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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

The Supreme Court holds that Heart and Lung benefits are not subrogable against an injured worker's recovery from a third party tortfeasor.

Pennsylvania State Police v. WCAB (Bushta); 14 WAP 2017; May 29, 2018; Justice Todd

The claimant was a Pennsylvania State Trooper who suffered multiple injuries when his state vehicle was struck by a tractor trailer. The employer issued a Notice of Compensation Payable (NCP) acknowledging the injury. The NCP stated that the claimant would be paid salary continuation Heart and Lung benefits by the employer.

The claimant later settled a third party case for $1,070,000. The employer filed a petition seeking subrogation against the settlement proceeds. In connection with that petition, the employer and the claimant entered into a stipulation in which it was agreed that the claimant had been paid $56,873.13 in workers' compensation benefits. However, the claimant never directly received them because he was being paid Heart and Lung benefits. The workers' compensation benefits were paid directly to the employer in order to avoid the need for the claimant to remit those benefits back, pursuant to the Heart and Lung Act. The stipulation set forth an amount the employer was entitled to as reimbursement of their net lien, based on the amount of workers' compensation benefits the employer paid. The lien did not include the benefits paid under the Heart and Lung Act. The Workers' Compensation Judge approved the stipulation and adopted it as a final order.

One week prior to signing the stipulation, the Commonwealth Court issued its decision in *Stermel v. WCAB (City of Philadelphia)*, 103 A.3d. 870 (Pa. Cmwlth. 2014), in which it held that the employer was precluded from subrogation for its payment of the claimant's medical bills and wage loss benefits due to the anti-subrogation provision in §1720 of the Motor Vehicle Financial Responsibility Law for Heart and Lung benefits. The court noted that, while Act 44 of the Workers' Compensation Act repealed §§ 1720 and 1722 of the MVFRL—permitting subrogation of benefits under the Act—the Legislature did not eliminate the prohibition against subrogation of Heart and Lung benefits.

Consequently, the claimant appealed the judge's decision. Because all of the benefits he received were pursuant to the Heart and Lung Act, the claimant argued they were not subrogable. The Workers' Compensation Appeal Board held that because *Stermel* was law at the time the stipulation was signed, the claimant was not bound by the concessions in it and voided the stipulation. The Commonwealth Court affirmed.

On appeal to the Supreme Court, the employer argued that, because the claimant was entitled to benefits under the Workers' Compensation Act and the Heart and Lung Act, the benefits to which the employee was entitled to under the Act are subject to subrogation. According to the employer, the right of subrogation to compensation payable under the Act applies whether the employer actually pays workers' compensation benefits to the claimant.

The Supreme Court disagreed and affirmed the decision of the Commonwealth Court. The court noted that the Heart and Lung Act requires the employee to turn over to the employer all workers' compensation benefits "received or collected." It follows that, in cases where the employee does not actually receive or collect workers' compensation benefits, there is no basis for subrogation. The Supreme Court further rejected the employer's argument that the mere acknowledgment of a work injury in a NCP and a specification of the amount of benefits an injured employee would be entitled to under the Act does not transform

an injured employee's Heart and Lung benefits into workers' compensation benefits under the MVFRL. II

A firefighter gave timely notice to the employer that her cancer was work-related; therefore, benefits were payable from the date of disability in 2004, not as of the date the claim petition was filed in 2011.

City of Pittsburgh and UPMC Benefit Management Services, Inc. v. WCAB (Flaherty); 29 C.D. 2018; filed Jun. 1, 2018; Sr. Judge Pellegrini

The claimant worked as a firefighter for the employer for 16 years. In August of 2004, a diagnosis of breast cancer was made and a mastectomy performed. The claimant stopped working on September 9, 2004. In July of 2011, the Workers' Compensation Act was amended to create a new occupational disease provision that grants a new presumption of compensable disability for firefighters who suffer cancer. Sometime after that, the claimant received a letter from her union, informing her of the new firefighter cancer presumption law. This caused the claimant to question whether there was a connection between her job and her cancer. As a result, on September 23, 2011, she filed a claim petition. The claimant did not receive actual confirmation of the link between her cancer and work until several months after the petition was filed.

In granting the claim petition, the Workers' Compensation Judge found that the claimant filed her petition within 300 weeks and was entitled to the presumption under § 301(f) of the Act. The judge further concluded that, even in the absence of the presumption, the claimant met her burden of proving that her cancer was caused by her occupational exposure as a firefighter. The judge awarded benefits commencing September 9, 2004. The employer appealed to the Appeal Board, which reversed the judge's decision in part. The Appeal Board concluded that the claim petition was filed 367 weeks after her last date of employment. They also held that the claimant was not entitled to the presumption. The Board nevertheless agreed that the claimant did meet her burden of proving that her cancer and disability were caused by occupational exposure. The Board remanded the matter for a determination as to when the claimant first discovered her cancer was possibly related to her work as a firefighter and when notice of the possible connection was given.

