

Delaware Workers' Compensation

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Paul V. Tatlow

was conducted virtually.

Corey Berry v. MITRA QSR KNE LLC, dba Kentucky Fried Chicken, (C.A. No. K20A-08-002 JJC-Decided Feb. 16, 2021)

This case came before the court on the claimant's appeal from the Board's decision granting the employer's termination petition. During the Board's virtual hearing, the parties stipulated that the claimant suffered a compensable work injury when he fell at work on April 24, 2019, and the injury was to the cervical spine. The parties disagreed as to the duration of disability and whether proposed treatment—neck surgery—would be necessary and reasonable.

Shortly after the work injury on May 7, 2019, the claimant saw his family physician, who released him to light-duty work. The claimant then returned to work with the employer but was later terminated for reasons unrelated to the work injury.

Superior Court affirms Board's decision granting employer's termination petition as being supported by substantial evidence and in so doing rejects claimant's argument that the court should not defer to the Board's credibility findings since the hearing

Aside from the claimant's live testimony before the Board at the virtual hearing, the only other evidence consisted of medical experts on behalf of each party. This evidence showed that there were two completely divergent expert opinions. Dr. Zaslavsky, the claimant's expert, testified that the claimant had multiple subjective symptoms consistent with cervical myelopathy. He testified that the claimant required surgery for this condition and was totally disabled. In fact, Dr. Zaslavsky felt that the claimant's condition had progressed to the point where it would border on medical malpractice to not recommend surgery.

In contrast, Dr. Piccioni, the employer's medical expert, testified that the claimant had only suffered a cervical strain and sprain. He pointed out that at his exam, which took place after Dr. Zaslavsky had begun treating the claimant, revealed no signs of myelopathy and that, since this is a progressive condition, the absence of such signs or symptoms consistent with that condition would make it impossible that it actually existed. Dr. Piccioni also testified that the claimant was malingering and exaggerating his symptoms and that the soft tissue injury had resolved as of May 7, 2019.

The Board's decision finding in favor of the employer cited numerous examples of inconsistencies in the claimant's testimony, making it not credible. This included the fact that the claimant gave testimony that conflicted with statements attributed to him in the medical records and also included the claimant's varying descriptions as to

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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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the mechanism of the injury. The Board also commented on the fact that the claimant was self medicating with marijuana, despite instructions from Dr. Zaslavsky not to do so. The Board granted the termination petition and found that the claimant was not entitled to any compensation benefits for the work injury after May 7, 2019.

On appeal, it was claimant's position the Board should have found the claimant credible and, based on that error, there was no substantial evidence to support the Board's adverse decision. The court rejected this argument, stating that the record clearly contained substantial evidence to support the decision to terminate benefits and the Board properly performed its factfinder role in assessing the evidence, finding the employer's evidence credible, but rejecting the evidence presented on behalf of the claimant.

The claimant further argued, since the Board held a virtual hearing, the court is not required to give deference

on appeal to the Board's credibility findings. The court rejected this argument out of hand and noted that the claimant cited absolutely no authority in support of this contention. The claimant also could not point to any specific difficulties with the virtual hearing, other than speculating that the Board could not adequately observe him and appreciate his body language and facial expression as it would do at a live hearing. The court emphasized that the Board, like all trial courts in Delaware, has been conducting virtual hearings during the COVID pandemic. The court concluded that, given the claimant's failure to identify any aspect of the record to support his argument that the Board could not appropriately assess the credibility of the witnesses, they would not alter their scope of review. As a result, the court stated that they will follow the well-recognized rule that they defer to the Board's judgment regarding issues of witness credibility. ▶

Florida Workers' Compensation

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Linda W. Farrell

Even though the claimant bore a wage loss to his temporary partial disability benefits due to a COVID-19 lay-off, he must still prove the work injury was a contributing causal factor to that wage loss.

St. Anne Narcisse v. Courtyard Management Corp/ Marriott International, Inc., OJCC#20-009066, Orlando District, Judge Sculco, Decision date: Feb. 4, 2021

This case is interesting because it involves a claim for temporary partial disability benefits relative to the COVID-19 pandemic. Recall that we are typically bound by the *Toscano* case, which leaves very few defenses to a claim for temporary partial disability.

