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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

The Supreme Court holds that the Construction Workplace Misclassification Act only applies to individuals who work for a business entity that performs construction services, not to an employer that is not in the business of construction.

Department of Labor and Industry, Uninsured Employer's Guaranty Fund v. WCAB (Lin and Eastern Taste); 27 E.A.P 2017; decided June 26, 2018; by Justice Wecht

The claimant was hired by a restaurant, Eastern Taste, to perform remodeling work. There was no expectation that the claimant would work at the restaurant after it opened. While repairing a chimney, the claimant fell from a beam and landed on a cement floor, rendering him paraplegic. The claimant filed a claim petition against the restaurant and, later, the Uninsured Employer's Guaranty Fund (Fund). Both the restaurant and the Fund filed answers, denying the existence of an employment relationship.

The Workers' Compensation Judge dismissed the claim petition, concluding that the claimant failed to prove he was an employee of the restaurant and, therefore, is ineligible for benefits. According to the judge, the claimant's work was not conducted in the regular course of the restaurant's business and his employment was casual. The judge also noted that the Construction Workplace Misclassification Act did not apply and, therefore, it was not improper to classify the claimant as an independent contractor.

The claimant appealed to the Workers' Compensation Appeal Board, which reversed the judge, concluding that the claimant was an employee for purposes of workers' compensation. The Appeal Board, though, did not consider the Construction Workplace Misclassification Act.

The Fund appealed the Board's decision to the Commonwealth Court. In reversing the Board's decision, the court noted that the dispositive issue was whether the claimant was an employee or an independent contractor. The court noted that the employer was a restaurant, not a construction business, and the claimant was hired to perform remodeling work, not to work in the restaurant. In the court's view, these factors demonstrated that the claimant was an independent contractor.

The court performed a separate inquiry as to whether the claimant was an employee under the CWMA and concluded that the CWMA did not apply. The court held that when determining whether the CWMA is applicable, the construction activity must be analyzed and considered in the context of the putative employer's industry or business.

The Supreme Court of Pennsylvania agreed with the Commonwealth Court's interpretation and affirmed their decision. The claimant argued that the applicability of the CWMA turned upon the nature of the work performed, not the employer's business purpose. He argued he was performing services in the construction industry for remuneration and, therefore, could not be classified as an independent contractor for purposes of workers' compensation. The Supreme Court rejected these arguments, finding that the claimant's interpretation of the CWMA would lead to absurd results, such as classifying a homeowner as an "employer" simply by hiring a kitchen remodeler and possibly subjecting the homeowner to administrative and criminal penalties. According to the court, the CWMA refers only to those individuals who work for a business entity that performs construction services and is inapplicable where the putative employer is not in the business of construction. ||

News from Marshall Dennehey

Rachel A. Ramsay-Lowe (Roseland, NJ) has been selected to *The Network Journal*'s 2018 List of "40 Under Forty" Dynamic Achievers. *The Network Journal* is a quarterly publication focused on Black professionals, executives and small business owners. Each year TNJ recognizes outstanding young African-Americans who are "reaching for higher goals" in their careers while remaining committed to their community's development.

Tony Natale (Philadelphia, PA) defended a non-profit corporation from reinstatement and penalty petitions. The claimant alleged that she was unlawfully prevented from treating for her work-related injury during work hours and was seeking partial disability benefits for time missed from work to attend physical therapy sessions. On cross examination, Tony was able to establish that the claimant did not research physical therapy providers in the area who could accommodate her work hours. The claimant alleged she did not have access to the Internet, access to a phone, or access to the business yellow pages and, thus, was limited to seeking therapy during work hours at a physical therapy office near her home. Tony introduced evidence demonstrating a myriad of PT offices in the geographical community near the claimant's work and home that could accommodate her work hours. The Workers' Compensation Judge dismissed the reinstatement and penalty requests.

