

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

Defendant's joinder petitions, which were filed more than 20 days after evidence was presented that provided the basis for the joinders, were properly dismissed as untimely.

Pennsylvania Uninsured Employers Guaranty Fund v. WCAB (Dudkiewicz, Deceased, Builders Prime Window and T.H. Properties); 1540 C.D. 2013; filed 4/7/14; by Judge McCullough

The claimant filed a claim petition against Employer A and the Uninsured Employers Guaranty Fund (UEGF), alleging that, while employed as a laborer for Employer A, he sustained multiple injuries after falling from a second story roof. The UEGF filed an answer denying the allegations and the existence of an employment relationship. At the first hearing, the parties requested bifurcation of the employment issue, and the claimant testified as to the entire case. The Workers' Compensation Judge stated that he did not want the case to drag out, given that the claimant was homeless, and imposed a litigation deadline on the parties. The proceedings, however, were delayed, and the judge extended the deadline with the proviso that the case be concluded expeditiously.

At a hearing of May 20, 2010, Employer A testified that he was a sub-contractor for Defendant B and that Defendant C was the owner of the construction site. Counsel for UEGF informed the Judge that the UEGF planned to file a joinder petition. Seven days after the hearing, UEGF filed a joinder petition against Defendant B. On September 3, 2010, UEGF filed a second joinder petition against Defendant C. The Judge then issued an interlocutory order dismissing both joinder petitions as untimely and finding, alternatively, that the petitions did not comply with the applicable regulations.

Ultimately, the Judge granted the claim petition and found that the claimant was an employee of Employer A. The UEGF appealed to the Appeal Board, which affirmed the Judge's decision and his dismissal of the joinder petitions.

On appeal to the Commonwealth Court, the UEGF argued that the joinder petition filed against Defendant B was in compliance with the regulations in that the 20-day deadline for filing a joinder petition did not begin to run until the hearing on May 20, 2010, at which time, Employer A testified that he was a sub-contractor for Defendant B. But, the court pointed out that the claimant testified at the first hearing on February 9, 2010, that it was his understanding that Employer A was installing windows for Defendant B. According to the court, the 20-day time period for filing a joinder petition began at that hearing. The court held, therefore, that the Judge properly dismissed the joinder petition and did not abuse his discretion in doing so. ||

SIDE BAR

The court emphasized that § 131.36 of the Special Rules of Administrative Practice and Procedure before Workers' Compensation Judges states that the 20-day time period for filing a joinder petition begins when evidence is presented regarding the reason for which the joinder is sought, not evidence establishing a reason for requesting joinder.

In a claim petition where there is both a documented work injury—either by adjudication or acceptance—and that injury gives rise to disability, the proper burden of proof is that of a reinstatement petition.

Philip Furnari v. WCAB (Temple Inland, et al.); 1171 C.D. 2013; filed 4/10/14; by Judge Covey

The claimant sustained a work-related injury to his right knee. Thereafter, the employer issued a medical only NCP. The employer also agreed to continue paying the claimant's salary. The claimant returned to work on modified duty, and the employer continued paying full salary. The claimant then resigned, at which time the employer stopped paying his salary. The claimant filed a reinstatement petition, alleging his injury

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What's Hot in Workers' Comp is published by our firm, which is a defense litigation law firm with 470 attorneys residing in 19 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.

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had worsened and that his earning power was affected.

The Workers' Compensation Judge denied the reinstatement petition on the basis that the employer's issuance of the medical only NCP and its payment of the claimant's salary was a *de facto* NCP and that the claimant failed to meet his burden of proving his condition had worsened such that he could not perform a modified-duty job. The Appeal Board affirmed the Judge's decision on appeal. However, the Board disagreed with the finding that the medical only NCP was a *de facto* NCP. The claimant appealed to the Commonwealth Court.