However, here the judge held that the closing of the employer's hotel on March 20, 2020, due to the pandemic was an intervening and superseding cause of the claimant's loss of wages, and he denied temporary partial disability benefits. He distinguished this claim from *Toscano* and, instead, relied on *Publix Risk Management v. Carter*, 278 So.3d 204 (Fla. 1st DCA 2019), which held that the claimant must still establish that the work injury is a contributing causal factor to the loss of wages.

Judge Sculco distinguished this set of facts from *Toscano* because the hotel had provided the claimant with full-duty work after the accident, at the same rate of pay and within her restrictions, versus as a result of her inability to perform the functions of the job before and after the lay-off. Therefore, the judge found the *Carter* case to be on point as both cases involved an employer that provided full-time modified work and then the claimant suffered wage loss for reasons unrelated to the work injury. ▶

The court finds that the judge erred by not ruling based on the notice that should have been provided within 52 weeks of the qualifying event versus when the symptoms manifested.

Palm Beach County Fire Rescue and Preferred Governmental Claims Solutions v. Andrew Wilkes, DCA#20-1615, First District Court of Appeal, Decision date: Dec. 14, 2020

In the case of *Andrew Wilkes v. Palm Beach County Fire Rescue and Preferred Government Claims Solutions*; OJCC # 19-019645, West Palm Beach District, Judge Stephenson; Decision Date: Apr. 23, 2020, the judge

held that a first responder's PTSD (due to a drowning event) was compensable when analyzed from the date of manifestation. On appeal, the First District Court of Appeal held that the judge erred by not ruling based on

the notice that should have been provided within 52 weeks of the qualifying event versus when the claimant's symptoms manifested. Therefore, the case was reversed and denied due to untimely notice. ▶

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division affirms a Judge of Compensation's dismissal of the petitioner's occupational hearing loss and tinnitus claim based on a finding that both the petitioner and his medical expert lacked credibility.

Bartolo A. Donzella v. SG

Performance Plastics Corp., Docket No. A-2048-19T3, (Appellate Division, Decided Jan. 12, 2021)

This Appellate Division decision deals with the Judge of Compensation's credibility findings in the context of an occupational exposure hearing loss and tinnitus claim. In dismissing the petitioner's claim, the judge attributed greater weight to the respondent's medical expert in finding a lack of credible evidence to prove the petitioner suffered hearing loss and tinnitus as a result of excessive noise exposure at his place of employment. The Appellate Division affirmed the judge's dismissal, finding his decision to be based on substantial credible evidence.

In August of 2015, the petitioner was employed as a fabricator of metal ball bearings for automobiles by the respondent at its manufacturing warehouse. He was surrounded on the warehouse floor by multiple machines that produced various levels of noise throughout the day. Though petitioner was provided with eyeglasses and gloves, he was not given protective hearing equipment. In September of 2015, he presented to the emergency room at St. Joseph's University Medical Center in Paterson, New Jersey, with complaints of dizziness and nausea upon waking that morning. Following an evaluation, he was prescribed Meclizine, a medication for treatment of motion sickness and vertigo. Following this emergency room visit, he never returned to work with the respondent.

On October 27, 2015, the petitioner sought treatment with Dr. Alfredo Festa, an ENT physician, to whom the petitioner reported complaints of chronic dizziness and

ringing in his ears for about one month. Dr. Festa did not diagnose any abnormalities as a result of his evaluation of the petitioner, but prescribed a 30-day regimen of Meclizine to alleviate his dizziness. In his report, Dr. Festa noted that the petitioner's hearing levels were normal. On November 30, 2015, the petitioner sought treatment with Dr. Daniel Samadi, another ENT physician. At that time, he complained of dizziness that worsened with increased activity, tinnitus in both ears and sensitivity to loud noises. Dr. Samadi diagnosed the petitioner with bilateral tinnitus, bilateral sensorineural hearing loss and disorders of the Eustachian tube.

