MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 18 | NO. 10 | OCTOBER 2014

25th Year in Publication!

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 may take an offset against workers' compensation benefits under Section 204(a) for pension benefits funded by its wholly owned subsidiary.

Regis Stepp v. WCAB (FairPoint Communications, Inc.); 2270 C.D. 2013; filed September 10, 2014; by Judge Leavitt

The claimant began working for Company "A" in 1973, which was acquired in 2000 by Company "B" as a wholly owned subsidiary. The claimant continued to be an employee of Company "A." Apparently, all employees of Company "B"'s subsidiaries were covered by the same workers' compensation policy as Company "A."

The claimant sustained a back injury in June of 2008 and had been receiving workers' compensation benefits since then. In 2010, the claimant notified Company "B" of his intention to retire. Company "B" then petitioned to suspend the claimant's benefits. In October of 2010, the claimant began receiving pension payments, and Company "B" filed a notice of workers' compensation offset. The claimant filed a petition to review the offset, alleging that, because Company "A" funded the pension plan, Company "B" was not entitled to an offset.

The Workers' Compensation Judge granted Company "B"'s petition, holding that Company "B" was entitled to a modification of the claimant's benefits based on the modified-duty work it made available to the claimant. The judge also denied the claimant's petition to review the offset. The judge found that, for purposes of determining whether benefits were subject to an offset, Company "B" and Company "A" were the same entity. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that Company "B" was not entitled to an offset for a pension plan funded by a different, but still existing, corporation, which was Company "A." The court rejected the claimant's argument and dismissed his appeal. According to the court, when Company "B" assumed responsibility for the claimant's work injury, it did so on behalf of Company "A," which remained the claimant's employer. The court held that Company "A," the claimant's employer, was entitled to the offset and that how Companies "B" and "A" performed the accounting for the offset was irrelevant to their right to the offset. II

Commonwealth Court holds that reimbursement of medical bills for treatment and therapy provided in India is not proper since the practitioners were not licensed in Pennsylvania, services were not provided under supervision of a licensed health care practitioner, and medical certificates did not comply with the requirements of the Act.

Rachel Babu v. WCAB (Temple Continuing Center); 166 C.D. 2014; filed September 15, 2014; by Senior Judge Colins

The claimant, a licensed Pennsylvania nurse, sustained an initial work injury in February 2000 while transferring a heavy patient from a bed to a stretcher. Indemnity benefits were awarded in connection with a claim petition filed for that injury. The claimant appealed to the Appeal Board, which remanded to the Workers'

Compensation Judge to make findings concerning Ayurvedic medical treatment (one of the world's oldest whole-body healing systems developed thousands of years ago in India) that the claimant received for the work injury. The judge affirmed, as did the Board. However, the claimant appealed to the Commonwealth Court. In an unreported opinion, the Commonwealth Court affirmed the disallowance of this treatment because the services were performed by non-licensed medical providers who were not under the supervision of or upon referral of a licensed practitioner.

The claimant had a subsequent work injury with the employer in 2008. A claim petition was filed, as were other petitions. The other petitions were resolved by a compromise and release agreement, and the claim petition remained open for a decision on the compensability of the Ayurvedic medical care the claimant received after the 2008 work injury. The judge denied the petition, finding that the practitioners—located in India—were not licensed providers in Pennsylvania; their services were not under the supervision of a licensed Pennsylvania health care practitioner; and the medical certificate submitted by the claimant did not describe the treatment or to what body parts the treatment was applied, nor did it include any medical reports required by the Act. The Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the treatment she received from providers in India, although unlicensed in the Commonwealth, was, nevertheless, compensable based on the claimant's testimony that it was prescribed by a treating physician and that the claimant, as a licensed registered nurse, could be considered the supervising health care practitioner over her own care. However, the court concluded that there was no evidence of record that a doctor actually prescribed the treatment the claimant received in India. Nor was there evidence that the claimant exercised supervisory control over the practitioners in India or in any way guided them during administration of the treatment. The court further rejected the claimant's argument that §109 of the Act—limiting payment of medical bills to services by Pennsylvania licensed health care providers—was unconstitutional under the Equal Protection Clauses of the Pennsylvania and United States Constitutions. **II**

Side Bar

This is the second reported opinion from the Commonwealth Court this year concerning medical treatment received by a claimant in a foreign country. In *Peter Levantakos v. WCAB*, the Commonwealth Court held that a judge lacked jurisdiction to rule on a utilization review petition filed by the claimant because the physician in Greece who was under review failed to submit medical records to the URO. The court further held that no exception was to be given for a provider who was out of the country or due to "foreign convention" of medical records not being kept.

