doctor and the judge that pain precluded her from working during those 12 days, but neither were convinced. The First District Court of Appeal pointed out that Section 440.09(1) states: "Disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings…" The court further noted that a judge may reject in whole or part uncontroverted testimony that he or she does not believe.

Therefore, the First District Court of Appeal held that the judge's findings were supported by competent substantial evidence and that the claimant failed to meet her burden of proof. The judge's holding was affirmed.

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire | 973.618.4122 | djbadalamenti@mdwcg.com

Dario J. Badalamenti

Appellate Division affirms a trial court's dismissal of an employee's tort action against his employer based on the exclusive remedy provision of the Workers' Compensation Act.

Hocutt v. Minda Supply Company, Docket No. A-4711-18T1 (App. Div., Decided Aug. 7, 2020)

In this per curiam decision, the Appellate Division affirmed a grant of summary judgment in favor of an employer based on the "exclusive remedy" provision of the New Jersey Workers' Compensation Act. Under the Act's exclusive remedy provision, filing a tort action against one's employer is prohibited except where the employer has committed an "intentional wrong." Here, the Appellate Division found that, despite numerous OSHA violations calling the employer's safety practices into question, the employer's conduct did not to rise to the level of intentional wrong necessary to trigger an exception to the Act's exclusive remedy provision.

The petitioner was a "special employee" of the employer. On his second day of work, he was instructed by his supervisor to partner up with a forklift operator to stack product in the warehouse. The petitioner's partner was to operate the forklift, and the petitioner was to ride on the back of the forklift to assist in loading and unloading pallets. It was the employer's longstanding practice to pair employees in this fashion to hasten the pace with which pallets were loaded and unloaded. While riding on the back of the forklift, the petitioner's partner inadvertently backed the forklift into a beam, resulting in significant injury to the petitioner's leg.

Following the accident, OSHA issued multiple citations to the employer, including one classified as "willful," for a violation of 29 C.F.R. 1910.178(m)(3), for allowing an employee to ride on a forklift. The petitioner filed a complaint against the employer for compensatory and punitive damages, alleging intentional wrongdoing on the employer's part as the petitioner's supervisor had directed him to ride as a passenger on a forklift in violation of federal workplace safety regulations. The petitioner pointed to the fact that the employer received OSHA citations within days of his accident as evidence of the employer's wrongdoing and knowledge of the existing risk. The employer asserted as an affirmative defense that the petitioner's claim was prohibited by the Workers' Compensation Act's exclusive remedy provision. Once discovery was completed, the employer moved for summary judgment. After hearing oral argument, the trial court granted the employer's motion, finding that the petitioner failed to demonstrate that his workplace accident met the intentional wrong standard. Accordingly, the petitioner's complaint was dismissed with prejudice. This appeal ensued.

On appeal, the petitioner argued that the trial court misinterpreted the Act and again asserted that the employer's conduct did rise to the level of an "intentional wrong," thereby exempting the petitioner's claim from the exclusive remedy provision of the Act.

In affirming the trial court's dismissal of the negligence action, the Appellate Division relied on *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985). In *Millison*, the Supreme Court delineated a two-prong test to be utilized as an analytical guide for judges who must consider and decide summary judgment motions based on the workers' compensation exclusivity provision. This test requires not only that the conduct of the employer be examined, but also the context of the event in question:

> [T]he trial court must make two separate inquiries. The first is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are

> outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar.

Here, the Appellate Division found that the petitioner could not establish either the conduct or context prong as set forth in *Millison*. As to the conduct prong, the Appellate Division held:

> [W]e accept that there was a recurring practice at Minda's warehouse to allow workers to stand on moving forklifts. So far as the record before us shows, however, no accidents or injuries had resulted from the unsafe practice until [Hocutt's co-worker] backed into a beam with Hocutt aboard. The absence of proof of prior forklift accidents at Minda's warehouse suggest the unfortunate accident in this case was not a substantial certainty as demanded in *Millison*.

