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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

An employer is not entitled to Supersedeas Fund reimbursement of unilaterally withheld medical benefits that are retroactively paid pursuant to a judge's order.

Erie Insurance Company and Powell Mechanical, Inc. v. WCAB (Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Workers' Compensation); 20 C.D. 2018; filed Feb. 21, 2019; by Judge Robson

The employer accepted liability for work injuries the claimant suffered in a vehicular accident. Later, it suspected the claimant may have been intoxicated at the time of the accident. It learned that the claimant, after delivering equipment for the employer, went to a bar and drank a number of beers. Thereafter, he was in an accident and charged with driving under the influence. The employer unilaterally stopped paying the claimant's medical expenses and filed termination and review petitions and also requested supersedeas.

The employer's request for supersedeas was granted by a workers' compensation judge, who later granted the employer's petitions and set aside the Notice of Compensation Payable (NCP). The judge also granted a penalty petition filed by the claimant, finding that the employer violated the Act for unilaterally stopping payment of medical benefits, and ordered the employer to pay medical bills from the date the NCP was issued through the date of decision. The claimant and the employer appealed to the Workers' Compensation Appeal Board, which affirmed. After the claimant's appeal to the Commonwealth Court was dismissed, the employer filed an application for Supersedeas Fund reimbursement, which was granted by the workers' compensation judge.

The Bureau of Workers' Compensation appealed the judge's decision with respect to reimbursement of medical expenses, and the Board reversed. In doing so, the Board concluded that the judge did not have the authority to grant supersedeas for medical expenses under the Act; therefore, his supersedeas order effectively denied supersedeas with respect to payment of medical bills. The Board also reasoned that the employer's payment of medical bills following the judge's decision was only because they were ordered to do so by the judge.

The employer appealed to the Commonwealth Court, arguing they were entitled to reimbursement for payment of medical expenses because the judge's order granting supersedeas as to wage loss benefits impliedly denied the supersedeas request for payment of medical expenses. The Bureau countered by arguing that the employer's payment of medical expenses was prompted by the judge's order granting the penalty petition, not by the prior denial of supersedeas. The Commonwealth Court dismissed the employer's appeal and affirmed the Board. They concluded that the employer unilaterally withheld payment of medical expenses in violation of the Act and that they were not entitled to reimbursement for those payments. According to the court, it was irrelevant that the employer subsequently prevailed on the termination petition because earlier violations of the Act may not be excused. II

Delaware Workers' Compensation

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwcg.com)

Paul V. Tatlow

Under the *Nally* doctrine, there was no untoward event and liability rested with the employer at the time of the original injury.

Trisha Collings v. BJ's Wholesale Club, Inc. and Fresenius Medical Care, Inc., (IAB Nos. 1436466 & 1463679 – Decided Dec. 31, 2018)

This case, involving an interesting medical causation issue, was successfully defended by my colleague, Jessica Julian. The claimant sustained the original injury on December 17, 2015, when she injured her left ankle, lumbar spine and cervical spine while employed with employer A. Litigation began in October 2017 when the claimant filed a DACD petition against employer A, seeking payment for cervical spine surgery, medical bills and a period of total disability. The claimant also filed a DCD petition against employer B as the subsequent employer, alleging a work injury on May 8, 2017. The employers disputed whether the original injury in December 2015 or the alleged injury in May 2017 was the cause of the claimant's cervical spine condition that necessitated the surgery and associated period of disability.

The claimant's testimony showed that the December 2015 injury with employer A occurred when her foot fell between a shipping dock and a truck, causing her to fall and sustain injuries to her left ankle, as well as her neck and low back. The claimant treated for the neck problems, but she was never a surgical candidate prior to the alleged work injury in May 2017. According to the claimant, on May 8, 2017, while working for employer B as a receptionist in the medical records room, she saw a significant amount of water on the floor. She took a mop and bucket and was mopping up the floor, using the wringer and pushing the mop down through it, when she experienced pain in her neck, going to her shoulders and down her arm. Thereafter, she had constant neck pain going down her shoulders and into her hand. She eventually underwent cervical spine surgery with Dr. Zaslavsky on August 10, 2017, involving a cervical fusion.