On September 27, 2017, the petitioner filed a claim with the Division of Workers' Compensation, alleging bilateral sensorineural hearing loss, bilateral tinnitus and other ENT injuries resulting from occupational exposure to excessive noise while in the employ of the respondent from August 3, 2015, through September 30, 2015. The respondent denied the petitioner's claim, and a trial ensued.

At trial, the petitioner testified about his exposure to loud noise while in the respondent's employ, his resulting injuries and their impact on his everyday activities. The medical reports of both of the petitioner's treating physicians, as well as the expert reports of Dr. Gerald West and Dr. Steven Freifeld, the petitioner's and respondent's evaluating ENT physicians, respectively, were submitted into evidence by stipulation.

Dr. West opined in his report that, based upon his review of the medical history and after performing a physical examination, the petitioner was suffering from bilateral disabling tinnitus "secondary to the extreme noise exposure that [he] suffered in 2015." However, the physical examination and hearing test performed by this physician were within normal limits.

The respondent's expert, Dr. Freifeld, opined that the petitioner's hearing was within normal limits and that any vestibular neuronitis or tinnitus the petitioner may have previously experienced was subjective and transient in nature. Rather, this physician diagnosed the petitioner

with an unrelated hyperacusis, i.e., an auditory condition of unknown etiology marked by a heightened awareness of sounds, disturbed loudness function and discomfort for sounds that would be acceptable to most normally hearing people. As such, and within a reasonable degree of medical probability, Dr. Freifeld concluded that the petitioner's symptoms did not result from exposure to noise and were unrelated to his employment. Rather, he attributed the petitioner's complaints to his unrelated hyperacusis diagnosis.

At the conclusion of trial, the Judge of Compensation noted that the petitioner was incredulous and gave inconsistent testimony. For example, the judge highlighted that the petitioner consistently described the machines in the respondent's warehouse as "loud," but admitted on cross-examination that he was able to hear directions and instructions from his supervisor on the floor as long as the supervisor raised his voice. Moreover, the judge emphasized that neither Dr. Festa nor Dr. Samadi "opined as to any causal connection between petitioner's work environment and his symptoms" of dizziness or loss of hearing. Further, the judge found Dr. West's report to be "perplexing, inconsistent and troubling" in that, although Dr. West found the petitioner to have suffered from bilateral tinnitus secondary to employment-based noise exposure, "[t]here [was] no data, study or reference of any kind to suggest that this condition was caused by the limited noise exposure" the

petitioner experienced while in the employ of the respondent. Accordingly, the judge dismissed the petitioner's claim for failure to sustain his burden of proof as to causation.

In affirming the Judge of Compensation's dismissal, the Appellate Division cited to *Ramos v. M&F Fashions, Inc.*, 154 N.J. 583 (1988), as to the scope of its inquiry on appeal. In *Ramos*, the court held that:

[A] compensation judge is considered to have expertise in weighing the testimony of competing experts and assessing the validity of the claim. The judge is "not bound by the conclusional opinions of any one or more, or all of the medical experts." We will not reverse a judgment simply because the judge gave more weight to the opinion of one physician over the other.

Considering the proofs as a whole, including the medical expert reports of Dr. West and Dr. Freifeld, and with due regard to the Judge of Compensation's opportunity to assess the credibility of the petitioner at trial, the Appellate Division found that the Judge of Compensation's conclusion that the petitioner failed to sustain his burden of proof could have been reasonably reached based on sufficient credible evidence present in the record. The Appellate Division, accordingly, affirmed the Judge of Compensation's dismissal of the petitioner's claim. ▶

Pennsylvania Workers' Compensation

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Francis X. Wickersham

A Workers' Compensation Judge's decision that found surgery unrelated to the work injury and said no further treatment was necessary for the injury did not bar a subsequent penalty petition for non-payment of medical expenses related to the injury.

