

PENNSYLVANIA WORKERS' COMPENSATION

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The Workers' Compensation Appeal Board did not err in finding that the claimant was ineligible for benefits on the basis that, by law, she was an independent contractor and not an employee at the time of her injury.

Agatha Edwards v. WCAB (Epicure Home Care, Inc. and SWIF); 1106 C.D. 2015; filed March 10, 2016; by Judge Simpson

The claimant worked as a personal caretaker for the company and filed a claim petition against the company, alleging an injury of February 2012. The company opposed the claim petition, taking the position the claimant was an independent contractor and not an employee. Before deciding the merits of the claim, the Workers' Compensation Judge first decided the issue of employment.

Extensive evidence was presented on the employment issue. The company controlled and dictated several aspects of the claimant's work, including what she wore for assignments. The company also advised the claimant of the client's condition and set the claimant's hours. The company established guidelines for care and provided the claimant with a manual for care. The company trained the claimant on how to be a caretaker. The company billed clients, and the clients sent separate checks to the company and the claimant. The claimant received payment directly from clients, not the company. The claimant deducted her own taxes from the payments, and in her tax returns, identified herself as self-employed. Finally, the claimant had signed a document titled "Independent Contractor Agreement."

The judge concluded that the claimant was an employee, not an independent contractor, and ultimately granted the claim petition. The company filed an appeal with the Workers' Compensation Appeal Board, which reversed. The claimant then filed an appeal with the Commonwealth Court.

The Commonwealth Court affirmed the Board, holding that they did not reweigh evidence or substitute their own findings, as argued by the claimant. The court noted that, overall, the judge found factors showing an employer/employee relationship existed. The claimant's daily tasks were controlled by the client, not the company. Although the company provided a set of guidelines, it did not prescribe actual tasks to be completed. Also, the claimant was not required to check in with the company on a daily basis and could take time off at her discretion. The claimant's uniform was not supplied by the company, and clients possessed the ultimate power to maintain or discharge caretakers and set the rate of pay. ||

An employer is not required to file a Notice Stopping Temporary Compensation and Denial when it seeks to revise a Notice of Temporary Compensation Payable by filing an amended NTCP.

William J. Church v. WCAB (Wayne Cook t/a Cook Landscaping and Fleming Termite and Pest Control); 1068 C.D. 2015; filed March 18, 2016; by Senior Judge Colins

The claimant sustained a work-related injury on July 29, 2004, and the employer issued a Notice of Temporary Compensation Payable (First NTCP), describing it as a "herniated disc." Later, the employer issued a second Notice of Temporary Compensation Payable (Second NTCP), amending the First NTCP to reflect a different average weekly wage and compensation rate. After the claimant returned to work on October 11, 2004, the employer filed a Notice Stopping Temporary Compensation (STC) and a Notice of Workers' Compensation Denial (NCD), stating that, although an injury took place, the claimant was not disabled as a result.

In 2011, the claimant filed a reinstatement petition, alleging that as of October 11, 2004, his condition worsened and caused a decrease in earning power. Later, the claimant amended the reinstatement petition to include a penalty petition, claiming that the first NTCP was not properly withdrawn at the time the second NTCP was issued.

The Workers' Compensation Judge denied the claimant's petitions, concluding that the claimant failed to meet his burden. In doing so, the judge pointed out that the claimant did not seek medical treatment from the time he returned to work without restrictions in October of 2004 until more than two years after he stopped working for the employer. The claimant appealed, and the employer cross-appealed. The Appeal Board affirmed the judge's decision.

On appeal to the Commonwealth Court, the claimant argued that the First NTCP was in effect a separate NTCP that should have been

deemed to have converted to an NCP because the employer did not file a separate Notice Stopping Temporary Compensation and Denial. The court rejected this argument and held that there was nothing in the Act or the Bureau regulations that could be interpreted to require the employer to file an NSTC or NCP at the time it properly amended the First NTCP. The First NTCP was simply properly amended by the second NTCP, and, thus, there was no conversion of the first NTCP to an NCP. **II**

PETITIONS FOR ALLOWANCE OF APPEAL GRANTED

The Supreme Court has granted Petitions for Allowance of Appeal in *Mary Ann Protz v. WCAB (Derry Area School District)*, 124 A.3d 406 (Pa. Cmwlth. 2015), a case where the Commonwealth Court held that the requirement under § 306 (a.2) of the Act that the most recent version of the AMA Guides be used to determine a claimant's impairment rating was unconstitutional. The issues the Supreme Court will be considering are as follows:

Does Section 306(a.2) of the Pennsylvania Workers' Compensation Act unconstitutionally delegate the State Legislature's lawmaking authority in violation of Article II, Section 1 of the Pennsylvania Constitution by incorporating

the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment?

Whether the Commonwealth Court – after properly determining § 306 (a.2) of the Workers' Compensation Act was unconstitutional – erred in remanding the case to the Workers' Compensation Judge with instructions to apply the 4th Edition of the American Medical Associations' Guides to the Evaluation of Permanent Impairment when neither (a.2) nor any other section of the Act ever references the 4th Edition and its usage was not sanctioned by the Pennsylvania legislature.