News from Marshall Dennehey

Effective Monday, October 27, 2014, our **Wilmington, DE office** has a new physical address:

Nemours Building
1007 N. Orange Street, Suite 600
Wilmington, DE 19801

Our mailing address remains:
P.O. Box 8888
Wilmington, DE 19899-8888

Please note our telephone numbers and extensions have not changed. However, effective October 27, 2014, our fax number changed to 302.552.4340.

Thomson Reuters Legal recently published **Matt Keris**'s new book, *Electronic Medical Records and Litigation*. Matt's book is an excellent source of information for all those involved in medical negligence cases about new issues being raised regarding electronic medical records. It is available for sale on Thompson Reuters' website:

http://legalsolutions.thomsonreuters.com/law-products/Practice-Materials/Electronic-Medical-Records-and-Litigation-2014-ed/p/100319261

Delaware Workers' Compensation

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

Paul V. Tatlow

The normal presumption that the claimant's treating physician is entitled to more credibility than the defendant's evaluating physician does not always apply.

Michael Tedesco v. Bayhealth Medical Center, (IAB No. 1332545 – Decided August 25, 2014)

The claimant had been employed as a surgical nurse when he sustained a work injury to his left knee and left hip on January 19, 2009, when, as he was preparing for surgery, he slipped and twisted his left knee. Afterwards, the claimant received conservative treatment with Dr. "R," whom he saw up until September 2009. The litigation before the Industrial Accident Board was the claimant's petition to determine additional compensation, which sought compensability for ongoing medical care and specifically for surgery the claimant needed to his left knee in 2014.

The claimant testified that, since his 2009 injury, there is never a time when he has not had either left knee or left hip pain and that he does not believe his complaints have ever changed since the initial injury. However, the evidence also showed that the claimant did not seek treatment for his left knee from 2009 up until 2013. The claimant claimed that Dr. "R" said there was nothing more that could be done, and he indicated he was unaware that workers' compensation insurance would cover the claim if he did not have other coverage. Additional records showed that in February 2010, the claimant had an intervening slip and fall, where he injured the left side of his body, including his left hip. Also, in October 2010, the claimant was involved in a motor vehicle accident where he sustained injuries to his neck, back and right wrist. Finally, in September 2013, the claimant had a third incident where he slipped and fell at an amusement park theater, injuring his left side and left elbow.

In support of his burden of proof, claimant's counsel presented medical testimony from Dr. "S," who first saw the claimant on February 26, 2014. Dr. "S" testified that, based on his review of the records, he disagreed with the earlier treating physicians and would have recommended back in 2009 that the claimant undergo meniscectomy surgery for the left knee problem.

The employer presented medical evidence from Dr. "L," who had evaluated the claimant on two occasions, on July 27, 2009, shortly after the work injury, and more recently on February 7, 2014. Dr. "L" testified that his comparison of two evaluations of the claimant showed that the findings were on the opposite sides of the knee, because in 2009 they were on the lateral aspect—which is away from the midline of the body—and in 2014 the findings were in the medial aspect—which is towards the midline. Dr. "L" also disputed that there was any definitive evidence of a meniscal tear in the 2009 MRI findings since his review of the study showed ambiguous findings, which could be either intrasubstance degeneration or a tear. Dr. "L" testified that his diagnosis of the claimant as it relates to the work injury was a patellofemoral contusion to the anterior kneecap and the structures below the kneecap, and also a sprain to the lateral collateral ligament. He concluded that the claimant's current need for left knee surgery is not related to the January 2009 work injury since the claimant's complaints immediately following the injury were all in the anterior and lateral compartments of the knee, whereas his current complaints involved medial pain on the opposite side of the knee from the original complaints.

The Board concluded that the claimant had failed to meet the burden of proving that the current need for left knee surgery was causally related to the original 2009 work injury. In so doing, the Board accepted the testimony of Dr. "L" as credible on the causation issue and commented that he had seen the claimant both close in time to the original injury as well as more recently. The Board's reasoning was that there was no clear evidence of the existence of a meniscal tear at the time of the original injury, the claimant had also experienced an 80% improvement within a few weeks of the original injury, and now, in 2014, had complaints to a different area of the knee. Given the fact that the claimant also had three intervening events and had gone four years without any treatment for the left knee injury, the Board concluded that it was more likely than not that the claimant's current need for medical treatment was unrelated to the 2009 work injury. II

Side Bar

This case was successfully handled by my colleague, Keri Morris-Johnston. She indicated that she made a key strategic decision to utilize Dr. "L" as the defense medical expert on the determination of additional compensation due petition because he had evaluated the claimant at the time of the original work injury. The Board clearly indicates that this was one of the factors that lead to their finding that Dr. "L"'s testimony was more credible than that of the claimant's medical expert. In essence, this was a situation where the employer was able to utilize a defense expert who was more familiar with the case than the claimant's expert, who had only seen the claimant for the first time in 2014. This gave Keri a basis to argue that the normal presumption that the claimant's treating physician is entitled to more credibility than the evaluating physician should not apply in this instance.