DTE Energy Company, Inc. and Old Republic Insurance Company v. WCAB (Weatherby); 418 C.D. 2020; by President Judge Levitt; filed Jan. 28, 2021

The claimant sustained a work injury in 1988, which the employer acknowledged via a Notice of Compensation Payable (NCP). The NCP described the injury as a "leg/back" injury. The claimant's benefits were suspended in 1995. In 2015, the claim was settled by a Compromise and Release (C&R) Agreement, which said the employer would remain responsible for certain medical bills regarding the work injury. In addition, the agreement left open a petition for penalties over the issue of whether fusion surgery performed on the claimant was causally related to the March 1988 work injury.

The Workers' Compensation Judge denied the penalty petition, finding that the claimant achieved maximum medical improvement by May of 2009, that no surgery was recommended or needed, and that the surgery was

unrelated to the work injury. The judge also said, “There is no further treatment that is necessary or that can be expected in the future relative to the low back condition as a result of the March 21, 1988, work event.”

In 2018, the claimant filed another penalty petition, alleging the employer violated the Act by not paying for medical expenses for treatment received since the surgery, consisting of pain management care. The employer took the position that they were not responsible for payment of medical bills, based on the statement, “[n]o further treatment is necessary,” made by the judge in the decision on the prior penalty petition.

The judge granted this penalty petition, finding the treatment was related to the claimant’s work injury. The judge found that the statement made by the prior judge in the other penalty petition had no binding effect and

believed the only issue in the prior petition was whether the low back surgery was related to the work injury. The employer appealed to the Workers’ Compensation Appeal Board, and the Board affirmed.

The Commonwealth Court affirmed the Board’s decision. They concluded that the decision issued in the first penalty petition, involving the low back surgery, did not preclude the judge’s subsequent decision granting a penalty petition. According to the court, the finding made by the judge in the prior penalty petition, that the claimant did not need further medical treatment for her 1988 work injury, was not essential to the judge’s judgement that the employer was not liable for the 2014 back surgery. Therefore, the prior decision did not collaterally estop the judge from considering whether the claimant’s work injury continued to require palliative treatment. ▶

Interplay Between the ADA, FMLA and Workers’ Compensation

The workers’ compensation attorneys at Marshall Dennehey have expansive knowledge of the ADA, FMLA and workers’ compensation statutes that all impact termination of employment. We fully understand the complex relationship between these statutes, and we provide our clients the necessary guidance during the pre-litigation phase. We also advise our clients on the potential impact of a wrongful termination and offer detailed recommendations to facilitate a lawful employment termination.

Our legal approach focuses on mitigating future exposure by giving practical advice to avoid pitfalls when navigating the decision to terminate an employee. We work with our clients to evaluate and address all legal issues involving the ADA, FMLA and workers’ compensation as they pertain to avoiding a wrongful termination claim.

Our talented team of attorneys stands ready to guide you through this specialized area of the law.

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Outcomes

Kacey Wiedt (Harrisburg) was successful in prosecuting a modification petition, changing the claimant's indemnity benefits from temporary total to partial disability based upon a labor market survey. After showing that the claimant had an earning power based upon the labor market survey, the judge modified the claimant's future indemnity benefits, even though the claimant was unemployed due to the accepted work-related back injury. Kacey was also successful in defending the claimant's review petition to expand the nature of his injury from the acknowledged injury of a lumbar sprain even though the claimant had a permanent spinal cord stimulator implant in his back.

In another matter, **Kacey** prevailed on a claim petition, defending his client, a bedding company, on a claim petition which alleged that the injured worker sustained upper extremity injuries as a result of her sewing position. Kacey was able to show through medical evidence and the employer's testimony that the claimant failed to provide notice of the injury in a timely fashion and that the claimant was neither credible nor persuasive that she sustained a repetitive trauma injury as a result of her job duties.

Kacey obtained a favorable decision from the Workers' Compensation Appeal Board, reversing the underlying judge's decision pertaining to the employer's entitlement to a credit for wages paid to a school teacher pursuant to a collective bargaining agreement. The Board granted credits for wages received by the injured worker through the school district's collective bargaining agreement, allowing offsets against the claimant's future entitlement to wage loss benefits.

