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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Claimant is not entitled to automatic resumption of temporary total disability benefits due to the end of a light-duty funded employment job if claimant already received maximum 500 weeks of partial disability benefits for the work injury.

Michael Sladisky v. WCAB (Allegheny Ludlum Corp.); 67 C.D. 2011; filed May 15, 2012; Judge Leavitt

The claimant sought a reinstatement of temporary total disability benefits because the light-duty job he was working ended. This job had been funded by the employer. Eventually, the claimant was laid off when the employer could no longer fund the position. Thereafter, the claimant filed a petition seeking a reinstatement of temporary total disability benefits.

Although the claimant had already received 500 weeks of partial disability benefits, the Workers' Compensation Judge (judge) granted the reinstatement petition, concluding that, because the claimant was working a funded employment job, he was not required to show that his physical condition had worsened. Although the claimant admitted that he was physically able to perform the job, the judge concluded there should be an exception because the claimant was working in a funded employment position.

The Workers' Compensation Appeal Board (Board) reversed and held that the fact that the claimant was working a funded employment job was immaterial. According to the Board, because 500 weeks of partial disability benefits had already been exhausted, the claimant's burden of proof was to show a worsening of his medical condition, which he failed to do.

The Commonwealth Court agreed and affirmed the Board's decision. The court rejected the claimant's argument that claimants working a funded employment job should automatically be eligible for total disability benefits upon elimination of the job. The court stated that there was nothing untoward about funded employment, that it was a legitimate way to bring an injured claimant back to work and reduce his disability from total to partial. ||

SIDE BAR

A strong dissenting opinion was authored by Senior Judge Friedman. In fact, she called the majority opinion unconscionable. In support of her dissent, Judge Friedman emphasized that it was undisputed that the claimant's medical restrictions from his injury were permanent and pointed out that, if the claimant had been laid off prior to the end of partial disability, he would have been entitled to an automatic reinstatement, absent proof of work availability. In other words, Judge Friedman concurred with the judge's opinion that the claimant should be automatically eligible for total disability benefits upon the elimination of the funded employment job.

What's Hot in Workers' Comp is published by our firm, which is a defense litigation law firm with 450 attorneys residing in 18 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.

A disfigurement award for a crooked nose is reversed where evidence did not establish that it presented an "unsightly appearance."

Walker v. WCAB (Health Consultants); 492 C.D. 2011 (Pa. Commonwealth); filed May 3, 2012; Judge Leavitt

The claimant fractured her nose when she fell down a flight of stairs at work and required surgery. The claim was accepted via a notice of compensation payable (NCP), and total disability benefits were paid until the claimant returned to work without restrictions. The claimant underwent a second nasal surgery four months after the first, which left her with scars on the nose and a crooked nose tip. In connection with petitions to reinstate TTD benefits and amend the NCP to include additional injuries, the claimant sought benefits for permanent disfigurement of the nose. The Workers' Compensation Judge (judge) granted a disfigurement award on the basis of before and after photos, which identified the crookedness in the nose, while denying the other petitions. On appeal, the Board viewed the claimant's nose and reversed the disfigurement award, finding that the "crookedness is not noticeably disfiguring." In the Commonwealth Court, the claimant argued that, because there was no dispute that the nose is disfigured, she is entitled to a disfigurement award. In rejecting this position, the court noted that not every visible alternation of the head, neck or face is compensable as it must create an unsightly appearance. The Board's independent view is that the nose, while slightly crooked, is not unsightly and supported the denial of benefits. ||

Side Bar

The court's ruling emphasizes the importance, but sometimes ignored, element of an unsightly disfigurement; the presence of a permanent scar or other disfigurement of the head, neck or face is insufficient without proof of an unsightly appearance. This case may be useful in arguing that disfigurement awards should not be viewed as automatic whenever a scar is present as the claimant also must prove that the disfigurement is unsightly. While the unsightliness of a scar is a subjective standard, defense counsel can marshal expert evidence challenging the unsightliness of the blemish.

The employee, who returned to work at no loss of earnings and who was found to be under the influence of alcohol at work, in violation of the employer's policy, is precluded from an award of disability benefits.

BJ's Wholesale Club v. WCAB (Pearson); 2010 C.D. 2011 (Pa. Commonwealth); filed May 10, 2012; Senior Judge Colins

Upon the claimant's return to sedentary work following a foot and toe contusion, the store manager for the employer suspected that the claimant had been drinking alcohol while at work and requested that she submit to a blood alcohol test (BAC). The employer's substance abuse policy provided that an employee who is under the influence of alcohol on the job will be subject to disciplinary action up to termination of employment. The BAC test identified a blood alcohol level of .108, with a serum alcohol level of .127. After receiving the test results, the employer terminated the claimant for being under the influence of alcohol in violation of its policy.