Tony Natale (Philadelphia, PA) successfully defended a clinical research laboratory against a claim petition in which the claimant alleged permanent upper extremity and neck injuries due to sitting and typing at work. Tony presented two nationally recognized orthopedic surgeons who casted doubt upon the claimant's allegations of a work injury based on the clinical findings, the short duration of the claimant's employment, and the nature of the claimant's job duties. The Workers' Compensation Judge ruled that the claimant was not credible as to his testimony surrounding a work injury. The judge further found all defense medical experts to be more credible than the claimant's expert. The claim petition was denied and dismissed.

Tony Natale (Philadelphia, PA) successfully defended a nationally renowned canning and food corporation headquartered in Berks County, Pennsylvania. The claimant alleged that she sustained an injury to her upper extremities due to repetitive motion at work. She described her duties to include placing slices of cheese on sandwiches and hand-making pizza in an assembly line, which she alleged lead to her injuries. The claimant's medical expert testified that he was told the job duties involved working with jars of mushrooms, repetitively causing the claimant's injuries. On cross examination, this expert was pinned down as to the mechanics of the claimant's job duties. Tony then presented fact witness testimony confirming that the claimant did not use her upper extremities at all in performing job duties—contradicting the claimant's testimony and the expert's testimony. The Workers' Compensation Judge concluded that the claimant did not use her upper extremities repetitively at work and dismissed the claim.

Michele Punturi (Philadelphia, PA) and **Audrey Copeland** (King of Prussia, PA) were successful in defending a worldwide manufacturer of automobiles before the Commonwealth Court. The claimant had suffered a compensable injury that was accepted as medical-only. The claimant's wage loss benefits were suspended due to her termination from employment for cause. In seeking to reinstate benefits, the claimant alleged her condition worsened, resulting in a decreased earning power. The claimant's credibility was also called into question after she changed her date of injury during the course of the litigation. In addition, a termination petition was filed. Ultimately, the Workers' Compensation Judge granted the reinstatement petition and denied the employer's termination petition. The Appeal Board reversed the reinstatement petition, and the claimant appealed to the Commonwealth Court. Based on an extensive and thorough cross-examination of the claimant and her expert, the court found that the claimant failed to meet her burden. The claimant asserted that her symptoms had worsened and deteriorated, yet she described no symptoms other than those she had at the time of the judge's decision when found not disabled from the work injury. It was also emphasized that the claimant continued to work full-duty following the injury for a period of time, despite her assertions that her symptoms were horrific. She also admitted that her treatment had decreased. The claimant asserted that her symptoms became worse at the time of her prior deposition, yet during that same event, she testified that she was looking for work. The claimant's expert suggested that her condition worsened at a recent exam, yet the claimant testified to a worsening years prior to her own expert.

Michele Punturi (Philadelphia, PA) and **Audrey Copeland** (King of Prussia, PA), representing a national car company before the Commonwealth Court, successfully litigated nine Medical Fee Review Petitions surrounding the propriety of a chiropractor's billing for an office visit in addition to charges for treatment provided at the same visit. The carrier/employer denied the chiropractor's bills, citing Regulation 127.105, which states, among other things, "Payment shall be made for an office visit provided on the same day as another procedure only when the office represents a significant and separately identifiable service is performed in addition to the other procedure . . ." The carrier/employer submitted the provider's bills and office notes supporting a "double payment," in violation of the regulation. Based upon the carrier/employer's factual and legal analysis, the Commonwealth Court vacated the decision. In remanding to the Fee Review Hearing Officer, the court required that the provider support that significant and separately identifiable services were performed, in addition to another procedure, and for the hearing officer to determine whether the examinations for which the provider sought payments were conducted for a new medical condition, change in medical condition, or other special circumstances that require an exam and assessment above and beyond the usual examination and evaluation for the treatment that the provider performed on those dates. The Commonwealth Court recognized that the carrier/defendant introduced evidence to support its burden of proof based upon the office notes that were introduced to support a violation of this regulation.

Ashley Talley (Philadelphia, PA) successfully defended a claim petition filed against an insurance carrier that was one of three named defendants in a workers' compensation proceeding. The claimant filed claim petitions against two transportation companies, one of which

was briefly insured by our client. In a case that presented complex legal issues, the claimant attempted to prove that our client was liable for the work injury. Ashley was successful in arguing that our client was not on the risk at the time of injury and, secondarily, that another transportation company was the claimant's legal employer. The Workers' Compensation Judge ultimately assessed liability against the other transportation company, completely absolving our client of any responsibility for the work injury.