The claimant first argued that the Judge improperly used the burden of proof for a claim petition rather than a reinstatement petition (in the underlying case, the claimant amended his reinstatement petition to a claim petition). The court held, however, that the Judge did use the burden of proof for a reinstatement petition. According to the court,

the employer's issuance of a medical only NCP, along with salary continuation to the claimant and evidence from the employer that the claimant was a valued employee whom they intended to transition back to work, established a *de facto* NCP. Therefore, the court concluded that the Judge properly found that the claimant failed to meet his burden of proof on a reinstatement petition. The court also rejected the claimant's argument that the *de facto* NCP obligated the employer to pay him workers' compensation benefits since the employer did not file a suspension petition after the claimant resigned from the employer. The court found that the Judge properly suspended the claimant's benefits without a formal petition since strictness of pleadings is not required in workers' compensation cases and because the Judge is empowered to take appropriate action based on the evidence presented. II

NEW JERSEY WORKERS' COMPENSATION

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Dario J. Badalamenti

Award of benefits reversed due to failure to properly weigh the testimony of petitioner's and respondent's competing medical experts.

Ascione v. U.S. Airways, Docket No. A-5049-12T1, 2014 N.J. Super. Unpub. LEXIS 810 (App. Div., decided 4/10/14)

The petitioner had been employed as a fleet service agent with the respondent since 1981. His job responsibilities included loading and unloading baggage from planes, working in the bag room, placing baggage on carts, driving diesel and gas tugs, driving the equipment to move planes from the ramp area and de-icing planes. The petitioner filed a claim with the Division of Workers' Compensation in October of 2009, alleging pulmonary disability resulting from exposure to "deleterious substances" during the course of his 28 years of employment with the respondent.

At trial, the petitioner's medical expert testified that the petitioner had "chronic bronchitis and probable restrictive pulmonary disease," which was exacerbated by his exposure to various pulmonary irritants while in the respondent's employ. In contrast, the respondent's medical expert testified that the petitioner had normal lung function, with "no evidence of obstruction, restriction or impairment in diffusion" indicative of pulmonary disability. At the conclusion of trial, the Judge of Compensation issued a written decision in favor of the petitioner, but she made no critical findings concerning the conflicting testimony of either expert. Rather, only factual findings as to the petitioner's work environment were made. The Judge of Compensation found the petitioner's diagnosis of chronic bronchitis "to be consistent, logical and probable in the context of petitioner's workplace exposure and complaints," and awarded the petitioner compensation benefits. The respondent appealed.

In reversing the Judge of Compensation's holding and remanding for further proceedings, the Appellate Division relied on *Perez v. Panta-*

sote, Inc., 95 N.J. 105 (1984), in which the court explained that, in order to obtain disability under the workers' compensation statute, a claimant must first make a satisfactory showing of demonstrable objective medical evidence of functional loss. The claimant's mere subjective complaints are insufficient to satisfy this burden. The Appellate Division concluded that the Judge of Compensation, although an expert with respect to weighing the testimony of competing medical experts, failed to provide "clear, complete and articulate reasons grounded in the evidence" to explain her decision. As the Appellate Division commented:

Although the judge discussed both experts' testimony and conclusions, which are diametrically opposed, she failed to make credibility findings. While the award in favor of the petitioner indicates the judge chose to credit the testimony of Dr. Hermele over the testimony of Dr. Safirstein, such a choice should be stated clearly and not implied.

Accordingly, the Appellate Division reversed the Judge of Compensation's holding and remanded the matter for more detailed findings, including specific findings as to the credibility of the petitioner's and the respondent's medical experts. II

SIDE BAR

Interestingly, despite her failure to assess the credibility of the petitioner's and the respondent's conflicting medical experts, the Judge of Compensation did make specific findings as to the petitioner's own credibility. With regards to the petitioner's testimony of his work history and the conditions of his employment, the Judge of Compensation found the petitioner "entirely credible and consistent," in addition to assessing him as "forthcoming, cooperative, candid and, therefore, reliable."

DELAWARE WORKERS' COMPENSATION

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



Paul V. Tatlow

The employer has a legal basis for denying payment for a claimant's narcotic medication on causation grounds where the claimant has been arrested and charged with illegally selling medication that was prescribed for the work injury.

Nathaniel Brandon v. State of Delaware,

(IAB No. 1372970 – Decided 4/4/14)

This case came before the Board at a legal hearing requested by claimant's counsel on a motion seeking to have the employer ordered to resume paying for the claimant's narcotic prescription medication.

