

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

The claimant's average weekly wage was calculated incorrectly as the workers' compensation judge failed to consider credited testimony that claimant was expected to work overtime during the summer; a suspension of benefits awarded by a workers' compensation judge for claimant's pre-trial incarceration was improper under the plain language of § 306 (a.1) of the Act.

Carl Sadler v. WCAB (Philadelphia Coca Cola); 328 C.D. 2018; filed May 22, 2019; by Judge Cohn Jubelirer

The claimant sustained an injury with the employer while working as a production manager. The employer acknowledged the injury by a Notice of Compensation Payable. The claimant was paid benefits at the rate of \$652.00 per week, based on an average weekly wage of \$978.00.

The claimant filed a review petition, claiming that his average weekly wage (AWW) was miscalculated in violation of §309 (d.2) of the Act. According to the claimant, he was expected to work overtime, which would have increased his AWW to no less than \$1,412.04. The employer filed a suspension petition, requesting suspension of the claimant's benefits because he spent 525 days in jail prior to his conviction and was credited with having served that time upon his conviction.

The workers' compensation judge credited testimony from the employer that there probably would be overtime and that overtime would be guaranteed during the busy season, which was typically

100 days in the summer. The claimant testified that he was told he would work in excess of 60 hours and there was never a week he did not work overtime. The judge based his dismissal of the review petition on paystubs which, according to the judge, did not reflect "a base of 60 hours per week." The judge granted the suspension petition, concluding that the employer was entitled to a reimbursement for benefits paid to the claimant during the 525 days the claimant was incarcerated and ordered the employer to obtain the reimbursement from the Supersedeas Fund.

The Workers' Compensation Appeal Board affirmed the workers' compensation judge's decision, except that it allowed the employer to obtain reimbursement via a credit against future disability benefits.

The Commonwealth Court reversed the decisions below. The court noted that the dispute as to the claimant's average weekly wage was whether the claimant was expected to work more than 40 hours per week. According to the court, the judge credited the testimony of the employer on this issue, who stated that overtime would be guaranteed during the busy season in the summer. The court remanded the case for a recalculation of the claimant's AWW. As for the incarceration issue, the court held that the plain language of §306 (a.1) of the Act does not support a suspension of benefits for an incarceration that occurs before a conviction due to an inability to meet bail, and that to hold otherwise would be contrary to the humanitarian purposes of the Act. ||

DELAWARE WORKERS' COMPENSATION

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



Paul V. Tatlow

The Superior Court disapproves of the Board's decision finding essentially that the employer must pay for any medical treatment that the claimant receives in the hospital where he is treated following a work-related injury.

Barrett Business Services, Inc. D/B/A Enterprise Masonry v. Robert Edge, (C.A.

No. N18A-05-005 CEB – Decided May 1, 2019)

The claimant had been an employee of Enterprise Masonry for twelve years. On May 11, 2017, while working at a jobsite for which Enterprise Masonry was the subcontractor, the claimant was erecting scaffolding and fell off the back of a scaffold to the ground, a distance of approximately six feet seven inches. The claimant sustained an injury to his left hip and a laceration under his left eye from his safety glasses. Importantly, the claimant was not a healthy man, having been a long-term smoker and having a lengthy history of high blood pressure.

The claimant was taken to the hospital emergency room where his treatment included getting stitches for his lacerations. During the course of his treatment and about four hours after the work-related fall, the claimant had a transient ischemic attack, or a mini-stroke. The mini-stroke was then treated by the hospital personnel. Complications developed such that the claimant had surgery, and two of his cerebral arteries were substantially occluded. The surgery was able to remove the clots, but the claimant had suffered substantial effects from the stroke and became completely disabled.

The hearing took place before the Board on the claimant's petition. The claimant's medical expert was Dr. Townsend, and the employer's expert was Dr. Fedder. While the facts were not disputed, the two experts came to opposing conclusions. In essence, Dr. Townsend testified that the work-related fall caused trauma to the carotid artery

itself which, in turn, caused the stroke, or alternatively, the claimant had embolic, non-calcified plaque that was loosened by the fall and this then traveled to the carotid artery, causing the stroke. Alternatively, Dr. Fedder testified that the timing of the stroke was a coincidence unrelated to the fall at work and, rather, was due to the claimant's hypertension.

The Board found that the claimant's hypertension was a pre-existing condition but that this did not matter since the claimant was in the hospital being treated for injuries related to the fall at work. The Board found that but for the work injury the claimant would not have been in the emergency room that day and receiving treatment for the hypertension. Therefore, they concluded the stroke was a work-related injury and awarded compensation to the claimant.

On the employer's appeal, the Superior Court took the Board to task for not making a finding as to whether or not the mini-stroke was caused by the work injury and, instead, simply ruling that but for the work injury the claimant would not have been in the emergency room getting treated for his hypertension. The court stated that this conclusion begs the question whether the treatment for the hypertension was in fact related to the work injury.