Ashley Talley (Philadelphia) successfully prosecuted a petition to modify benefits on behalf of a regional transportation company to recoup benefits that were wrongfully withheld by the claimant. The claimant alleged two work-related injuries during the course and scope of his employment with our client. On appeal, Ashley was successful in reversing one of the claims while preserving a credit for any benefits that the claimant received in connection with his other injury. A subsequent investigation uncovered that the claimant not only received ancillary income, but denied that receipt on state-required documentation. Ashley filed a modification petition to enforce the Board's award and received a defense verdict. Our client was awarded full relief, despite the claimant's attempt to use the "rehabilitative" nature of the Workers' Compensation Act in his favor. ||

Delaware Workers' Compensation

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Paul V. Tatlow

Motion to assess a fine against the employer's medical expert was denied on the basis that the expert witness fee in question did not exceed the amount allowed and that the limit in the practice guidelines on expert witness fees does not apply to defense medical experts.

Carol Streifthau v. Bayhealth Medical Center, (IAB No. 1432002 – Decided June 27, 2018)

This case of first impression came before the Board on a motion filed by claimant's counsel requesting that the Board impose a fine against Dr. Fedder, the employer's medical expert, following the February 13, 2018, hearing on the claimant's petition seeking approval for surgery. The Board had found in favor of the claimant and awarded payment for the surgery. My colleague, Keri Morris-Johnston, Esquire, represented the employer and successfully defeated this motion.

The claimant argued that Dr. Fedder's expert fee of $5,000 was too high and violated the Workers' Compensation Act as well as the health-care practice guidelines. Specifically, regulation 19 Del.Code Section 1341 subsection 4.16.1.2 provides that "testimony by a physician for non-video deposition shall not exceed $2,000.00, for video deposition $500.00 additional." The claimant further argued that a fine should be assessed against Dr. Fedder, who was a party to the proceedings, in the amount of $4,000, the maximum fine allowed under the statute.

In response to the motion, the employer argued that Dr. Fedder's $5,000 fee included not only his expert testimony but also his charges for reviewing records and correspondence and a pre-deposition conference. Dr. Fedder testified on his own behalf and confirmed that his fee encompassed all of those activities. He stated that he simply sends one bill for his services since clients become annoyed when they receive several separate bills.

The employer further claimed that the regulation in question deals with fees for non-clinical services and that Dr. Fedder is not subject to that provision since he is not providing any services to the claimant. In support of that contention, it was pointed out that the statute as a whole talks about payments for benefits to claimants and medical witness fees on behalf of claimants, not about defense expert witness fees. The employer also challenged the standing of the claimant to file the motion in the first instance, since the claimant had not been requested to pay the expert fee. Therefore, the amount of the expert fee did not impact her case or her ability to obtain medical treatment. The contention was made that the claimant was tortuously interfering with the contract between Dr. Fedder and the insurance carrier for the employer. The claimant attempted to counter that argument by contending that she did have standing since the deposition charges had occurred in her case and her position was in peril based on the testimony of Dr. Fedder, even though it was ultimately not accepted by the Board.

After considering the competing arguments, the Board found in favor of the employer and refused to impose a fine against Dr. Fedder under the circumstances of the case. The Board agreed with the employer's argument that the regulation putting a cap on expert fees is meant to limit the amount that an employer can be required to pay for a claimant's medical witness fees. It is not meant to limit an employer who chooses to pay more for its defense medical expert testimony. In addition, the Board accepted the testimony that Dr. Fedder's actual deposition fee was less than $2,000 as the remaining charges were for his time spent doing other expert activities aside from actual testimony.

