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What's Hot in Workers' Comp

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2015

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Paul V. Tatlow

1. Legislature passes House Bill 166 allowing injured workers to obtain medical care from out-of-state, non-certified providers.

The most significant legislative development this year impacting Delaware workers' compensation was the passage of House Bill 166, which allows claimants to seek medical care from out-of-state and non-certified health care providers in the payment of their medical expenses. This Bill removes the certification requirement for health care providers who are licensed in another state but not in Delaware. The comments to the Bill indicate its purpose was to correct the flaw in the current statute that was exposed by the Delaware Supreme Court in *Wyatt v. Rescare Home Care* and *Vanvliet v. D and B Transportation*, which dealt with the problem of treatment by non-certified providers and there being no practical way to compel non-Delaware physicians to become certified.

2. Delaware Supreme Court upholds determination that the parties had reached a settlement agreement that barred a later petition filed by claimant for permanency benefits.

Christiana Care Health Services v. Kenneth Davis, (No. 138, 2015 – Decided November 3, 2015)

This case involved a DCD petition filed by the claimant alleging a work-related back injury and ongoing total disability. While the petition was pending, a DME on behalf of the employer indicated that any low back injury related to the work incident had resolved and any ongoing symptoms were not work related. Counsel for the claimant and counsel for the employer then reached an agreement to acknowledge the work injury and pay medical bills, with the injury described as "a lumbar spine contusion-resolved." The parties executed an Agreement and Receipt acknowledging this injury, which were approved by the Board. Several months later, the claimant filed a new petition seeking permanency benefits. The employer filed a motion to dismiss, which was granted by the Board and later upheld by the Supreme Court on the basis that the parties had created a valid and enforceable settlement agreement providing that the claimant's back injury had "resolved" as of a date certain.

3. The Superior Court clarifies that in calculating the average weekly wage, the number of weeks actually worked should be used as the divisor and any partial disability benefits that were received by the claimant should be excluded from the calculation.

Jerry Crouse v. Hy-Point Dairy Farms, Inc., (C.A. No. S14A-12-002 – RFS-Decided July 22, 2015)

This case involved a dispute between the claimant and the employer as to the correct method for calculating the pre-injury average weekly wage. The Superior Court affirmed the Board's decision and determined that, since the claimant had actually worked for 22 of the 26 weeks prior to his injury, only 22 weeks should be used as the proper divisor in calculating his average weekly wage. Further, the court determined that the partial disability benefits the claimant had received during those 26 weeks were properly excluded from the average weekly wage calculation.

4. New workers' compensation rates.

The Department of Labor announced that the new compensation rates effective July 1, 2015, establish an average weekly wage of $1,019.44. Accordingly, the maximum compensation rate is $679.63 and the minimum compensation rate is $226.54.

5. Personnel changes at the Industrial Accident Board during the past year.

Stephanie Parker was officially named as the Administrator replacing John F. Kirk, who retired towards the end of the prior year. Mitchell Crane replaced Terry Shannon, who also retired, and Gemma Buckley replaced Otto Medinilla, Sr., who likewise retired. Parker, Crane and Buckley comprise the current Board, along with chairman Lowell Groundland, John Daniello, Marilyn Doto, William Hare, Mary McKenzie-Dantzler, John Brady, Robert Mitchell and Patricia Maull.

6. The employer's termination petition was not subject to dismissal on the grounds that a prior Board decision had determined that the claimant was a displaced worker.

Priscilla Stove v. Aramark c/o Wesley College, (Hearing No. 1258714 – Decided July 23, 2015)

This case was before the Board on the employer's review petition that sought to terminate total disability benefits. Prior to the hearing, claimant's counsel filed a motion to preclude the Board from hearing the petition on the grounds that it was barred by the legal doctrines of *res judicata* and collateral estoppel. Specifically, the motion asserted that a prior Board decision issued back in June 2012 had determined that the claimant was a prima facie displaced worker. The Board denied the claimant's motion, finding that those legal principles would only prevent it from reconsidering the correctness of the 2012 decision. However, they did not prevent the Board from adjudicating the current petition, which dealt with the wholly separate issue of whether the claimant at the present time continued to be a prima facie displaced worker. The employer indicated that they were prepared to present new evidence in the form of a Labor Market Survey to show that the claimant no longer had displaced worker status.