New Jersey Workers' Compensation

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

Dario J. Badalamenti

The Appellate Division quashes an "intentional tort" challenge to the exclusive remedy provision of the Workers' Compensation Act.

Blackshear v. Syngenta, Docket No. A-3525-12T1, 2014 N.J. Super. Unpub. LEXIS 2394 (App. Div., decided October 6, 2014)

The petitioner was employed by the respondent from 1995 through 2006 and was licensed by the State of New Jersey, Department of Environmental Protection as a commercial pesticide applicator and participated in the state's certification program "designed to facilitate, demonstrate, and maintain an acceptable competency in the safe use of pesticides by certified pesticide applicators." The petitioner maintained his certification through required recertification courses provided six or seven times a year by the respondent. The respondent also provided the petitioner with material safety data sheets and labels for the pesticides used by the company and a variety of personal protective equipment, including latex gloves, rubber gloves, Tyvex coveralls, shoe coverings, goggles, respirators and caps. Additionally, the respondent provided its employees with laundry service so that they were not required to launder their uniforms at home. It was established at deposition that the petitioner followed the safety protocols of the pesticide labeling.

In 2006, following a series of headaches and hallucinations, the petitioner was admitted to the hospital where it was determined that he had a cancerous tumor in the right temporal lobe of his brain. Although the tumor was removed, a new tumor subsequently appeared. The petitioner died in February 2007 following an unsuccessful round of radiation therapy.

The petitioner's widow brought a wrongful death and survivorship action against the respondent, as well as several pesticide manufacturers. At the conclusion of discovery, the respondent filed a motion for summary judgment based on the Workers' Compensation Act's so-called "exclusivity provision," N.J.S.A. 34:15-8, which provides, that "[i]f any injury... is compensable under the Act ... a person shall not be liable to anyone at common law or otherwise on account of such injury ... except for an intentional wrong." The respondent's motion was granted, and the matter was dismissed. On appeal, the widow argued that by providing the petitioner with "inadequate" personal protective equipment, the respondent knowingly exposed him to cancer-causing pesticides and had concealed that information from him.

In affirming the lower court's granting of summary judgment, the Appellate Division relied on *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985) and its progeny. In *Millison*, the Supreme Court adopted a "substantial certainty" standard to be utilized in evaluating employer intentional tort actions. As the *Millison* court explained, for an employer to lose immunity, a plaintiff must show that:

> (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment, and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.

The Appellate Division concluded that there was nothing in the record to support the widow's claims that the respondent deliberately deceived the petitioner into believing that the personal protective equipment he was provided was adequate to protect him from the pesticides he was applying, thus constituting an intentional wrong under the statute. As the Appellate Division reasoned:

> [Petitioner] was a licensed exterminator. Many, if not most, pesticides are poisonous and their use poses a substantial risk of harm. That risk of harm is undoubtedly one of the reasons the State requires commercial pesticide applicators to be licensed and obtain periodic recertification to demonstrate and maintain acceptable competency in the safe use of pesticides. It also is the reason the federal government requires the promulgation of material safety data sheets and extensive product labeling for pesticides.

Here, the overwhelming evidence in the record demonstrated that the respondent provided safety training, product labeling and material safety data sheets to the petitioner, as well as personal protective equipment. Therefore, petitioner's widow could not prove the "intentional wrong" required to overcome the exclusivity bar. ||

Side Bar

The Appellate Division did not address the merits of the widow's allegations of a causal link between the petitioner's cancer and his exposure to pesticides at work. On summary judgment, that issue was not before the court. Rather, the court's task was simply to determine whether the evidence, viewed in the light most favorable to the petitioner, and according him all legitimate inferences, presented a sufficient disagreement to warrant submission of the matter to a jury, or "[w]hether it [was] so one-sided that one party must prevail as a matter of law." Here, despite the inference of a causal link between the petitioner's cancer and his use of pesticides, the Appellate Division still found that the widow had failed to establish the requisite "intentional wrong" under the statute:

> Assuming as we do for purposes of this motion that Blackshear's brain cancer was a result of his exposure to pesticides at work due to inadequate personal protective equipment, we cannot conclude that such was plainly beyond anything the legislature intended the Workers' Compensation Act to immunize.