Dr. Zaslavsky testified as the claimant's medical expert and indicated that he saw a loose fragment of disc during the surgery. He testified that he could not date the actual fragment to the 2017 work incident, but the symptoms from it clearly related to that event. His opinion was that the claimant would not have needed the cervical spine surgery but for the 2017 work incident since she went from having minimal stenosis to having severe stenosis on the right side following the May 2017 event. The claimant did well following the surgery, and he released her to light-duty work as of November 2017.

Dr. Kalamchi testified as the expert for employer A. In his opinion, the May 2017 work event resulted in a sudden change and acute symptoms in the claimant, leading to the need for surgery. His opinion was that the May 2017 incident caused a worsening of the claimant's condition and was more than a simple progression of her prior cervical condition. Dr. Kalamchi stated that the May 2017 event made the claimant a surgical candidate and that the surgery helped improve her symptoms.

Dr. Rushton testified on behalf of employer B. His opinion was that the claimant's cervical spine surgery was the result of the original work injury in 2015. Dr. Rushton testified regarding his review of the MRI films. He did not detect any free disc fragment in reviewing them. He further testified that the mechanism of the May 2017 injury could not cause a free disc fragment to spontaneously occur. Dr. Rushton stated that the 2017 MRI findings do not support the conclusion that there was a traumatic disc extrusion or free disc fragment. His opinion was that the claimant's cervical spine surgery in 2017 was the result of the 2015 work injury and the long-standing consequences of the abnormalities the claimant had to the C6-C7 level and the onset of persistent cervical radiculopathy.

The Board analyzed the complex medical causation issue in order to decide whether the cervical spine surgery was the legal responsibility of either employer A or employer B. According to applicable law, if a claimant suffers a recurrence, liability rest with the employer at the time of the original injury. On the other hand, if the claimant suffers an aggravation resulting from a new work accident, liability rests upon the employer at the time of the second incident. The applicable law is set forth in *Standard Distributing Co. v. Nally*, 630 A.2d 640 (1993), where the Supreme Court stated that responsibility is placed on the carrier at the time of the initial injury when a claimant with continuing symptoms and disability sustains a further injury that is not accompanied by an intervening or untoward event that could be deemed the proximate cause of the new condition.

The Board stated that the claimant's cervical spine condition in 2017 was clearly a worsening of her cervical complaints, but the key question was whether this worsening was "attributable to an untoward event." As to what is an untoward event, the Board discussed the *Nally* case in detail and stated that a mere worsening of the claimant's symptoms is not the critical factor. Instead, an untoward event requires something such as a fall or being struck by something, rather than merely doing the normal activity of the job, when the pain increases.

As applied to this case, the Board concluded that the claimant did not have an untoward event in the May 2017 incident. Specifically, the claimant did not slip and fall, she was not struck by anything, she was not jerked or pushed. She was just mopping and felt an increase in her pain while pushing the mop through the wringer. Therefore, the Board concluded that liability was with employer A as the original employer since the claimant suffered a recurrence of her original injury rather than an aggravation. The Board ordered that employer A remain responsible for all compensation benefits owing to the claimant. Liability did not shift to employer B. ||

Florida Workers' Compensation

By Linda Wagner Farrell, Esquire (904.358.4224 or lwfarrell@mdwcg.com)

Linda W. Farrell

Before leaving office, Florida Governor Richard L. Scott reappointed Judges Holley (JAX), Humphries (JAX) and Winn (PNS). He also appointed Michael James Ring to replace Judge Geraldine Hogan upon retirement in Fort Lauderdale and Rita Lawton Young to replace Judge Spangler upon retirement for Tampa. II

Travel time of one hour and fifteen minutes exceeds the permissible time allowed under AHCA Rule 59A-23.003(6) of sixty minutes.

Brander v. Marriot Vacation Club and Zurich American Ins. Co., JCC# 17-030008, West Palm Beach District, JCC Johnsen

The claimant filed a petition for benefits, and there was a dispute over the employers' selection of a pain management physician. The employer contended they have the right to select the doctor. Although the claimant agreed, she did not agree to the doctor chosen because the doctor required her to sign a medication contract, required her group health insurance information, and was more than 60 minutes from her place of employment. The judge of compensation claims pointed out that the employer's right to select a physician has been and continues to be subject to a standard of reasonableness. The judge held that the employer is allowed to select the physician but that the selection of Dr. Wachman in this matter violated AHCA rules because the commute was more than 60 minutes from the claimant's job. The judge also stated that Dr. Wachman should not require her to give her health information. II

Second opinion referral granted even though workers' compensation law does not provide for same.