7. The Board will not issue a prospective order that all future prescriptions must be approved by the employer.

Migdalia Rodriguez v. Verizon Delaware, Inc., (Hearing No. 1279920 – Decided August 26, 2015)

This case came before the Board on a legal motion by the claimant seeking an order compelling the employer to approve all future medications prescribed for the claimant as the result of the accepted work injury. The employer asserted that there was no legal basis for the Board to do so. The Board agreed with the employer and emphasized that the statutory scheme provides that, when medical treatment, including prescriptions, occurs, the employer can either pay the properly submitted medical invoice in accordance with the fee schedule or deny it and refer it to Utilization Review. However, the Board emphasized that there must first be an invoice for the medical bill. In this case, there were no currently outstanding prescription bills. As such, the Board refused to issue a blanket prospective order that all future prescriptions must be approved.

8. Chronic pain treatment continues to be the most frequently challenged Guideline in Utilization Review requests.

The most recent Annual Report from the Department of Labor gives statistics for 2014 which show that during that year 415 requests for Utilization Review were filed, which represented a 9% decrease from the previous year. From that total, 390 dealt with Practice Guidelines and that, once again, chronic pain treatment and in particular prescription pain medication was the Guideline most frequently challenged. Specifically, 272 of the Utilization Review requests dealt with the chronic pain Guideline, 70% of the total that were filed.

9. The Board allows the employer to reimburse the Fund all the total disability benefits paid while the petition was pending, thereby creating a large credit in favor of the employer against the partial disability benefits that would otherwise be owing to the claimant.

Parent Kare Solutions v. Damon Jordan, (Hearing No. 1364931 – Decided September 17, 2015)

This case came before the Board on the employer's motion seeking to reimburse the Fund for all compensation benefits it had paid to the claimant while his termination petition was pending. This was somewhat of an unusual request in that it was more than the Fund was actually seeking to be reimbursed by the employer. The Board's decision had granted the termination petition and reduced the claimant's compensation to a low partial disability rate, which legally can continue for up to 300 weeks. The claimant opposed the motion, but it was granted by the Board, with the impact that the claimant would not be required to repay any of the money he had received from the Fund, but the Fund would be made whole and the employer would be given a sizeable partial disability credit, which would in essence wipe out the claimant's entitlement to partial disability benefits.

10. The five-year statistics on appeals from Board decisions shows that reversal rates continue to be extremely low.

The Annual Report from the Department of Labor gives a five-year cumulative summary of appeals from Board decisions. For the five-year period from 2010 through 2014, the Board rendered 2,259 decisions on the merits. From that number, 274 were appealed, an average of 54.8 appeals per year. Further, only 31 of the cases appealed were either reversed and/or remanded in whole or in part. This means that of the total decisions issued by the Board during that five-year span, the reversal rate was only 1.37%. The lesson is that it continues to be extremely difficult to overturn a Board decision on appeal. **II**

TOP 10 DEVELOPMENTS IN NEW JERSEY WORKERS' COMPENSATION IN 2015

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Dario J. Badalamenti

1. An Order for home remediation was reversed because the Judge of Compensation relied not on competent medical evidence but, rather, on the testimony of an expert in home modification for disabled people, who indicated that the petitioner would benefit psychologically from the installation of an elevator in his home.

Loeber v. Fair Lawn Board of Education, Docket No. A-1990-13T1, 2014 N.J. Super. Unpub. LEXIS 2814 (App. Div., decided December 5, 2014)

The New Jersey Supreme Court acknowledged in *Squeo v. Comfort Control Corp.*, 99 N.J. 588 (1985), that N.J.S.A. 34:15-15 does note specifically mention home remediation as an available remedy but, rather, speaks in terms of payment or reimbursement for medical, surgical and other treatment. That notwithstanding, the *Squeo* court interpreted that language as permitting a Judge of Compensation to order home modifications where there is sufficient and competent medical evidence to establish that the requested "other treatment" is reasonable and necessary to relieve the injured worker of the effects of his injury.

2. Appellate Division reversal decides horse trainer is an independent contractor and not entitled to benefits under the Act.

Perry v. Robert Horowitz Stable, Docket No. A-3845-12T2, 2014 N.J. Super. Unpub. LEXIS 2850 (App. Div., decided December 9, 2014)

In reversing the Judge of Compensation's ruling that the petitioner was the respondent's employee, the Appellate Division relied on *Pollack v. Pino's Formal Wear & Tailoring*, 253 N.J. Super. 397, cert. denied, 130 N.J. 6 (1992), in which the court utilized two tests to determine whether an individual is an employee or an independent contractor: (1) the "control test" considers several factors in determining whether an employer-employee relationship exists, including right of control, right of termination, furnishing of equipment and method of payment; and (2) the "relative nature of the work test," under which the primary inquiry is whether there is substantial economic dependence upon the employer by the employee.

3. The petitioner was not in the course of her employment when she was injured while walking through the lobby of the building in which the respondent was located, the 10th floor of a multi-tenant building.

