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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

Denial of fatal claim petition because decedent's death did not occur within 300 weeks of the date of the original work injury was proper.

Jamie Whitesell v. WCAB (Staples, Inc.); 205 C.D. 2013; filed July 10, 2013; Judge Pellegrini

The decedent suffered a work injury on October 15, 2003, which was acknowledged by Notice of Compensation Payable (NCP) as a "lumbar strain/sprain." Later, in connection with a petition to review, the parties stipulated to amending the description of the work injury to "lumbar strain/sprain and lumbar disc disruption L4-5, resulting in total disc arthroplasty at L4-5 level." The Workers' Compensation Judge's decision granting the review petition was dated June 28, 2006.

On June 8, 2011, the claimant filed a fatal claim petition, alleging the decedent died on June 13, 2010, as a result of mixed drug toxicity from medications prescribed by her treating physician. The employer requested a dismissal of the petition since the decedent's death did not occur within 300 weeks of the date of the work injury, as required by §301 (c) (1) of the Act. The judge denied the claimant's petition, concluding that it was barred under this provision of the Act. The Workers' Compensation Appeal Board (Board) affirmed.

On appeal to the Commonwealth Court, the claimant argued that the 300-week limitation to file a death claim starts from the date that the additional injuries occurred. In other words, the claimant took the position that the 300-week limitation should be extended since the decedent had sought and received an expansion of the work injuries by a Workers' Compensation Judge's decision in June of 2006.

The Commonwealth Court rejected the claimant's argument, finding it irrelevant that the decedent's work injury was legally expanded by the judge in 2006. The compensable injury for the decedent commenced in 2003. The Commonwealth Court, therefore, affirmed the dismissal of the fatal claim petition on the basis that it was time barred. II

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The Commonwealth Court also rejected the claimant's argument that the decedent's injury was similar to that of an occupational disease in that it was "insidious" in nature, thereby entitling the claimant to an extension of the 300-week limitation from the date of the judge's 2006 decision that added to the injury description. The court dismissed this attempt. Overall, the court strictly construed the time limitation imposed by § 301(c) (1) of the Act.

An employer is not obligated to reinstate benefits and need not show continuing availability of suitable work when a claimant, with a residual disability who seeks to return to work at a light-duty job, suffers a non-work-related total disability preventing him/her from working at all.

Southeastern Pennsylvania Transportation Authority (SEPTA) v. WCAB (Cunningham); 2045 C.D. 2011; filed July 12, 2013; by Judge McCullough

In June 1996, while working under permanent, light-duty restrictions, the claimant suffered a work injury to his right knee. The claimant filed a claim petition, and benefits were awarded after a Workers'

Compensation Judge granted the petition. Shortly after the June 1996 injury, the claimant returned to his pre-injury light-duty job. However, in July of 1996, the claimant was involved in a non-work-related car accident, suffering injuries to his left knee, low back and left hand. Again, the claimant went out of work and again returned to his light-duty job in April of 1997. On December 24, 1998, the claimant was in a second non-work-related accident, suffering injuries to his left knee, low back, left hand and left shoulder. During the week of December 26, 1998, the claimant unsuccessfully tried a brief return to work and has not returned to work in any capacity since then.