The claimant had sustained a low back injury on July 26, 2011, which was accepted as compensable. The claimant had undergone two back surgeries and was receiving narcotic medications. His total disability benefits had been terminated in February 2014, and he was receiving partial disability benefits. In March 2014, the employer stopped approving the claimant's prescription for Oxycodone on the basis that the claimant had been arrested in February 2014 and charged with illegally selling that medication.

At the legal hearing, claimant's counsel asserted that the treating doctor had indicated that suddenly stopping the claimant's medication could cause serious medical problems. The employer countered that the medications were being denied as not being necessary, reasonable and related to the accepted injury. The claimant asserted that the employer had no legal basis to stop paying for the medications. However, the Board rejected that argument and stated that, as a general rule, an employer can refuse to pay for medical treatment that it in good faith believes is not necessary, reasonable and causally related to the work injury. In this case, since the claimant had been charged with selling Oxycodone—the very medication that the employer was paying for—it was reasonable for the employer to assume that the claimant no longer needed the medication for his work injury. Thus, the Board found that there was no illegal conduct by the employer in denying payment for the medication.

The Board further addressed the issue of whether the denial of the medication should have been submitted to Utilization Review as not

being necessary and reasonable. The Board's analysis shows that this situation falls into a gray area in which it could be contended that the claimant no longer needs the medication and that it is, therefore, not necessary and reasonable and the dispute should be sent to Utilization Review. On the other hand, the Board also indicated that the employer could contend that, since the claimant no longer needs the medication, the work injury is then no longer causing the need for the medication, and thus, it can be denied on causation grounds. The Board concluded that the employer did not act improperly in characterizing the denial of the medications as being due to causation and, therefore, it was not required to be submitted to Utilization Review. In conclusion, the Board denied the claimant's motion to compel payment for the medication and indicated that claimant's counsel would need to file a Petition to Determine Additional Compensation Due to pursue this issue further. ||

SIDE BAR

This case was handled by my colleague, Jessica Julian, and we have discussed its importance for employers from a practical standpoint. Employers and their insurance carriers should be vigilant to any activity on the part of a claimant who is receiving prescription medications for the work injury indicating that the claimant may not, in fact, be taking them in accordance with the prescription. Clearly, the evidence in this case—that the claimant was selling those medications—is a strong indication that the claimant was not, in fact, taking them as prescribed by the physician. Another example would be where a claimant fails a drug test for the prescribed medication, which would strongly suggest that the claimant is not taking them in accordance with the prescription. Both of those instances would allow the employer to deny payment for the medication on causation grounds. The other important point about the Board's ruling in this case is that, by denying the claimant's motion to compel payment by the employer, it puts claimant's counsel to the task of filing a DACD Petition and proving through factual and medical evidence the entitlement to the medications rather than obtaining quick relief at a legal hearing.

NEWS FROM MARSHALL DENNEHEY

Tony Natale (Philadelphia) successfully defended a large Philadelphia-based university in litigation involving medical issues. The claimant originally injured his left knee as a result of a slip and fall at the university. Months later, the claimant alleged that the work incident in question also injured his low back in the form of multiple disc herniations with resulting unsparing radiculopathy. Additionally, the claimant alleged that his radicular pain was so unrelenting that he could barely move about. The surveillance evidence, however, told a much different story—the claimant frequently walked, and even jogged, through his neighborhood. He was also able to operate a motor vehicle. After cross examination of the claimant, coupled with a presentation of the surveillance evidence and

credible medical expert opinions, the judge found that the claimant's low back problems were not related to the work injury and that the claimant had fully recovered from the knee injury.

Marshall Dennehey has been named to the 2014 *Honor Roll of Legal Organizations Welcoming Women Professionals* by the Pennsylvania Bar Association's Commission on Women in the Profession. The firm was selected for its programs and initiatives that help women lawyers continue and advance in their professional careers, including overall culture and atmosphere, mentorship opportunities, flexible work schedules, annual women's events, and its high numbers of female attorneys and women in positions of leadership at the firm. ||