Addressing the context prong, the Appellate Division held that, although regrettable, the employer's practice of allowing its workers to stand on forklifts to hasten the pace with which pallets were loaded and unloaded was not the type of circumstance which the Legislature contemplated would expose an employer to a common law negligence action. As the Appellate Division reasoned:

> This unsafe practice . . . appears to reflect a deliberate decision by warehouse supervisors to expedite the movement of goods within the warehouse. That circumstance, however, does not by itself transform the company's negligence or recklessness into intentional wrong[.] [Although] we believe that these practices are deliberate in the sense that the employer made a business decision to maximize speed and efficiency at the expense of worker safety, such decisions are simply a type of mistaken judgement that is a fact of life in industrial workplaces.

This decision provides a useful benchmark of an employer's culpability under the *Millison* standard. Here, the Appellate Division emphasized that violating an OSHA regulation does not per se rise to the level of an intentional wrong. Rather, the Appellate Division concluded that escalation to intentional wrong generally occurs when there is repeated conduct committed in disregard of prior OSHA citations or other warnings. Based on the Appellate Division's reasoning, this decision suggests that absent a showing of prior accidents or injuries, prior OSHA violations, a failure to abate such OSHA violations, prior complaints from workers about unsafe practices or conduct on the part of an employer evidencing efforts to conceal its safety infractions or deceive safety investigators, it is unlikely that an employer will be found culpable under *Millison*'s analytical framework.

Medicare Set-Aside Practice Group

Settling a case and need CMS approval for a Medicare Set-Aside? Not satisfied with the vendor you have used in the past? Turn to the experienced Medicare team at Marshall Dennehey where our attorneys can quickly ascertain the information on conditional payments, advise on Advantage plans, and obtain CMS approval of Medicare Set-Asides. Feel free to give us a call or send us an email and let us know how we can help!

Ross Carrozza, Esq. – Co-Chair
(570) 496-4617 | racarrozza@mdwcg.com

Anthony Natale, Esq. – Co-Chair
(215) 575-2745 | apnatale@mdwcg.com

John Swartz, Esq.
(717) 651-3532 | jcswartz@mdwcg.com

Linda Wilson, Esq.
(302) 552-4327 | llwilson@mdwcg.com

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire | 610.354.8263 | fxwickersham@mdwcg.com

Francis X. Wickersham

Medical reports offered by the claimant to corroborate the testimony of her medical expert were hearsay and were properly excluded from evidence in a termination petition.

Cynthia Ciarolla v. WCAB (AstraZeneca Pharmaceuticals LP); 1263 C.D. 2019; filed May 12, 2020; by Judge Crompton

The claimant sustained a work-related low back injury from a motor vehicle accident she was involved in while travelling for work as a pharmaceutical sales representative. The employer accepted the injury and issued a Notice of Compensation Payable. Later, the employer filed a termination petition, alleging the claimant was fully recovered from her work injury.

In support of its petition, the employer presented testimony from a medical expert, who testified that the claimant was fully recovered from her work injury and noted that there was a "gap" in treatment from October 2014 until March 2016. The claimant also presented testimony from a medical expert. During that expert's deposition, the employer raised hearsay objections to the opinions of two other treating providers, which were sustained by the judge. The judge granted the termination petition, which the claimant appealed. The judge's decision was affirmed by the Workers' Compensation Appeal Board.

On appeal to the Commonwealth Court, the claimant argued that the medical opinions of the non-deposed physicians were admissible hearsay as they were offered to corroborate the medical opinion of her expert. She also argued that the testimony offered by the employer's medical expert was not competent since it relied on a mistaken fact, which was that the claimant had a year-and-a-half gap in medical treatment.

The Commonwealth Court rejected the claimant's arguments and dismissed the appeal, holding that hearsay medical reports do not constitute substantial evidence and cannot support an independent finding of a workers' compensation judge, even if the hearsay evidence is not subject to objection. The court further noted that the use of hearsay evidence is limited to cases where there is corroborating evidence and no objection on the record. In this case, the employer properly raised objections to the submission of the evidence and, therefore, the opinions of the medical providers were inadmissible hearsay. The court further rejected the claimant's argument that the opinion given by the employer's medical expert was incompetent because it was based on the mistaken fact that there was a gap in treatment of a year and a half. The evidence showed that for that period, the claimant performed at-home exercises and took medications, but the employer's expert testified that this did not qualify as treatment because the claimant did not actively consult with a medical provider and the judge had accepted the testimony as credible.