This is an important ruling. Had the claimant had been successful on the motion, it could prevent any employer in Delaware from retaining expert witnesses whose fee are in excess of $2,000. As a practical matter, medical experts, including those who testify on behalf of claimants, frequently charge more than that amount, but the additional charges should be allocated to other activities involved in preparing for the actual deposition testimony. Finally, the regulations do provide that a claimant's medical expert who testifies live at a hearing—which does still occur in some instances—can receive an expert witness fee up to $3,500, pursuant to 19 Del. Code Section 1341 subsection 4.16.1.3. ||

Florida Workers' Compensation

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

Linda W. Farrell

Claimant unable to overcome presumption of marijuana intoxication. Interesting dissenting opinion.

Bonita Brinson v. Hospital Housekeeping Services, LLC and Broadspire, No. 1D-17-505 (1st DCA, Jun. 22, 2018)

The claimant was injured on June 29, 2015, when she slipped and fell while working as a custodian at a hospital. Her supervisor drove her to take a post-accident drug test before medical care was to be provided. The claimant tested positive for marijuana, and the confirmation test was positive as well. The employer denied the claim in its entirety pursuant to F.S. 440.09(3), which states that "[c]ompensation is not payable if the injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs…"

Although the employer was not a qualified drug free workplace, the claimant did sign a stipulation when hired acknowledging the employer's drug testing policy which stated, in part, that all employees who are injured are subject to a drug test. The claimant also signed a "Drug Free Awareness" policy, acknowledging that she "[m]ay be asked to provide (if there is reasonable suspicion) body substance samples…to determine whether illicit or illegal drugs…have been or are being used."

Florida Statute 440.09(7) states that an employer may require an employee to submit to a test for the presence of any or all drugs or alcohol if the employer has reason to suspect that the injury was occasioned primarily by the intoxication of the employee. This section applies to employers that have not implemented qualified drug free workplaces per F.S. 440.101 and 440.102.

Florida Statute 440.09(7)(b) allows a claimant to rebut the presumption of intoxication by clear and convincing evidence that the intoxication or the influence of drugs did not contribute to the injury. Per F.S. 440.09(7)(e), the claimant must prove the actual quantitative metabolites as measured post-accident and provide additional evidence regarding the absence of drug influence, other than the worker's denial of being under the influence of a drug.

In this case, the claimant focused on attacking the limits of drug testing and the Act's reliance upon drug testing results. She presented two doctor witnesses who testified that the presence of drug metabolites do not conclusively indicate that drugs are active in the bloodstream or caused impairment. However, the 1st DCA held that the claimant's experts also left open the question of whether she was under the influence when the accident occurred. The court held that, "[b]ecause their testimony did not present clear and convincing evidence, she failed to rebut the presumption."

As pointed out by the 1st DCA, the claimant did not argue that she had been tripped by a careless doctor or pushed by an unruly patient. Nor did she argue that the marijuana in her system was merely inactive residue of some fairly recent usage. The court went on to say that "[a]rguments along these lines, if true in her case, might have rebutted the statutory presumption."

Judge Makar wrote a strong dissenting opinion. His dissent noted that the claimant was injured "as she rushed to alert the nurse's station that a patient had coded and was not breathing." He repeatedly pointed out that the claimant tested positive for *inactive* marijuana metabolites. He also stated that the claimant attempted to rebut the presumption by arguing that the drug test conducted was unauthorized in that there was an absence of the "reason to suspect" that the injury was caused by intoxication. Judge Makar asserted that the employer had no authority to administer the drug test under F.S. 440.09(7) because there was no reasonable suspicion. He also felt that the claimant could not have done anything more than she did to rebut the presumption. Her experts "debunked the widespread misconception that testing positive for marijuana use necessarily correlates with intoxication or influence at the time of the accident." He went on to say that the experts explained that inactive metabolites only prove that the employee—at some indeterminate and potentially distant point in the past—had marijuana in her system, which does not prove impairment. Judge Makar stated that there is no test for marijuana impairment like there is for alcohol.