The court reasoned that the Board had several alternative expert theories on causation but did not rely upon any of them. Instead, the Board side stepped the question by finding in the broadest terms possible that the work injury caused the claimant to go to the hospital where he was treated for high blood pressure. In so doing, the Board effectively broadened the liability of the employer to that of a general insurer and ignored the basic question of causation. That determination, the court stated, is not acceptable. As stated by the court, a holding by the Board that the employer must pay compensation for any treatment that occurs in a hospital after a workplace injury is inconsistent with the Act. The mere fact that a condition is discovered at the same time does not equate to but for causation. Therefore, the court reversed and remanded the Board's decision since it failed to articulate findings on causation sufficient to allow the reviewing court to engage in appellate review. **II**

NEWS FROM MARSHALL DENNEHEY

Michele Punturi (Philadelphia, PA) spoke at CLM Workers' Compensation Conference in Chicago. In "Maximizing the Productivity of an Aging Workforce," Michele joined a panel of insurance industry professionals for an engaging discussion about the impact of an aging workforce as many baby boomers reach retirement age yet elect to continue working. This demographic shift is forcing companies to change the way they think about their workforce strategies, including their workers' compensation and disability programs. The panel examined some of the changes workers go through as they age, how these factors affect their performance and productivity, and ways to mitigate any declines

and accentuate opportunities for improved productivity.

Angela DeMary (Mount Laurel, NJ) presented at the Workers' Compensation from A to Z Conference hosted by the National Business Institute in Atlantic City. Angela presented two classes. In the first, "Workers' Compensation Key Concepts and Issues," she discussed state workers' compensation laws, responsibilities of employers and employees, statutes of limitations and fraud. The second was titled, "Navigating Workers' Compensation Processes, Procedures and Forms."

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FLORIDA WORKERS' COMPENSATION

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



Linda W. Farrell

The Florida Legislature recently concluded the 2019 session. Lawmakers passed about 10% of the 1,861 bills that were filed.

Some of bills passed are of note:

OPIOID LAWSUIT: Allows state lawyers to access a Florida Department of Health database of patients' opioid prescriptions. State Attorney General Ashley Moody needs

the database for a lawsuit in which it is alleged that Walgreens and CVS "raced to sell as many opioids as possible" in Florida while failing to stop suspicious shipments of drugs.

NEEDLE EXCHANGE: Expands the pilot needle exchange established in Miami-Dade County by allowing other counties to create their own programs with the approval of their county commissions.

TELEHEALTH: Establishes a regulatory framework for telehealth.

SMOKING: Repeals a ban on smokable medical marijuana.

TEXTING: Makes driving while texting a primary offense, meaning law enforcement can stop motorists for just that offense.

FIREFIGHTERS WITH CERTAIN CANCERS NOW COVERED: Grants certain benefits to firefighters with any of the 21 forms of cancer, including the full cost of treatment and a \$25,000 payout. Recently signed by Governor DeSantis, this bill also grants disability pay and death benefits for beneficiaries. Firefighters must be tobacco-free for at least five years before diagnosis to be eligible. ||

Does the employer's ability to have an ex parte conference with the treating physician violate the claimant's right to privacy? The First DCA says no.

Varricchio v. St. Lucie County Clerks of Courts and Ascension Insurance, No. 1D17-3229 (1st DCA Fla, Apr. 29, 2019)

The claimant appealed an order denying her claim for temporary disability benefits. The court affirmed the judge of compensation claims but wrote to address the claimant's assertion that section 440.13(4)(c), Florida Statutes (2013), allowing ex parte conferences, violates the privacy clause of the Florida Constitution.

The attorney for the employer had a conference with the treating physician shortly before the doctor completed a questionnaire specifying a retroactive date for maximum medical improvement (which was relevant to the claim for temporary disability). The First DCA held that the claimant had no legitimate expectation of privacy and that it is well established that this section does not violate the right to privacy. The court noted that workers' compensation is substantially different from a medical malpractice action (where conferences are a violation of privacy) and that the only medical professional to be interviewed was explicitly hired for the purpose of workers' compensation, to evaluate the causal connection between the work performed and the injury. The claimant argued that section 440.13(4)(c) was substantially amended in 2003 and these amendments expand the scope of the law to permit employers to obtain records from, and secretly meet with, all physicians, not just those authorized to treat workplace injuries. However, the court disagreed. ||

NEWS FROM MARSHALL DENNEHEY (CONT.)

Raphael Duran (Philadelphia, PA) and **Kiara Hartwell** (Mount Laurel, NJ) presented to adjusters at Corvel on the topic of psychiatric and traumatic brain injuries. They provided the group with a background on strategies to defend the claims, as well as red flags to look for while investigating the claims.

Raphael Duran (Philadelphia, PA) co-presented to the Baltimore Claims Association on the impact of criminal convictions on civil litigation. This included findings in a criminal court regarding gross negligence and its effect on damages (*i.e.* punitive damages)

and other types of claims. The audience included auto, GL, property and workers' compensation carriers.

Gregory Bartley (Roseland, NJ) was a speaker at the Mt. Arlington Workers' Compensation Court Law Day. He presented to an audience of 20 lawyers and judges on the topics of permanent total disability, law practices and methods, and ethics covering rules of professional conduct regarding attorney advertising and fee splitting. ||