Burke v. Investors Bank, Docket No. A-1551-13T1, 2015 N.J. Super. Unpub. LEXIS 552 (App. Div., decided March 16, 2015)

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Hersh v. County of Morris*, 217 N.J. 236 (2014), where the New Jersey Supreme Court found that public places not under the control of the employer are not considered part of the employer's premises for purposes of workers' compensation benefits, even if employees use the route for ingress or egress to the place of employment.

4. A PIP carrier may file a claim with the Division of Workers' Compensation as a means of enforcing its statutory right of reimbursement under N.J.S.A. 39:6A-6.

High Point Insurance Co. (as Subrogor of Kevin Smith) v. Drexel University, Docket No. A-2030-13T4, 2015 N.J. Super. Unpub. LEXIS 868 (App. Div., decided April 17, 2015)

This right of reimbursement exists under N.J.S.A. 39:6A-6, the so-called "collateral sources" provision of New Jersey's PIP statute, which was interpreted in *Aetna Casualty & Surety Co. v. Para Manufacturing Co.*, 176 N.J. Super. 532 (App. Div. 1980), where the court held that, where a PIP insured is entitled to, but never files a workers' compensation claim, the PIP carrier, as subrogor for its insured, may file a claim for reimbursement with the Division of Workers' Compensation to prove that the motor vehicle accident in which its insured was injured is compensable under the Act.

5. The petitioner's motion for medical and/or temporary disability benefits was properly dismissed because the medical expert report on which it was based did not contain a precise description of the type of treatment indicated and failed to establish a prima facie basis for relief.

Amadeo v. United Parcel Service, Docket No. A-1013-13T2, 2015 N.J. Super. Unpub. LEXIS 753 (App. Div., decided April 8, 2015)

N.J.A.C. 12:235-3.2(a) provides that motions for temporary and/or medical benefits filed with the Division of Workers' Compensation shall evidence that the petitioner is in need of current medical treatment. In support of such a motion, affidavits or certifications made on personal knowledge by the petitioner, or the petitioner's attorney, as well as the report(s) of a physician(s) stating the medical diagnosis and the specific type of diagnostic study, referral to specialist, or treatment being sought shall be submitted.

6. The New Jersey Superior Court and the Division of Workers' Compensation have concurrent jurisdiction to resolve a genuine dispute regarding a worker's employment status when the plaintiff elects to file a complaint in Superior Court only.

Estate of Kotsovska v. Saul Liebman, A-89 September Term 2013, 073861, 2015 N.J. LEXIS 568 (Supreme Court, decided June 11, 2015)

Although it acknowledged that the forum best suited to decide employment issues is the Division of Workers' Compensation, the New Jersey Supreme Court opined that the Division is in no better a position to make the threshold determination of a worker's employment status than the Superior Court which, as the Supreme Court pointed out, is often tasked with making this determination in a variety of contexts. Accordingly, the Supreme Court reasoned that the determination of employment status is not peculiarly within the Division of Workers' Compensation's discretion or one that requires the Division's expertise.

7. The Appellate Division finds an Uber-type limousine driver to be an independent contractor, utilizing the criteria set-forth in the New Jersey Supreme Court decision of *Estate of Kokovska*.

Babeker v. XYZ Two Way Radio, Docket No. A-3036-13T3, 2015 N.J. Super. Unpub. LEXIS 1887 (App. Div., decided August 6, 2015)

In *Estate of Kokovska*, the New Jersey Supreme Court used the following criteria to determine if an individual is an employee under the Act: (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation – supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.

8. A Judge of Compensation utilizes the "control test" and the "relative nature of the work test" to determine that a dancer at a gentlemen's club is an employee under the Act.

Colvin v. Coconuts, CP# 2013-16306 (Division of Workers' Compensation, decided July 31, 2015)

The "control test" focuses on the degree of control exercised by the employer over the means of completing the work, the source of the worker's compensation, the source of the worker's equipment and resources, and the employer's termination rights. Under the "relative nature of the work test," a petitioner must show a "substantial economic dependence" on the employer, which is demonstrated when there is a "functional integration" of the parties' respective operations.

9. A petitioner, who was simply walking down an aisle of the respondent's retail store when she felt a "pop" in her lower back and severe pain radiating into her buttocks and down her legs, was not entitled to workers' compensation benefits because her injury did not arise out of her employment.

Fitzgerald v. Walmart, Docket No. A-1186-14T3, 2015 N.J. Super. Unpub. LEXIS 2669, (App. Div., decided November 20, 2015)

In applying the "positional risk test," as set forth in *Sexton v. County of Cumberland/Cumberland Manor*, 404 N.J. Super. 542 (App. Div. 2009), the Judge of Compensation determined that the petitioner, who was engaged in no activity other than walking at the moment of her injury, failed to establish that she would not have been exposed to the very same risk of injury had she not been at work.

