MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 20 | NO. 9 | SEPTEMBER 2016

What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

Claimant's attorney cannot subsequently file a review petition to recover litigation costs and attorney's fees incurred in the successful dismissal of a prior suspension petition.

Christopher Byfield v. WCAB (Philadelphia Housing Authority); 2002 C.D. 2015; filed July 26, 2016; by Judge Wojcik

The employer filed a suspension petition, alleging the claimant refused reasonable medical treatment, which the Workers' Compensation Judge granted. The claimant appealed to the Workers' Compensation Appeal Board and successfully argued that the judge's decision should be reversed since there was no evidence presented that the claimant refused treatment. The Board agreed and reversed the judge's decision. Although the Board acknowledged the claimant's request for attorney's fees, the Board did not address the issue in their opinion. Neither the claimant nor the employer appealed from the Board's order.

Later, the claimant filed a review petition, seeking to recover the litigation costs and attorney's fees incurred in the prior litigation. This petition was denied by a different Workers' Compensation Judge, and the claimant appealed to the Board, which affirmed.

On appeal to the Commonwealth Court, the claimant argued that he had no standing to appeal the Board's order because he was not aggrieved by the Board's decision. The Commonwealth Court disagreed and affirmed the Board's decision. According to the court, although the claimant prevailed before the Board in his appeal of the suspension order, he only prevailed in part since the Board failed to address the request for costs and attorney's fees. Consequently, the claimant was aggrieved, and his recourse was either to request reconsideration from the Board or file an appeal to the Commonwealth Court. II

Workers' Compensation Appeal Board's decision granting benefits to a firefighter for a malignant melanoma on the basis that it was a recognized occupational disease for firefighters under § 108(r) of the Act vacated by the Commonwealth Court.

City of Philadelphia Fire Department v. WCAB (Sladek); 579 C.D. 2015; filed August 12, 2016; by President Judge Leavitt

The claimant, a firefighter, developed a skin lesion in 2006 that was diagnosed as malignant melanoma and removed surgically. The claimant filed a claim petition, alleging the melanoma was caused by his workplace exposure to carcinogens. The claimant sought payment of medical bills, and the employer denied the allegations of the petition.

The Workers' Compensation Judge granted the petition, finding the claimant's workplace exposure to arsenic and soot, which are Group I carcinogens, to be a significant contributing factor to his malignant melanoma. The employer appealed to the Workers' Compensation Appeal Board, arguing the claimant did not meet his burden of proving that malignant melanoma is an occupational disease under § 108(r) of the Act. The Board affirmed the judge's decision, interpreting § 108 (r) of the Act as saying there is a causal relationship between a firefighter's exposure to any group carcinogen and any cancer and holding that the claimant did not need to show that the carcinogens to which he was exposed caused his particular cancer. Additionally, the Board said that, once the claimant proved exposure to Group I carcinogens at work, the employer failed to meet its burden to show that the claimant's cancer was not caused by firefighting.

In analyzing the employer's appeal from the Board, the Commonwealth Court pointed out that, where a claimant has an occupational disease listed in § 108 of the Act, the claimant need not prove this occupational disease was caused by workplace exposure as opposed to another exposure. The court further pointed out that § 301(f) of the Act states that

compensation, pursuant to cancer suffered by a firefighter, shall only be for those firefighters who have served four or more years in continuous firefighting duties and who can establish direct exposure to a carcinogen referred to in § 108(r). This presumption may be rebutted by evidence showing that the cancer was not caused by the occupation of firefighting. In other words, to establish that a firefighter's cancer is an occupational disease, the firefighter must first show he has been diagnosed with a type of cancer caused by exposure to a known Group I carcinogen. Once this is established, the firefighter may take advantage of the statutory presumption in § 301(e) and (f) of the Act, which relieves the firefighter of the need to prove that his cancer was caused by his workplace exposure.

The Commonwealth Court said that it was incumbent upon the claimant to prove that his malignant melanoma was a type of cancer caused by the Group I carcinogens to which he was exposed in the workplace in order to establish an occupational disease. Only then do the presumptions come into play. The court concluded that the Board erred in its interpretation of § 108(r) of the Act. Additionally, the court held that the Board's rejection of the expert testimony given by the employer's expert as not rebutting the statutory presumption was in error since the testimony was relevant both to the initial question of whether the malignant melanoma was an occupational disease and to the employer's rebuttal of the statutory presumption in § 301(e) of the Act. The Commonwealth Court vacated the Board's order and remanded the case to the Board for further consideration. II

New Jersey Workers' Compensation

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

Dario J. Badalamenti

The Appellate Division holds that a workers' compensation carrier's lien pursuant to N.J.S.A. 34:15-40 attaches even if the injured worker's third-party recovery was for pain and suffering only.