What is interesting about Judge Makar's dissenting opinion is how he ended it. He wrote, "No chemical test for marijuana impairment exists, making it scientifically impossible for employees to directly overcome the premise of the presumption, which is that they were intoxicated or drug-influenced at the time of the accident." He closed by saying, "Marijuana intoxication is a serious matter of public health and a workplace safety concern that employers face daily. The confluence of lawful marijuana use (medical in Florida, medical/recreational elsewhere), the lack of scientific standards or chemical tests for marijuana impairment, and the interplay of federal enforcement policy make the future application of workplace drug tests challenging, to say the least." ||

Side Bar

Judge Lazzara was very conservative, and most of the other Judges of Compensation Claims would have come to another conclusion in this case. Therefore, do not put too much weight on this case as it related to an intoxication defense involving marijuana. It is a tough defense to win. Judge Lazzara has now retired, and the new judge in Tallahassee, JCC Newman, use to practice defense in the area. Also, Judge Makar could be signaling an available constitutional challenge relative to the intoxication presumption portion of the statute. Furthermore, he echoes everyone's concerns about how medical marijuana may impact workplace safety and workers' compensation claims handling in the future.

New Jersey Workers' Compensation

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Dario J. Badalamenti

Judge of Compensation orders respondent to pay for petitioner's medical marijuana despite objection that New Jersey's Medical Marijuana Law is preempted by federal law.

Steven McNeary v. Freehold Township, Claim Petition Nos. 2007-10498, 2008-8094 and 2014-10233 (N.J. Division of Workers' Compensation, decided June 28, 2018)

A Judge of Compensation has ruled that the respondent must pay for the petitioner's medical marijuana. The petitioner suffers from muscular spasticity resulting from an injury sustained while in the respondent's employ. Despite the respondent's objections, the Judge of Compensation refused to follow the recent Maine Supreme Court decision in *Burgoin v. Twin Rivers Paper Co*., Docket No. WCB-16-433, Decision No. 2018 ME 77 (Supreme Court, decided June 14, 2018). In *Burgoin*, the Maine Supreme Court overruled a lower court, which had ordered a workers' compensation carrier to pay for marijuana for an injured worker. The court discussed at length the penalties an employer and its insurance company could face for violating the Controlled Substances Act:

> It also bears noting that aside from the exposure to a federal conviction itself, the penalties for violation of the CSA can be significant. Pursuant to the least severe penalty ranged for a violation . . . the sentence, at minimum, is a mandatory fine of $1,000, and it may also include as much as one year of incarceration, with an even greater sentence if certain aggravating factors are present, such as a prior conviction for any drug offense, including offenses established by the CSA.

According to the Maine Supreme Court, were the employer to comply with the hearing officer's order and knowingly reimburse the injured worker for the costs of medical marijuana as permitted by the Maine Medical Use of Marijuana Act, the employer would be engaging in conduct made criminal by the CSA. Accordingly, the Maine Supreme Court concluded that compliance with both would be an impossibility.

Despite the respondent's objections, the Judge of Compensation in *McNeary* declined to follow the Maine Supreme Court's ruling. As the Judge of Compensation reasoned:

> I don't believe that the New Jersey Medical Marijuana Act is in conflict with that. Certainly, I don't understand how a carrier, who will never possess, never distribute, never intend to distribute these products, who will [merely] sign a check into in attorney's trust account is in any way complicit with the distribution of illicit narcotics.

The judge also expressed concern over the potential for abuse of the opioid drugs that the petitioner's physicians found to be his only treatment alternative. As the Judge of Compensation concluded:

> I believe that medical marijuana is safer, it's less addictive, it is better for the treatment of pain. It is better for, in this particular case, the muscular spasticity which Mr. McNeary suffers from. The long term prognosis is better and, quite frankly, it is cheaper for the carriers. I think it's the right thing to do and I feel no moral or legal hesitancy in that. ||

Side Bar

It is undetermined at present if the respondent intends to appeal the court's ruling. However, the Judge of Compensation did express a desire for a higher court to weigh in on the issue: "I would welcome at some point in time the Appellate Division in New Jersey or the Supreme Court to address the issue, because clearly then I will be bound by what they say, but . . . I think it's time for us, as the Division of Compensation, to try to get away from these opioids which are killing people and I don't say that lightly."