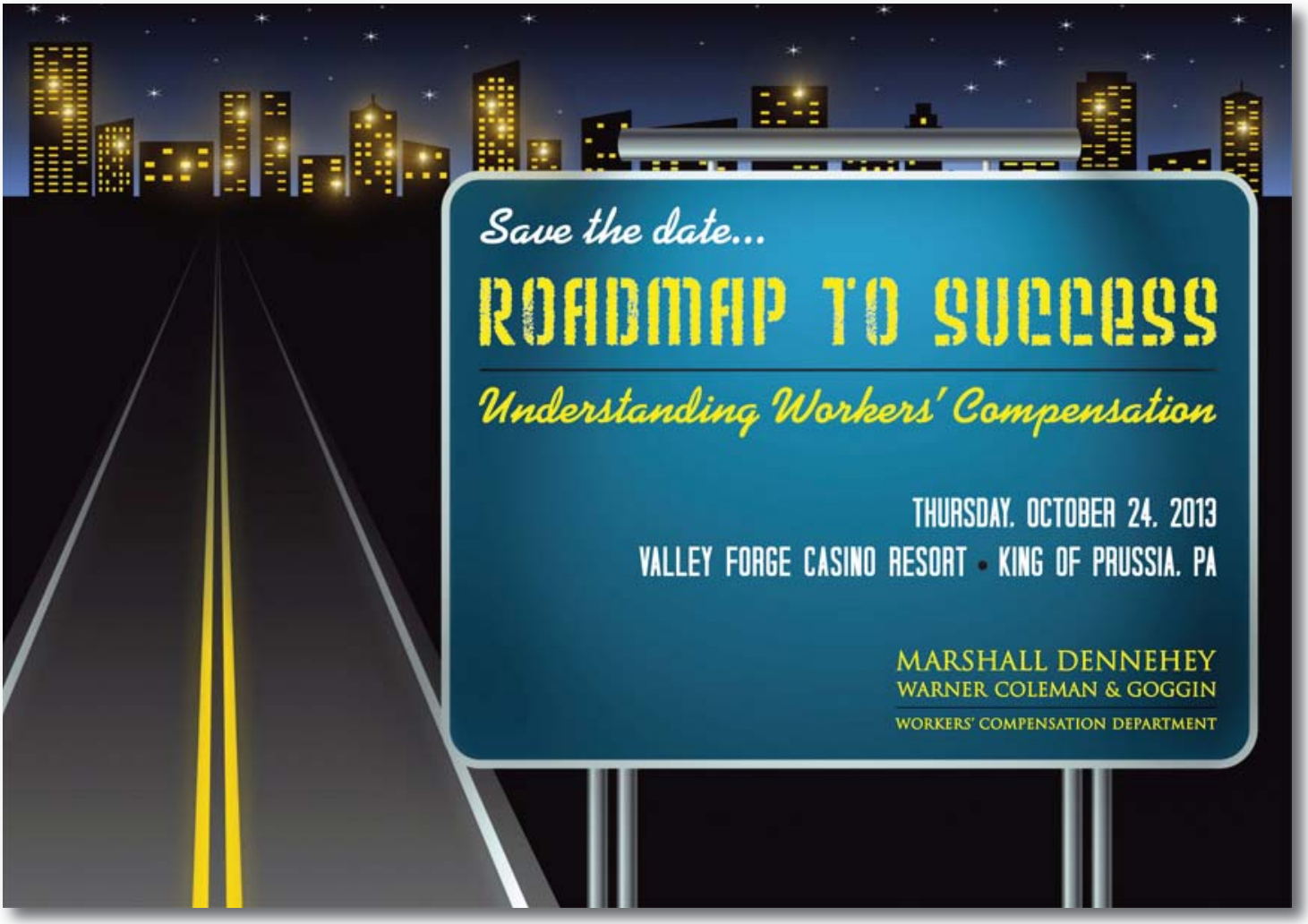
The employer filed a petition to modify/suspend the claimant's benefits, alleging that, but for his December 1998 non-work-related injuries, the claimant was able to return to work as of November 9, 2005. The Workers' Compensation Judge concluded that the employer met its burden of proving that the claimant's work-related injury had resolved to the point that he could perform sedentary work but for the non-work-related injuries he suffered in the motor vehicle accidents. The judge found that the claimant's non-work-related injuries rendered him incapable of all possible work activity and suspended the claimant's benefits.

The claimant appealed the suspension of his benefits to the Appeal Board. The Board reversed the decision of the judge. According to the Board, because the employer failed to establish the availability of a job equal to or greater than the claimant's pre-injury average weekly wage, the suspension was not warranted.

The employer appealed to the Commonwealth Court, which reversed the Board's decision. In doing so, the court was guided by the Supreme Court's decision in *Schneider, Inc. v. WCAB*, 650 Pa. 608, 747 A.2d 845 (2000), wherein the Court held that the employer was not required to show job availability where a claimant was totally disabled by non-work-related conditions. In *Schneider*, after the claimant suffered work-related injuries to his head and neck, he was involved in a non-work-related incident, causing severe brain damage and paralysis, leaving him permanently unable to work in any capacity. The Court further held that, although there was no obligation on the part of the employer to show job availability in cases like this, the employer was still required to provide the claimant with a Notice of Ability to Return to Work, as required by §306 (b) (3) of the Act. II

Side Bar

The importance of the Notice of Ability to Return to Work form cannot be overstated. If a claimant is released to return to work for the work injury, the Notice of Ability to Return to Work must be sent to the claimant, even if that claimant is totally disabled for reasons completely unrelated to the work injury. The Commonwealth Court pointed out that, in this case, the employer sent the Notice of Ability to Return to Work to the claimant prior to seeking relief by filing a Suspension Petition. If they had not done so, the petition likely would have been dismissed.



New Jersey Workers' Compensation

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

Dario J. Badalamenti

Accidents occurring on the respondent's premises during the petitioner's personal time are not compensable.

Patterson v. the Atlantic Club, Docket No. A-0657-12T1, 2013 N.J. Super. Unpub. LEXIS 1716 (App. Div., decided July 11, 2013)

The petitioner was employed as a part-time personal trainer for the respondent, a health club and athletic facility. The petitioner trained clients from 6:00 to 7:00 a.m., 8:00 to 11:00 a.m. and 12:00 to 3:00 p.m. On September 22, 2010, at 11:15 a.m., the petitioner tripped, fell and broke her wrist on the respondent's premises. She filed a workers' compensation claim. The respondent denied the claim, asserting that the petitioner was not training a client at the time of her incident, but was herself working out.

At trial, the petitioner admitted that her 11:00 a.m. client had not appeared for her session. However, the petitioner claimed she was moving exercise weights she intended to use with that client when she was injured. The petitioner's supervisors' testimony contradicted these statements. Specifically, they indicated that the petitioner told them she was working out on her own and was not training anyone when the accident occurred. Also, both supervisors testified that the petitioner was in her own workout clothes at the time of her injury, not in the black trainer's shirt she would have been wearing were she working with a client. The petitioner claimed to have removed her uniform because of the heat.