NEW JERSEY WORKERS' COMPENSATION

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



Dario J. Badalamenti

Respondent's Section 40 lien attaches to the petitioner's third-party recovery despite the fact that the petitioner's net proceeds fail to exceed the costs of litigation.

Cabrera v. Cousins Supermarket, Docket No. A-5287-13T1, 2016 N.J. Super. Unpub. LEXIS 392 (App. Div., decided February 23, 2016)

The petitioner sustained an injury to his right hand at work while operating a meat perforating machine. He filed a claim with the Division of Workers' Compensation for which he received both medical and indemnity benefits. He also filed a tort action against the manufacturer of the machine, which was submitted to binding arbitration. Though the arbitrator found no liability as to the third-party defendant, pursuant to a "high/low" agreement, the petitioner recovered \$25,000, all of which went to litigation costs and attorney's fees. The respondent brought a motion to enforce its lien pursuant to N.J.S.A. 34:15-40, which allows for a compensation lien to attach to an employee's recovery against any other

tortfeasors. The Judge of Compensation ruled that, despite the petitioner's failure to recover any net monies from his third-party action, the respondent was entitled to reimbursement of up to two-thirds of the amount of medical and indemnity benefits it had paid. The petitioner appealed.

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Frazier v. N.J. Mfrs. Ins. Co.*, 142 N.J. 590 (1995), where the New Jersey Supreme Court held that a statutory lien attaches under N.J.S.A. 34:15-40 regardless of whether the cumulative awards are sufficient to fully compensate the injured worker. As the Appellate Division reasoned:

There is no full compensation rule in the statute. Cabrera recovered a sum of money as a result of his third-party complaint. The unfortunate consequence that the entire sum recovered from the third-party action was consumed by fees and costs of the litigation is not relevant to the application of the statute.

The Appellate Division concluded that, no matter how atypical or novel the nature of the settlement agreement, the respondent's lien attached to the petitioner's third-party proceeds as a derivative of the petitioner's suit against a third-party tortfeasor. **II**

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The petitioner's third-party recovery was recognized pursuant to a "high/low" agreement. In a high/low arbitration, the parties specify that the award will be no higher than a certain amount and no lower than another amount. High/low parameters are set forth in an independent contract the parties make prior to the arbitration. The arbitrator, who is not usually made aware of the parameters of the high/low, makes his or her award based on the evidence. An award not within the parameters of the high/low is then reduced or increased in order to conform with the parameters. Here, despite a finding by the arbitrator that the petitioner's claim was without merit, he received the minimum award permitted under the high/low agreement – i.e., \$25,000.

DELAWARE WORKERS' COMPENSATION

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



Paul V. Tatlow

The Board's decision dismissing the petition to determine compensation due, based on the determination that the claimant's intoxication was the proximate cause of his work injury, is affirmed by the Superior Court.

Roger Johnson v. R.C. Fabricators, Inc.,
(C.A. No. S15A-05-001-RFS - Decided December 22, 2015)

This case was before the Delaware Superior Court on the claimant's appeal from the Board's decision which had dismissed his DCD Petition. The facts show that the claimant was a construction worker for the employer and that on October 30, 2013, he fell from a roof of a one-story building while installing acoustic decking and sustained injuries to his ribs, right shoulder and hip. The employer defended the petition on the basis that the claimant's intoxication at the time of the work injury caused his fall.

The evidence before the Board was conflicting as to whether the claimant had taken illegal substances the night before the accident, when he and co-workers were staying at a Holiday Inn. The claimant also presented testimony from co-workers indicating that he did not appear impaired on the job site the morning of the injury. The employer presented testimony from Dr. Hameli, whose review of records included blood samples taken from claimant over 24 hours after the time of the work injury. These blood tests revealed metabolites of cocaine and marijuana in the claimant's system. Dr. Hameli testified that, in his assessment, the claimant had consumed cocaine within two to four hours of the work injury. He further indicated that the effects of marijuana include deteriorating concentration and judgment, vertigo and impaired motor activities, like balance and other physical activities. Further, he testified that the effects of cocaine include hallucinations, nausea, vomiting, blurred vision, dizziness and impairment of observation, judgment and attention. Dr. Hameli testified that in his opinion the claimant's impairment due to ingesting the drugs substantially contributed to the work injury.

The Board accepted the testimony of Dr. Hameli as credible in determining that the claimant's intoxication was the cause of his work injury. Accordingly, the Board dismissed the petition and concluded that the claimant had forfeited his right to receive compensation pursuant to § 2353(b) of the Act.

The issue as framed by the Superior Court was whether there was substantial evidence to support the Board's finding that the employer had met its burden of proving that the claimant was intoxicated, thus causing the work injury. The proximate cause standard applies in this situation to determine the cause of the claimant's accident, which essentially requires the employer to meet two criteria: (1) showing that the claimant was intoxicated; and (2) showing that the intoxication was a but for cause of the work injury. The court reviewed the evidence and determined that there was clearly substantial evidence to support the conclusion that the claimant was intoxicated based on the testimony of Dr. Hameli, whom the court reasoned was a qualified medical expert and whose detailed testimony clearly established that the claimant had been intoxicated.