Dorflaufer v. PMA Management Corp., Docket No. A-1727-14T3, 2016 N.J. Super. Unpub. LEXIS 1861 (App. Div., decided August 9, 2016)

The plaintiff was struck by a car while working as a part-time crossing guard. She filed a workers' compensation claim with the Division of Workers' Compensation. She also filed a tort action against the driver of the vehicle that struck her, resulting in a settlement of $95,000 for pain and suffering. The day before the settlement, her employer's workers' compensation carrier notified the plaintiff that it was asserting a lien under Section 40 of the Act, N.J.S.A. 34:15-40, in the amount of $46,856.22 for medical expenses it paid on her workers' compensation claim. The plaintiff refused to pay the lien and asserted that the defendant was only entitled to the temporary benefits paid and that medical benefits were not subject to a lien. The plaintiff argued that, since personal injury protection (PIP) medical payments are not recoverable from the tortfeasor, a workers' compensation carrier should not be able to recover medical expenses it paid arising from an employee's work-related automobile accident. Further, the plaintiff argued that the defendant's lien did not attach because her third-party recovery was for pain and suffering only.

The plaintiff filed a motion for summary judgment, and the defendant filed a cross-motion for the same relief. On November 17, 2014, the court issued an order denying the plaintiff's motion and granting the defendant's cross-motion. The court reasoned:

> [T]he Act states that any money paid to an injured employee from a third party settlement reduces the liability of the plaintiff's insurance carrier and entitles it to reimbursement for medical payments made. There is nothing in the statute that says it matters what the settlement was specifically compensating the plaintiff for or whether the plaintiff recovered full damages from it.

This appeal ensued. In affirming the lower court's ruling, the Appellate Division concluded that there is nothing in Section 40 of the Act that prevents a lien from applying where the settlement represents payment for pain and suffering.

Read in conjunction, Section 40 and New Jersey' collateral source statute, N.J.S.A. 2A:15-97 (governing the deduction of duplicate benefits awarded plaintiffs in civil actions) plainly require that a third-party tortfeasor be held to the full extent of its liability for a workplace injury, that the employer or compensation carrier be repaid for the benefits it paid to the injured worker pursuant to the Act without regard to the compensability of the claim, and that the employee not obtain a double recovery.

The Appellate Division also opined that the fact that PIP benefits are not recoverable against a tortfeasor has no bearing on an employer's Section 40 lien rights. II

Side Bar

As basis for its holding, the Appellate Division referenced N.J.S.A. 2A:15-97, the so-called "collateral sources" provision of New Jersey's PIP statute, which was interpreted by the Appellate Division in *Aetna Casualty & Surety Co. v. Para Manufacturing Co.*, 176 N.J. Super. 532 (App. Div. 1980). The *Aetna Casualty & Surety Co.* 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 in the Division of Workers' Compensation to prove that the motor vehicle accident in which its insured was injured is compensable under the Workers' Compensation Act.

Delaware Workers' Compensation

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

Paul V. Tatlow

The claimant's appeal is denied. The Superior Court finds that the Board properly determined that the claimant's 2014 surgery, while necessary and reasonable, was not causally related to the 2001 work injury.

Vicki Fountain v. McDonald's, (C.A. No. S15A-07-005 MJB - Decided June 30, 2016)

The claimant injured her back on August 12, 2001, when she slipped and fell during the course of her employment. Following the work injury, the claimant received a substantial amount of medical treatment that was paid for by the carrier. The claimant filed a DACD petition, seeking payment for medical expenses incurred for treatment to the low back with Dr. Balu and Dr. Uthaman.

At the March 27, 2006, Board hearing, evidence included testimony that the claimant had a significant past medical history, having undergone surgery for developmental scoliosis in the early 1970s. Dr. Balu, as the claimant's expert, testified that the claimant suffered from lumbar facet syndrome, lumbar radiculopathy and post-traumatic spondylolisthesis. Dr. Balu testified that, in his opinion, all three of those conditions were causally related to the work injury. Dr. Sopa, as the employer's medical expert, testified that not all of the claimant's treatment was related to the work injury but, rather, some of it was due to the scoliosis and degenerative condition. The Board found in favor of the claimant and determined that the work accident aggravated the claimant's pre-existing condition and that the lumbar facet syndrome, lumbar radiculopathy and post-traumatic spondylolisthesis were caused by her work injury.

The petition that became the subject of the Superior Court appeal was a DACD petition filed much later in 2014 seeking compensation for a lumbar spine surgery the claimant had on September 25, 2014. At the June 19, 2105, hearing before the Board, Dr. Yalamanchili, the treating surgeon, testified that during surgery he found substantial disc problems at several levels as well as severe nerve impingement. He further testified that his September 2014 surgery involved a decompression spinal fusion, which was necessary, reasonable and related to the 2001 work injury. Dr. Stephens testified on behalf of the employer that, in his opinion, the claimant's lumbar complaints were not causally related to the work injury and that the claimant most likely would have needed the spinal fusion surgery regardless of whether she ever had the work injury. The Board found in favor of the employer, concluding that the claimant had the same lumbar complaints prior to the work injury as she did following it, which supported the opinion of Dr. Stephens that the surgery and related treatment were causally related to the scoliosis surgery and degenerative arthritic changes, not the work injury. Therefore, the Board found that the claimant failed to meet her burden of proof and did not establish that the 2014 surgery and related treatment were compensable.