A claimant who raises a *Protz* challenge to a pre-*Protz* IRE on the basis that the IRE was unconstitutional is entitled to a reinstatement of temporary total disability benefits as of the date the reinstatement petition is filed and not the date of the IRE.

Yolanda White v. WCAB (City of Philadelphia); 1463 C.D. 2019; filed Aug. 17, 2020; by Judge Crompton

Following the claimant's January 2005 work injury, she underwent an Impairment Rating Evaluation in December 2013. After receiving a 36% whole body impairment, the employer filed a modification petition, which was granted by the judge. The claimant did not appeal the decision.

Later, in October 2015, after the Commonwealth Court's decision in *Protz v. WCAB (Derry Area School District)*, 124 A.3d 406 (Pa. Cmwlth. 2015) (*Protz I*), affirmed in part and reversed in part, 861 A.3d 827 (Pa. 2017) (*Protz II*), the claimant filed a reinstatement petition, seeking to nullify her IRE on the basis it was unconstitutional. Before litigation of this petition was concluded, the Supreme Court issued its opinion in *Protz II*, finding the IRE provisions of § 306 (a.2) of the Act unconstitutional and striking the section from the Act.

The judge granted the claimant's reinstatement petition and determined the employer was not entitled to a credit for any weeks of partial disability paid. The employer appealed to the Appeal Board. Although the Board affirmed, they held that the reinstatement was effective as of the date the claimant filed her petition in 2015, rather than the date of her conversion from total to partial disability benefits. The Board further vacated the judge's determination that the employer was not entitled to a

credit, stating that the credit is triggered only when the IRE process is initiated under § 306 (a.3)(1) of Act 111.

The claimant appealed to the Commonwealth Court, and the court affirmed the Board. The court noted that the claimant previously had her benefits modified from total to partial disability in 2013, did not appeal the judge's decision modifying her benefits and sought a reinstatement of benefits via petition after *Protz I* in October 2015. According to the court, the claimant was not litigating the underlying IRE when *Protz II*, or *Protz I*, was issued.

Consequently, the court found that the claimant was entitled to a reinstatement as of the date of her petition, not the effective date of the change in her disability status from total to partial. The court further rejected the claimant's argument that the Board's vacating of the judge's decision as to the employer's credit was the equivalent of granting a credit. The court found that the Board did not grant a credit, but merely stated that the credit provision is triggered only when the IRE process under § 306 (a.3) was initiated.

Commonwealth Court holds that Act 111, which implemented the new IRE provisions under § 306(a.3) of the Act, was not a substantive change of the law and could not be applied retroactively, absent a clear legislative intent to do so.

Rose Corporation v. WCAB (Espada); 661 C.D. 2019; filed Aug. 17, 2020; by Judge Cohn Jubelirer

In this case, at the time of Act 111's enactment in October of 2018, the employer had pending an appeal of a judge's decision that had reinstated the claimant to total disability status as of the date the IRE was performed under the former IRE provision, § 306(a.2) of the Act, which was found to be unconstitutional by the Commonwealth Court in *Protz I* and the Supreme Court in *Protz II*. While the employer's appeal was pending with the Appeal Board, the Commonwealth Court issued its decision in *Whitfield v. WCAB (Tenet Heath System Hahnemann LLC)*, 188 A.3d 599 (Pa. Cmwlth. 2018), holding that a claimant seeking reinstatement of total disability benefits is entitled to a reinstatement as of the date the petition was filed, provided the claimant demonstrates ongoing disability and the petition is filed within three years of the last payment of compensation.

Accordingly, citing *Whitfield*, the Board affirmed the judge's decision, with a modification of the reinstatement date to September 8, 2017, the date the claimant filed the reinstatement petition. The Board did not address the effect of Act 111. The employer appealed to the Commonwealth Court, arguing that because the prior IRE conformed with the requirements of Act 111, it should stand and the claimant's disability status should remain that of partially disabled.