The court further determined that there was likewise substantial evidence to show that the claimant's intoxication was the proximate cause of the work injury. Dr. Hameli testified as to the effects of cocaine and marijuana negatively impacting the claimant's ability to perform physical activities. His opinion testimony that the claimant's impairment from those drugs substantially contributed to the work injury was substantial evidence to support the Board's finding that the work injury would not have occurred but for the claimant's intoxication. Accordingly, the decision of the Board was affirmed. II

SIDE BAR

The applicable statute dealing with the intoxication defense is § 2353(b), which provides that, if an employee is injured as a result of his/her own intoxication, he/she shall not be entitled to compensation. Importantly, the provision further provides that the burden of proof shall be on the employer. As demonstrated by the *Johnson* case, in order to meet that affirmative defense, the employer must present competent medical testimony, which requires obtaining medical information, such as the results of drug testing, to establish that there was intoxication by the claimant at the time of the work injury. The medical expert is further required to testify on the proximate cause issue that, but for the intoxication, the work injury would not have occurred. The latter requirement is critical since there are cases where an intoxicated claimant was not denied compensation if the intoxication was not the proximate cause of the work injury.

NEWS FROM MARSHALL DENNEHEY

Michele Punturi (Philadelphia, PA) and **Frank Wickersham** (King of Prussia, PA) are presenting at CLM Atlanta on May 19 and 20, 2016, in Atlanta, Georgia. This program offers sessions in four tracks: workers' compensation, insurance fraud, product liability and claims/litigation management. In *Aging Gracefully? The Senior Workforce and Impacts on Workers' Compensation*, **Frank** joins a panel of industry professionals to address the challenges the aging workforce presents to the workers' compensation industry from a medical, legal, and claims perspective, and will provide practical, cost-effective strategies for managing such claims. **Michele** will participate in the panel presentation *Developing a Robust Return to Work Program*. This presentation will provide practical tips and actionable information to expedite the return of injured employees to gainful employment, while avoiding litigation under the Workers' Compensation Act. For more information, visit the Events page of our website, or [click here](#).

Tony Natale (Philadelphia, PA) will be speaking at our *Insurance Fraud 360* seminar on June 2, 2016, in Lafayette Hill, Pennsylvania. Tony and Ariel Brownstein (Cherry Hill, NJ) will share the podium in their presentation *Current Fraud Trends in Workers' Compensation and PIP*. For more information, visit the Events page of our website, or [click here](#).

Kristy Olivo Salvitti (Cherry Hill, NJ) is among twelve attorneys from our New Jersey offices who have been recognized in the 2016 edition of *New Jersey Super Lawyers* magazine. A Thomson Reuters business, New Jersey Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Each year, no more than five percent of the lawyers in the state are selected as Super Lawyers and no more than 2.5 percent are selected for Super Lawyer Rising Stars. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations.

John Zeigler (Harrisburg, PA) obtained a decision denying and dismissing an original claim petition specific to an alleged lower back injury. The Workers' Compensation Judge, relying on defense photo, video and testimonial evidence specific to the work site, determined that it was not possible the claimant had stepped off a step into a drain hole as alleged. Additionally, the judge relied on surveillance evidence of the claimant tearing down a shed to discredit his allegation of

disability. Critical to this determination was the employer's testimony about communications with the claimant contemporaneous with the surveillance in which the claimant described himself as totally disabled. Finally, the judge credited the employer's medical expert over the claimant's treating physician that the claimant had no acute injury but, rather, a pre-existing and unrelated degenerative condition without any proven aggravation. The dismissal of the claim petition by the judge not only avoids potential long-term indemnity exposure, but also significant medical exposure as the claimant was scheduled for multi-level disc fusion surgery.

Tony Natale (Philadelphia, PA) successfully defended a national mid-market life insurance company in the litigation of a claim petition wherein the claimant alleged a debilitating lumbar nerve root injury while carrying company property from her car into her home. Under cross examination, the plaintiff admitted that she previously injured her back many months before the alleged work injury and was actively treating for the same at the time of the work incident. The claimant also admitted she was discharged from employment for cause and did not report the alleged work injury until after this discharge. In cross examination of the claimant's medical expert, Tony highlighted that the expert was unaware of the claimant's prior injuries and treatment and had an incomplete history as to the onset date of the her back pain and radiculopathy. The judge found the credibility of both the claimant and her expert to be in considerable doubt, and denied and dismissed the claim petition.

Tony Natale (Philadelphia, PA) successfully defended an international money transfer network in the litigation of a claim petition. The claimant alleged a traumatic injury in the form of aggravation of right hip and right knee arthritis as a result of confined travel in an automobile during the course and scope of employment. The claimant alleged total disability from work and sought hip and knee replacement surgery. On cross examination of the claimant, Tony established the timing of his alleged disability due to this injury was contemporaneous with his discharge from employment for cause. Tony further presented credible opinions from an orthopedic surgeon that the hip and knee injuries alleged were actually normal arthritic changes that were not incident to employment. The judge ruled that no work-related injury had taken place, and the claim petition was dismissed. **II**