Sylvestre v. Coca Cola and Travelers Ins, Sedgwick, OJCC# 16-003534, Ft. Lauderdale District, JCC Lewis

This case involved a claimant with a severe crush injury to his left foot and ankle. The claimant made a claim for authorization for a second opinion with a plastic surgeon. His authorized treating orthopedic surgeon thought he may be a candidate for a transfer or transplantation of muscle or tissue to his heel pad to provide additional cushion. The authorized plastic surgeon opined that this procedure would not alleviate his pain and he did not believe that any additional surgery should be performed. Therefore, the plastic surgeon had nothing more to offer in the way of treatment/care. The employer argued that there is no second opinion provision in the statute (440.13(2)(f)) and that the claimant could use his one time change. The judge of compensation claims held that case law demonstrates that a claimant may obtain a second opinion but has the burden of proof to show that same is reasonable and medically necessary. In this case, the judge did find that the claimant met his burden, and he granted the second opinion. II

Honors and Awards

Ashley S. Talley

Ashley S. Talley of our Philadelphia, PA office was awarded a Westfield Insurance Company 'Golden Gavel' for outstanding legal representation on behalf of the insurer in a complex workers' compensation case.

The Golden Gavel Award is a formal recognition program designed by Westfield Insurance to recognize outstanding achievement by its outside counsel. Nominations for award winners are completed by Westfield claims professionals and submitted to its legal unit for consideration.

Ashley devotes the entirety of her practice to workers' compensation defense, representing insurers, self-insureds and TPA clients. She has experience across numerous industries including retail, manufacturing, transportation, chemical, construction, hospitality, non-profit and food industries. II

News from Marshall Dennehey

On March 29, 2019, **Linda Wagner Farrell** (Jacksonville, FL) will be a featured speaker at the Northeast Florida Disability Management Forum, which will be held at the Brooks Rehabilitation Hospital, Jacksonville, FL. Linda will present "Insurance Law & Updates: Opioids…The Not So New Epidemic," and also serve as a panelist for a discussion on "Alternative Treatments to Opioids." For complete information and registration, click here.

On April 9, 2019, **Niki Ingram** (Philadelphia, PA), director of the Workers' Compensation Department, and **Tony Natale** (Philadelphia, PA) will be presenting "Influence of Pharmaceuticals and Changing Landscape in Workers' Comp Medical Costs" at this year's Philly I-Day conference. A two-part presentation, this engaging session will explore disruptors (those rapid and most likely permanent changes that impact our industry and are caused by forces beyond our control) in workers' compensation, how they evolved, what is happening now and what is expected as we move into the future. For more information or to register for this event, click here.

We are a proud sponsor of the 2019 Florida Bar Workers' Compensation Forum taking place April 11-12 at The Omni Orlando Resort at Champions Gate, Orlando, FL. **Heather Carbone** (Jacksonville, FL) will be speaking on "Average Weekly Wage and Indemnity Benefits" while **Linda Wagner Farrell** (Jacksonville, FL) will be presenting "Opioids in Workers' Compensation." For complete information and registration, click here.

Kacey Wiedt (Harrisburg, PA), assistant director of the firm's Workers' Compensation Department, is speaking at the *Tough Problems in Workers' Compensation* seminar hosted by the Pennsylvania Bar Institute on April 18, 2019. The program is designed to explore some of the toughest issues in a lively point/counterpoint style. In addition to focusing on specific problems, the faculty will provide a review of recent decisions from the Commonwealth and Supreme Courts and how they affect workers' compensation practitioners and their clients. For more information, click here.

Anthony Natale and **Ashley Talley** (Philadelphia, PA) are presenting "The Interplay Between Traumatic Brain Injuries and Fraud in Workers' Compensation" at the upcoming Pennsylvania Insurance Fraud Conference, being held in Hershey, PA between April 23-24. In the workers' compensation field, one of the biggest red flags for fraud is the nature of injury and, more recently, injuries involving concussion, post-concussion or similar traumatic head injuries. Attendees will gain insight into how to identify, manage and fight claims for traumatic head injuries that are diagnosed based upon subjective complaints alone. Fore more information, click here.