The court rejected the employer's argument and affirmed the Board. According to the court, the General Assembly did not expressly provide either that an IRE performed prior to the effective date of Act 111 had any effect under Act 111 or that Act 111, in its entirety, should be applied retroactively. The court further held that Act 111 constituted a substantive change in the law that could not be applied retroactively without clear legislative intent permitting retroactive applicability. According to the court, § 306 of Act 111 established a mechanism by which employers/insurers may receive credit for weeks of compensation previously paid relative to the 104 weeks of total disability paid that triggers the employer's right to request an IRE for the claimant. The court said that retroactive application of Act 111 would have a direct, negative impact on the claimant's disability status by giving effect to an IRE performed under a process that the Supreme Court in *Protz II* found constitutionally invalid. Thus, the change brought about by Act 111 was substantive, not procedural, and, thus, not retroactive.

Where an employer was on notice of a claimant's work injury and did not timely issue an NCP as required by the Act, there was no reasonable basis to contest the claim petition and an award of attorney fees under § 440(a) of the Act should have been made.

David Gabriel v. WCAB (Procter & Gamble Products Company); 1499 C.D. 2019; filed Sep. 11, 2020; by Judge Cohn Jubelirer

The claimant sustained a work injury to his left arm on February 27, 2016, and gave the employer notice of the injury on March 7, 2016. The employer did not issue a Notice of Compensation Denial or an NCP within 21 days of notice, but they paid medical expenses. On August 17, 2017, the claimant filed a claim petition. The employer answered, denying all the petition's allegations.

At an initial hearing before the judge, the judge asked the employer whether they denied the claimant had a puncture wound. Employer's counsel said no and that two medical bills had been paid. The judge also asked whether the employer would have the claimant examined, and the employer's counsel again said no due to the lack of treatment received since April of 2016.

The claimant testified in connection with the claim petition and also submitted a report from a medical expert. The claimant identified a March 10, 2016, letter he received from the employer's claims administrator, notifying the claimant that they had received a report of

the work injury and that the claim was under review. At a final hearing held in March of 2018, the employer indicated a willingness to stipulate to the injury based on the conclusions reached by the physician who prepared the medical report for the claimant. After the hearing, the employer issued a Medical Only NCP for a punctured left upper arm.

The judge granted the claim petition but did not award penalties or an unreasonable contest attorney fee. The claimant appealed to the Appeal Board. The Board affirmed, and the claimant appealed to the Commonwealth Court.

The claimant argued to the court that it was not reasonable for the employer to wait until he submitted his medical report before it issued the Medical Only NCP and that the employer issued the document long after it was required to do so. The claimant maintained that the judge should have determined that unreasonable contest attorney fees were warranted.

The court agreed. In doing so, they noted that the employer knew of the claimant's injury and paid for his medical bills but never issued an NCP, forcing the claimant to hire an attorney, file a petition and engage in litigation. The court also pointed out that the employer filed an answer denying all of the allegations of the claim petition, despite (1) having notice of the injury, (2) the employer's doctors treating the claimant for the injury, (3) the employer's claims administrator acknowledging notice of the injury, and (4) the employer paying medical bills for the injury. Ultimately, the employer presented no contrary evidence to contest the claim petition, was willing to stipulate to the claimant's expert's report and, finally, issued a Medical Only NCP that recognized the injury as a punctured left upper arm. The court rejected the employer's argument that its contest was reasonable because the claimant sought to establish a more extensive injury in the claim petition than the injury for which it had notice. The case was remanded to the judge for an award of reasonable attorney fees. ▸

News

Michele Punturi (Philadelphia, PA) authored the article "Reflections on a Pandemic" for the *Philadelphia Bar Reporter*. Read it here. ▸

Outcomes

Michael Duffy (King of Prussia, PA) won a case where 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 in which he averred the carrier violated the Pennsylvania Workers' Compensation 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. The judge issued an Interlocutory Decision, ordering the carrier to reinstate disability benefits due to its failure to stop the claimant's benefits within five days of the last payment. Mike appealed on behalf of the carrier, arguing that the Interlocutory Order was a final adjudication merely labeled as "Interlocutory." The carrier argued that 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 benefits within five days after the last payment, but does so within the 90-day NTCP timeframe, the NTCP does not convert to a NCP. Nevertheless, the Appeal Board agreed that the Interlocutory Order was, in fact, a final adjudication and further 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. ▸