The claimant filed a claim petition seeking total disability benefits as of the date of her termination of employment. In granting the petition, the Workers' Compensation Judge (judge) found that, despite the undisputed results of the blood test, additional evidence—the claimant's testimony that she drank alcohol long before work, combined with the absence of outward signs of intoxication such as the smell of alcohol, unsteadiness or blurred speech—did not support a finding that the loss of earnings was unrelated to the work injury.

In reversing this conclusion, the court reaffirmed the principle that where a loss of earnings is the result of termination of employment for misconduct unrelated to the work injury, a claimant is not entitled to disability benefits. The burden of proof that the claimant's conduct amounted to bad faith or lack of good faith so as to justify a denial of benefits rests with the employer. The court held that the violation of a substance abuse policy and termination for such conduct is proof of a lack of good faith and justifies a denial of disability benefits. ||

Side Bar

An employee terminated after being found to be under the influence of alcohol or drugs at work in violation of a clear policy precludes an award of disability benefits, but only where the claimant is working at no loss of earnings. The court reaffirmed the limited application of the decision in *Vista International Hotel* that an employee on partial disability who is terminated for misconduct unrelated to the work injury does not result in a forfeiture of all benefits.

News from Marshall Dennehey

On June 8, 2012, Niki Ingram and Mary Kohnke Wagner of our Philadelphia office participated in the Pennsylvania Chamber of Business & Industry's *Workers' Compensation Roundtable*. Niki gave a presentation "Understanding Workers' Compensation Benefits." Mary will made a presentation "What' s Happening Now in Workers' Compensation" and "The Top 10 Things Companies Do Wrong Before Going to WC Litigation."

Jay Habas (Erie, PA) recently gave a presentation to the Inns of Court in Erie on the subject of "Maritime Liability for Work-Related Injuries—Concurrent Jurisdiction of the Pennsylvania Workers' Compensation Act with the Longshore and Harbor Workers' Compensation Act."

Join the Marshall Dennehey Workers' Compensation Department and representatives from Solomon & Associates for Happy Hour on Thursday, July 19 from 4 p.m. – 8 p.m. at Bahama Breeze at the Cherry Hill Mall (Rt. 38), Cherry Hill, NJ from 4pm – 8pm. For more information, contact Robin Shaffer at rlshaffer@mdwcg.com or 215.575.2641. ||

New Jersey Workers' Compensation

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

Dario J. Badalamenti

When asserting "casual employment" defense to workers' compensation claim filed under a New Jersey homeowner's policy, respondent bears burden of proof. If successful in asserting "casual employment" defense, Judge must dismiss claim for lack of jurisdiction.

Marco Antonio Cruz v. Ivania Perez Alonzo, Docket No. A-0444-11T4, 2012 N.J. Super. Unpub. LEXIS 1025 (App. Div., decided May 9, 2012)

The petitioner was injured while remodeling the respondent's residential basement. The petitioner was introduced to the respondent through her uncle and, beginning in 2009, did occasional minor work around the respondent's home. Before beginning work on the basement project, it was agreed that the respondent was to provide transportation for the petitioner, who neither owned a car nor had a driver's license, and that the petitioner was to work only on weekends as he had a full-time job at a supermarket. Although the respondent determined the time the petitioner spent on the basement project on any given day, the petitioner himself chose the days on which he would work. With the exception of the petitioner's own power saw, all other tools and materials for the basement project were provided by the respondent. On April 23, 2010, during his third weekend of work, the petitioner suffered serious injury to several fingers of his left hand while operating his power saw.

The petitioner filed a claim for medical and temporary benefits with the Division of Workers' Compensation claiming he was an "occasional employee" and eligible for workers' compensation coverage under the petitioner's homeowner's policy. The respondent moved for dismissal arguing that the petitioner was a "casual employee" and, thus, excluded from the Workers' Compensation Act pursuant to N.J.S.A. 34:15-36. That section defines "casual employment" as:

> If in connection with the employer's business, as employment the occasion of which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.

The Judge of Compensation granted the respondent's motion and dismissed the claim, finding that the petitioner was a "casual employee" and ineligible for benefits under the Act. The petitioner appealed.

In affirming the Judge of Compensations' ruling, the Appellate Division relied primarily on *Berkeyheiser v. Woolf*, 71 N.J. Super. 171 (App. Div. 1961) in which the court enumerated certain criteria in making its determination that the petitioner was not an "employee" as defined by the Act, but was, rather, a "casual employee." As the court stated:

> [Petitioner] had a regular and permanent full-time job elsewhere at a substantial salary; had no expectation of regular and steady employment by the respondent; his work was not part of the respondent's ordinary business; the odd jobs he did for respondent occurred at irregular and isolated occasions and only when the need arose; and he did not perform the repairs on a regular schedule, but he himself chose the times when he would appear to make the repairs..

The Appellate Division found that utilizing the criteria set forth in *Berkeyheiser* required a finding that the petitioner in the instant case was himself a "casual employee" and that he failed to meet the correspondingly heightened burden of proving that his work was "regular, periodic or recurring." Accordingly, he was not entitled to benefits under the Act.