On appeal, the claimant raised three issues: (1) the doctrines of collateral estoppel and res judicata precluded the Board from relying on Dr. Sopa's prior medical opinion; (2) the Board erred in permitting the employer to present expert medical testimony and a defense to the petition; and (3) the Board's decision was not supported by substantial evidence. The Board reviewed and rejected each of those assertions.

On the collateral estoppel and res judicata doctrines issue, the court found that neither one applied since, while the testimony of Dr. Stephens referred to the prior testimony years ago of Dr. Sopa, nowhere in that testimony did Dr. Stephens indicate that he relied on those opinions. Rather, the testimony makes it clear that Dr. Stephens came to an independent opinion after evaluating the claimant and reviewing extensive medical records. The court also commented that the issue in the current petition was different from that in the prior petition because here the question was whether there was substantial evidence to support the Board's decision that the 2014 surgery was not causally related to the work injury. Therefore, the Board's finding was neither inconsistent with nor contradictory of the prior decision issued in 2006.

With regard to the argument that the Board had erred in permitting the employer to present expert medical testimony in defense of the petition, the evidence did show that the employer's counsel had been late in producing the expert report of Dr. Stephens and in submitting a pre-trial memorandum. However, the court concluded, as had the Board, that there was no violation of Board Rule 9 in the production of the expert report as this was not a claim for permanent impairment. As to the pre-trial memorandum, the court agreed with the Board that its late submission did not preclude a defense since the real question is whether there had been any unfair surprise to the claimant. The court concluded that there was no unfair surprise to the claimant since the causation defense was a common one in this type of case and claimant's counsel had vigorously cross-examined Dr. Stephens.

As to the final argument that the Board's decision was not supported by substantial evidence, the court concluded that Dr. Stephens clearly had sufficient information on which to base his opinion, including his evaluation of the claimant and review of extensive medical records. It was true that there were some medical records that he had not reviewed, but he had reviewed those that were critical to the issue before the Board. His opinion that the 2014 surgery and related treatment were reasonable and necessary to address the claimant's medical condition, but were not causally related to the 2001 work injury but, rather, were directly caused by the 1975 scoliosis surgery, was an opinion that was supported by substantial evidence. As such, the claimant's appeal was denied. ||

Side Bar

The court granted oral argument, which they do not typically do in most appeals. This suggests that the court did take a high level of interest in the legal arguments raised by claimant's counsel as the appellant. Nevertheless, the court in its opinion affirmed the Board's decision, which illustrates that it is extremely difficult to obtain a reversal from the appellate courts in a workers' compensation appeal.

News from Marshall Dennehey

Ashley Talley (Philadelphia, PA) obtained a favorable decision on a claim petition that sought to impute liability for significant injuries to the left elbow and left wrist as a result of the claimant's heavy-duty employment. The claimant was employed as a cemetery grounds keeper for a large landscaping company. In his petition, the claimant alleged a total of six injuries, including multiple tears in the left wrist and elbow from removing a stone foundation at work. Surgery had been recommended by the claimant's treating physician, the payment of which was contested by the defendant. After considering both factual and medical evidence from both parties, the Workers' Compensation Judge ultimately denied the majority of conditions being alleged by the claimant, although the judge granted benefits for two of the "lesser" injuries. However, this was a limited award as the judge also granted a termination for one of the liable injuries. As such, the defendant's future liability was significantly reduced in terms of both medical and indemnity exposure.

Tony Natale (Philadelphia, PA) successfully defended a Lehigh Valley textile facility in an appeal stemming from litigation involving a neck and shoulder injury. In the underlying litigation, Tony convinced the Workers' Compensation Judge that the claimant's departure from work after a shoulder injury was unrelated to that injury. On appeal, the claimant argued that the judge relied on speculative evidence presented by the employer to support a non-work-related disability. Tony argued to the Workers' Compensation Appeal Board that the underlying evidence at issue marked a legitimate area of inquiry and examination, and the end result was that the claimant's credibility was suspect. The Board agreed, and the appeal was dismissed.

Tony Natale (Philadelphia, PA) was successful in defending a Berks County mushroom farm in an action involving incessant medical treatment stemming from a work-related low back injury. The claimant lives in Berks County and treated with a Philadelphia physician for what the employer argued was palliative, non-essential pain relieving modalities. Tony was able to make a legal argument that allowed the Workers' Compensation Judge to find in the employer's favor without any review of the treatment in question. All payment allegations for medical treatment at issue were dismissed based on a *res judicata* finding by the judge. II