Tony Natale (Philadelphia, PA) successfully defended a mushroom distribution company in an unemployment action surrounding a claimant's discharge for cause. The claimant had been assigned as a custodial worker to clean bathrooms in the facility. On the date in question, she signed verification forms claiming she cleaned the bathrooms in the facility at specifically denoted times. After major complaints were lodged as to the condition of the bathrooms, an investigation ensued, including review of in-house surveillance. As a result, the claimant was discharged. She hired counsel to represent her in the unemployment action. During the hearing, the claimant testified on cross examination that it took her 35 minutes to clean each bathroom on the date in question. However, the verification forms reflected sign-out times that were wholly contradictory. The decision found the claimants' discharge for cause met the definition of willful misconduct.

Tony also defended a mushroom farm in litigation surrounding a fall at work. The claimant fell down stairs while watering soil, striking her head in the process. She was diagnosed with myriad injuries, including post concussion syndrome, and neck, back, upper extremity and lower extremity sprains. The parties submitted medical expert opinions on the ongoing nature of the claimant's conditions and disability status. The workers' compensation judge found the claimant to be fully recovered from all injuries and granted the employer's request for a termination of benefits.

Finally, **Tony** defended the Corporation of Roman Catholic Clergymen in an appeal action arising out of the claimant's allegations that she should receive workers' compensation benefits for time out of work she was using to undertake treatment for a work-related injury. The Workers' Compensation Appeal Board upheld the original decision of the workers' compensation judge and dismissed the claimant's appeal on the basis that medical treatment must be undertaken outside of work hours, if available. ||

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwcg.com)

Dario J. Badalamenti

The appellate division finds that medical provider applications filed with the NJ Division of Workers' Compensation are governed by the six-year statute of limitations requiring that actions at law for recovery upon a contractual claim shall be commenced within six years after the cause of action has accrued.

The Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc., Docket Nos. A-5597-16T1, A-5603-16T1, A-5604-16T1, A-0151-17T1, A-0152-17T1, 2019 N.J. Super. Unpub. LEXIS 8 (App. Div., Decided Jan. 17, 2019)

The Plastic Surgery Center, PA, The Woods O.R., Inc., Steven Paragioudakis, M.D. and Marc Menkowitz, M.D. filed petitions in the Division of Workers' Compensation for payment of services rendered to employees of Malouf Chevrolet-Cadillac, Inc., Leone Industries and Café Bayou. The claims were each filed more than two years from the date of each employee's accident, but less than six years from the date on which the medical services were rendered. In interpreting N.J.S.A. 34:15-15 so as to require application of the two-year statute of limitations to these medical provider applications, the judge of compensation dismissed all of the claims. The medical providers appealed, and the appeals were heard on a consolidated basis.

In reversing the judge of compensation's dismissal of the medical providers' applications, the Appellate Division attempted to ascertain the intent of a 2012 legislative amendment to the New Jersey Workers' Compensation Act. In 2012, the legislature amended N.J.S.A. 34:15-15, granting the Division of Workers' Compensation exclusive jurisdiction over claims brought by medical providers for payment of services rendered to injured employees. Before the 2012 amendment, a medical provider was entitled to file a collection action for payment in the Superior Court and had no obligation to participate in a patient's pending workers' compensation claim. See, *University of Mass. v. Christodoulou*, 180 N.J. 334 (2004). However, as the court in *Christodoulou* held, when an employee pursues a claim in the Division of Workers' Compensation, a provider's Superior Court collection action must be transferred to the Division for efficiency purposes. It was well-established long before the 2012 amendment that the timeliness of medical provider claims is governed by the general six-year statute of limitations (N.J.S.A. 2A:14-1) requiring that every action at law for recovery upon a contractual claim shall be commenced within six years after the cause of action shall have accrued.

Although the Appellate Division found a multitude of reasons to conclude that the legislature did not intend to alter the long-standing six-year statute of limitations for medical provider claims, it found most compelling the fact that any other interpretation would be logically inconsistent. The Appellate Division reasoned:

> [W]e are most persuaded that the legislature intended to leave unaltered the time within which medical provider claims must be commenced because the Act's two-year time-bar simply doesn't fit. It is safe to say that there would be—if this shorter statute of limitations applied—numerous times in which the window within which medical providers would be required to assert their claims would expire before their claims accrued. In seeking a reasonably plausible interpretation of the legislature's amendment, [we refuse] to assume the legislature intended to create a situation where a medical provider's right to pursue a legitimate claim might actually be extinguished before it even accrued. II