10. An actual absence from work is a prerequisite to a temporary disability award.

Hulitt v. Farm-Rite, Inc., CP# 2012-18007 (Division of Workers' Compensation, decided September 1, 2015)

The petitioner was terminated for cause the day after his work-related injury. The petitioner had received authorized medical treatment and temporary disability benefits through maximum medical improvement, but was not entitled to temporary disability benefits when he was instructed out of work two years later for the same injuries because he failed to satisfy the burden of demonstrating an actual loss of income. In denying the petitioner's benefits, the Judge of Compensation relied on *Cunningham v. Atl. States Cast Iron Pipe Co.*, 386 N.J. Super. 423 (App. Div. 2006), which holds that the purpose of temporary disability benefits is to provide an individual who suffers a work-related injury with a "partial substitute for loss of current wages." In *Hulitt*, the petitioner testified that he had not been employed since the date of loss and had looked for employment since that time. II

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2015

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Francis X. Wickersham

1. Commonwealth Court reverses a prior decision and holds that the robbery of a liquor store clerk at gunpoint was an abnormal working condition and, therefore, a compensable psychiatric injury.

Pennsylvania Liquor Control Board v. WCAB (Kochanowicz), 108 A.3d 922 (Pa. Cmwlth. 2014)

2. A finding of maximum medical improvement by an IRE physician, even with the possibility of future surgery, does not render the IRE invalid.

Nicole Neff v. WCAB (Pennsylvania Game Commission), 103 A.3d 291 (Pa. Cmwlth. 2015)

3. Under certain circumstances, an employer may recover attorney's fees when the claimant pursues a frivolous appeal.

Steven Smith v. WCAB (Consolidated Freightways, Inc.), 111 A.3d 235 (Pa. Cmwlth. 2015)

4. The claimant established by clear and convincing evidence that she was in a common law marriage in accordance with Native American tradition and custom at the time of the decedent's death and, therefore, was entitled to death benefits under Section 307 of the Act.

Elk Mountain Ski Resort, Inc. v. WCAB (Tietz, Deceased and Tietz–Morrison), 114 A.3d 27 (Pa. Cmwlth. 2015)

5. Pennsylvania Supreme Court holds that §319 of the Act does not confer on employers or their workers' compensation insurers a right to pursue a subrogation claim directly against the third party tortfeasor when the compensated employee who was injured has taken no action against the tortfeasor.

Liberty Mutual Insurance Co. as Subrogee of George Lawrence v. Domtar Paper Co. v. Commercial Net Lease Realty Services, Inc., and Commercial Net Lease Realty Trust, and Commercial Net Lease Realty, Inc. and National Retail Properties, Inc. and National Retail Properties Trust, 113 A.3d 1230 (Pa. 2015)

6. Pennsylvania Supreme Court holds that an employer is not obligated to issue a Notice of Ability to Return to Work before offering alternative employment where the injured employee has not yet filed a claim petition and, thus, not yet proven an entitlement to workers' compensation benefits.

School District of Philadelphia v. WCAB (Hilton), 117 A.3d 232 (Pa. 2015)

7. An employer is not required to first seek an agreement from a claimant on an IRE physician before filing a request with the Bureau to designate an IRE physician.

William Logue v. WCAB (Commonwealth of Pennsylvania), 119 A.3d 1116 (Pa. Cmwlth. 2015)

8. A divided Commonwealth Court holds that use of the 5th and 6th Editions of the AMA Guides to the Evaluation of Permanent Impairment under the Pennsylvania Workers' Compensation Act is unconstitutional; and, therefore, IREs performed under § 306(a.2) of the Act must use the 4th Edition of the AME Guides.

Protz v. WCAB (Derry Area School District); No. 1024 C.D. 2014; (Pa. Cmwlth. September 18, 2015)

9. A claimant cannot seek a reinstatement of benefits where the injury is acknowledged by a Medical Only NCP because the Medical Only NCP does not recognize disability.

Sandra Sloane v. WCAB (Children's Hospital of Philadelphia) and Children's Hospital of Philadelphia and Risk Enterprise Management v. WCAB (Sloane); No. 53c.D. 2015;(Pa. Cmwlth. October 1, 2015)

10. Pennsylvania Supreme Court holds that the Commonwealth Court erred in finding that an employee sustained a work-related injury when brutally stabbed by her employer, who was her son, while sleeping in her own home, as the employee's presence on the premises was not required by the nature of her employment.

O'Rourke v. WCAB (Gartland); No. 27 WAP 2014; October 27, 2015; By Mr. Justice Stevens II