Michele Punturi (Philadelphia) successfully defended the claimant's reinstatement petition on behalf of a multi-national car manufacturer. The claimant sustained a work injury on October 18, 2004, in the nature of bilateral strain/sprains CMC osteoarthritis and bilateral dequervains, which was accepted through a Notice of Compensation Payable. Thereafter, the claimant received various periods of disability and periods of return to work, for which benefits were suspended pursuant to Bureau

documents and a stipulation. The claimant's benefits remained on a suspension status as of March 31, 2011. On February 5, 2020, the claimant filed a reinstatement petition. Michele adamantly argued that the petition should be dismissed as the statute of repose bars the claimant's entitlement to any benefits as he had received in excess of 500 weeks of partial disability status—the claimant received 12.4 years and had not filed the reinstatement petition within three years after the date of his most recent payment of benefits. The judge concluded that the petition was barred pursuant to § 413(a) of the Act and emphasized the Supreme Court's decision in *Cozzone v. WCAB (Pa. Municipal East Goshen Township)*, which further supported that the claimant's right to benefits had been extinguished and the petition barred.

Judd Woytek (Allentown) received a favorable decision denying and dismissing the claimant's claim petition and granting the termination petition. The claim was accepted as medical-only for a low back strain. The claimant then filed a claim petition, seeking wage loss benefits after refusing a modified-duty job offer by the employer. Judd obtained an opinion of full recovery from the IME physician and filed a termination petition. The judge denied the claim petition and granted Judd's termination petition, finding that the employer had made a good faith offer of employment within the claimant's restrictions, which she refused to accept. Therefore, the claimant was not entitled to any wage loss benefits. The judge also found that the claimant fully recovered as of the date of our IME and terminated benefits completely as of that date.

Judd also received a favorable decision denying a coal miner's claim for benefits when the only evidence submitted by his widow was the death certificate that listed severe chronic obstructive pulmonary disease (COPD) as the primary cause of death. The Department of Labor claims examiner agreed with Judd's position that the death certificate alone was insufficient evidence to sustain the claimant's burden of proving that her husband had totally disabling coal workers' pneumoconiosis during his lifetime. Benefits were denied. ▶

News

On March 11, **Niki Ingram** (Philadelphia) was an invited speaker for the Philadelphia Association of Defense Counsel's "How Women Judges and Lawyers Succeed During Challenging Times." Niki joined an esteemed panel of judges and lawyers offering advice on how to move forward, while overcoming obstacles, juggling work life with personal life and maintaining civility.

Ashley Eldridge (Philadelphia) is speaking at the "Personal Injury Potpourri" webinar on April 20, hosted by The Dispute Resolution Institute. The day-long event will feature discussion on various topics, including recent case analysis, COVID-19 and workers' compensation, new disciplinary rule regarding referral fees, Common Pleas update and much more. For more information, [click here](#).

Michele Punturi (Philadelphia) is speaking at the 2021 CLM Workers' Compensation and Retail, Restaurant & Hospitality Conference to be held virtually on May 12-14. In "Changing the Employee Safety and Wellness Mindset to Reduce Workers' Compensation Costs and Avoid Liability," Michele

will be part of a panel discussion that will focus on changing the claims management mindset surrounding employee safety and wellness to drive down workers' compensation costs and avoid liability exposure. Today's litigious environment, particularly considering COVID-19, calls for an innovative approach that might include self-reporting programs and dedicated medical case management teams to help employers spot issues before they become costly claims. For more information, [click here](#).

Michele Punturi (Philadelphia), **Tony Natale** (Philadelphia), **Jessica Julian** (Wilmington) and **Ben Durstein** (Wilmington) presented the webinar "Workers' Compensation Winter Roundup" for Pennsylvania and Delaware claims professionals. The webinar addressed current issues in workers' compensation, including IREs and the use of TNCPs in Pennsylvania, and Medical Only Agreements and use of the Employer Form in Delaware. A recent Delaware case that is the first COVID-19 decision to come down in the state was also discussed. ▶