Side Bar

Homeowner's policies in New Jersey are automatically endorsed to provide limited workers' compensation coverage for occasional residence employees. In fact, the petitioner's claim in the instant case was filed against the respondent's homeowner's policy. An effective defense to workers' compensation claims filed under a homeowner's policy is "casual employment," and it should be considered in any case involving brief, accidental or non-recurring employment. Although the respondent bears the burden of proof, if successful in asserting a "casual employment" defense, the Judge of Compensation must dismiss the claim for lack of jurisdiction.

Ask Our Attorneys

Q: Does a case involving a professional athlete who possesses a very high average weekly wage due to an inflated salary of millions of dollars per year ever benefit from an earning power evaluation or job search after a career ending injury?

A: YES. Unknown to most practitioners, a professional athlete's salary for purposes of calculation of partial disability is LIMITED by the Pennsylvania Workers' Compensation Act to double the statewide average weekly wage..

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Q: Is there case law that requires insurers to pay for gym memberships for an injury?

A: Yes, at least in Delaware. If prescribed by a treating physician, a gym membership can be compensable. For accepted injuries, the inquiry at the UR level is whether the treatment falls within the applicable practice guideline. If a UR determination is appealed to the Board, the inquiry is the broader one of whether the treatment is necessary and reasonable. I have a case where the treating physician—one of the top orthopedic surgeons in the state—has recommended a YMCA membership for the claimant so he can participate in a swimming program. The physician has pointed out that this will be much cheaper than formal physical therapy. Given this situation, the employer is better off paying for the gym membership as being more cost-effective than possibly trying to show it falls outside the guidelines. Obviously, the duration of any such membership should be closely monitored to make sure the need for it is due to the residual disability as opposed to a general conditioning regimen.

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A: There is no New Jersey case law directly on point expressly requiring a respondent to pay for a gym membership. However, N.J.S.A. 34:15-15 does provide that an "employer shall furnish the injured worker with such medical, surgical and other treatment . . . as shall be necessary to cure and relieve the worker of the effects of the injury." The New Jersey courts have liberally construed the term "other treatment" to include a variety of unconventional modes of treatment if there is competent medical evidence to conclude that the treatment is reasonable and necessary to cure and relieve the injured worker of the effects of his injury. If a treating physician recommends that a petitioner obtain a gym membership and finds it to be medically necessary, the court will likely compel the respondent to authorize same.

Notwithstanding the foregoing, authorizing a gym membership can certainly raise concerns for a respondent. A gym membership, unlike physical therapy, is conducted by the petitioner himself, rather than under the supervision of a licensed professional. As such, the petitioner could lie about his attendance, make use of the gym for exercises not related to the compensable injury, or perhaps utilize gym equipment improperly and creating risk for aggravation of his injuries. The best way to mitigate this exposure is to speak with the physician who prescribed the gym membership. The physician should be made to provide a detailed treatment plan, including the specific gym exercises the petitioner is to perform, the number of days the petitioner is to perform the exercises in order to achieve the desired result, and the overall length of the gym membership. Perhaps a physical therapist could provide the same treatment. Despite its likely greater cost, physical therapy might be the better alternative as it affords th respondent a much greater level of control over the petitioner's treatment and progress.

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Delaware Workers' Compensation

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

Paul V. Tatlow

Employers are permitted to mandate the pharmacy from which claimants must obtain work-related prescription medications.

Kevin Capel v. Johnson Controls, Inc., (IAB No. 1268060 - Decided March 2, 2012)

This case involved a legal motion before the Industrial Accident Board filed on behalf of the claimant which sought to compel the employer to pay for prescription medical expenses and also requested that a fine be assessed against the employer for failing to do so. The evidence presented by the claimant showed that the claimant was using Injured Workers' Pharmacy for obtaining the medications prescribed for the work injury. The employer countered with evidence that it had offered to provide those medications to the claimant through a company it used by the name of Preferred Medical. The Board denied the claimant's motion and agreed with the employer that it was permitted to mandate the provider of prescription medications.

The Board's order points out that §2323 of the Act provides as follows: "Any employee who alleges an industrial injury shall have the right to employ a physician, surgeon, dentist, optometrist or chiropractor of the employee's own choosing." It is important to note that this provision does not refer to a pharmacy, and, as such, the employer can choose a medication provider for the claimant from whom the claimant must obtain work-related prescription medications. The claimant can only choose their own pharmacy if the employer refuses or fails to provide the prescribed medications. ||

Side Bar

This case illustrates that in Delaware the employer does not have the right to select or control the physicians or other medical providers with whom the claimant treats for work-related injuries. However, prescription medications do not fall within that rule, and the employers are free to mandate a prescription provider. Employers should take advantage of this provision since it will generally be cost effective by allowing them to contract with a provider of their choosing. If this is done, the claimant and claimant's counsel should be notified of the mandated provider, and the claimant should also be given a prescription card.