In dismissing the petitioner's claim, the Judge of Compensation relied on *Sparrow v. La Cachet, Inc.*, 305 N.J. Super. 301 (App. Div. 1997) and *Zahner v. Pathmark Stores, Inc.*, 321 N.J. Super. 471 (App. Div. 1999). The employee in *Sparrow*, a beautician, after ending her own job responsibilities for the day, requested a facial and was burned in the process. Despite the fact that the injury occurred at her workplace, her employer was not responsible for providing workers' compensation benefits because she was on her own time. In *Zahner*, a supermarket employee sustained injuries when she slipped and fell after she had punched out and had begun shopping for herself. Although her injuries occurred on her employer's premises, she was not entitled to workers' compensation because she was not working at the time. The Judge of Compensation found these cases to be factually analogous and, accordingly, dismissed the petitioner's claim. This appeal followed.

The Appellate Division affirmed the judge's decision. In doing so, it found the detail that the petitioner was out of uniform to be significant, as had the Judge of Compensation. "[Petitioner] changed out of her uniform and into her personal clothes," the Judge of Compensation had reasoned, "because she was on her personal time and no longer working." The Appellate Division found that there was insufficient credible evidence presented by the petitioner to establish that her injuries arose out of and in the course of her employment. "Petitioner," the Appellate Division concluded, "had simply not met her burden." II

Side Bar

For compensation under the New Jersey Workers' Compensation Act, an employee's injuries must have been caused by an accident both arising out of and in the course of her employment. The "in the course of employment" inquiry looks to time, place and circumstances of an accident, while the "arising out of employment" inquiry looks to the causal nexus between the accident and the employment. As in the *Sparrow* and *Zahner* cases, as relied on by the Judge of Compensation, Patterson's injuries did indeed occur in the course of her employment, because she remained on her employer's premises upon completion of her job duties. However, her claim was dismissed because she failed to evidence the causal nexus between the accident and her employment necessary to establish compensability – *i.e.*, the accident did not arise out of the employment.

News from Marshall Dennehey

On November 21, 2013, **James Pocius** (Scranton, PA) will present "Medicare Secondary Payer Issues: Ask the Expert" at The National Workers' Compensation and Disability Conference® & Expo in Las Vegas. For more information, visit www.wcconference.com.

Jay Habas (Erie, PA) presented "Cyber Data Breach: The Latest Threat to Workplace Security" at the annual conference of the Human Resource Management Association of Northwest Pennsylvania. The conference took place in Erie, Pennsylvania.

Recently Published Articles:

- *Special Pennsylvania Workers' Compensation Alert, Whitesell v. WCAB (Staples, Inc.)* by Anthony Natale, Esquire
- *Further Expansion of Governmental Immunity Exception to Workers' Compensation Section 40 Liens* by Robert Fitzgerald, Esquire
- *Avoid Post-Settlement Surprises by Carefully Drafting Settlement Documents* by Shannon Fellin, Esquire
- *Compelling Social Media Issues in Litigation* by Raphael Duran, Esquire and Andrea Rock, Esquire

Delaware Workers' Compensation

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

Paul V. Tatlow

Delaware Supreme Court affirms the right of employers to direct claimants to obtain prescribed medications from the employer's preferred pharmacy.

Patricia Boone v. Syab Services/Capitol Nursing, (DE Supreme Court No. 525,2012 – Decided July 16, 2013)

The Delaware Supreme Court has issued its ruling in this case, agreeing with the Superior Court as well as the Industrial Accident Board, that under the Compensation Act, employers have the right to direct claimants to obtain their prescribed medications from the preferred pharmacy chosen by the employer.

The claimant argued in this appeal that the Board had erred as a matter of law in requiring her to obtain her prescriptions from the employer's preferred pharmacy provider. The Supreme Court found that there was no merit to this contention. The Court focused on §2323 of the Act, which provides in relevant part: "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." The Court stated that this provision gives claimants an absolute right to choose the physicians and other providers with whom they treat, but that this does not extend to a pharmacist or a pharmacy.

Accordingly, since the statute does not give claimants an absolute right to choose a pharmacy where they will have medications filled, the Court reasoned that the Board was within its discretion to determine that it was reasonable for an employer to require a claimant to obtain prescriptions from their preferred pharmacy provider. Thus, the claimant in this case was not allowed to obtain prescriptions from her own treating physician. ||

Side Bar

By giving the employers control over the selection of prescription providers, this case carves out an exception in Delaware from the general rule that claimants have an absolute right to select the medical providers with whom they treat for an accepted work injury. Doing so is generally advantageous to employers since they can obtain prescription medications at a lower cost than they might otherwise pay. It is important that in utilizing this right, employers make certain that the preferred providers furnish the medications on a timely and convenient basis. Otherwise, they could put in jeopardy their right to provide this service.