On remand, the Workers' Compensation Judge found that the claimant failed to show that she provided notice within 21 days of discovering her cancer was possibly related to occupational exposure. According to the judge, the claimant should have filed her claim petition within 21 days from the day she received the union's letter. Instead, she waited 120 days to do so. Consequently, the judge awarded benefits as of the date the claimant filed her claim petition. The employer appealed, and the Appeal Board partially reversed, concluding that the notice began once the claimant received the medical report establishing causation.

The employer appealed to the Commonwealth Court. The issue was whether the claimant filed her claim petition within 21 days of knowing her cancer was possibly work-related, thereby entitling her to compensation from the date of disability as opposed to the date her claim petition was filed. According to the court, a claimant must have more than just a suspicion about causation for the clock to start on notice under § 311 of the Act. A claimant does not know of the possible relationship between a disease and work until informed by a medical expert. In this case, the claimant did not obtain medical confirmation until after she filed her claim petition. Although she did not file her petition within 21 days of receipt of the letter from the union, the court nevertheless concluded that by filing her claim petition within 120 days of receipt of the letter, she complied with the "reasonable diligence" requirement of § 311 of the Act. II

The Commonwealth Court analyzes the retroactive effect of Protz II.

Paulette Whitfield v. WCAB (Tenet Health System Hahnemann LLC); 608 C.D. 2017; filed Jun. 6, 2018; Judge Cohn Jubilerer

The claimant suffered a work injury in 2002, requiring her to undergo low back surgery. In 2006, an IRE was performed using the Fifth Edition of the AMA Guides. The IRE physician concluded the claimant had an impairment rating of 44%, and the Workers' Compensation Judge modified the claimant to partial disability status as of the date of the IRE. The Appeal Board affirmed the judge's decision on June 1, 2009. At no time did the claimant challenge the constitutionality of the IRE before the judge or the Board. The claimant last received benefits at her total disability rate in mid July of 2015.

One month after the Commonwealth Court's decision in *Protz v. WCAB (Derry Area Sch. Dist.)*, 124 A.3d 406 (Pa. Cmwlth. 2015) (Protz I), the claimant filed a petition in which she requested reinstatement to total disability status. The request was contested by the employer, who argued that: *Protz I* did not have retroactive effect; the claimant waived the constitutional issue; and the claimant's partial disability status had already been fully decided. The claimant's petition was denied by the Workers' Compensation Judge, and the Appeal Board affirmed on appeal. The claimant appealed to the Commonwealth Court, arguing that the *Protz* decisions applied, entitling her to restoration of her disability status from partial to total due to an unconstitutional and invalid IRE. The claimant also argued that reinstatement petitions may be filed within three years of the date of last payment, which she did.

The Commonwealth Court held that, because the claimant filed her petition within three years from the date of her last payment, as permitted by § 413(a) of the Act, she was entitled to seek modification of her disability status based upon the *Protz* decisions, which found the IRE provision unconstitutional. In the court's view, permitting claimants to seek modification under these circumstances does not prejudice employers or insurers by upsetting their expectation of finality. Such determinations are not truly "final" until three years have passed since the date of last payment. The court remanded this case for a determination as to whether the claimant continues to be totally disabled, despite the partial disability status she had pursuant to the IRE. II

Delaware Workers' Compensation

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Paul V. Tatlow

Although denying employer's termination petition based on medical evidence that claimant is not physically able to return to work, Board cautions claimant that treating physician needs to focus treatment plan on increasing activity, weaning off narcotic medications, with goal of returning to work.

Leanne Maoy v. First State Orthopedics, (IAB No. 1409920 – Decided May 4, 2018)

The claimant sustained a work injury to her thoracic spine, lumbar spine and lower extremities on February 14, 2014. The claimant was on an open agreement for temporary total disability. In September 2017, the employer filed a review petition, alleging the claimant was physically capable of returning to work and asking that her total disability benefits be terminated. The claimant opposed that petition on the basis that she remained totally disabled.

At the hearing before the Board, the claimant testified that she had worked for the employer for 21 years as a patient account representative, which she acknowledged was a sedentary job. Somewhat ironically, the claimant had worked in the workers' compensation and auto accident departments, helping patients navigate their insurance coverage issues. The claimant's testimony showed that she had injured her mid back, low back and both of her hips in a work-related fall. She also had a fracture at the T-1 vertebrae for which she later had a kyphoplasty procedure. The claimant stated that she felt worse after that surgery. Her testimony further indicated that she had all kinds of treatment, including physical therapy, acupuncture, injections, ablations and medical massage. She stated that she had many different types of injections but nothing had worked. The claimant's testimony showed that she had gained over 100 pounds since the work injury due to depression, inactivity and medications. Her typical day involved mostly staying in her bedroom on a recliner, taking naps throughout the day. She stated that she was in constant pain.

In an effort to meet its burden of proof, the employer presented deposition testimony from Dr. Rushton, who testified that, based on the claimant's subjective complaints, surgery would not be warranted. Also, based on the diagnostic studies, there did not appear to be any surgically amenable diagnosis. It was Dr. Rushton's opinion that the claimant was able to work and could at least do sedentary full-time work. The claimant's medical evidence consisted of deposition testimony from two experts. Dr. Ginsberg testified that he had treated the claimant up until May 3, 2017. In his opinion, the claimant was permanently and totally disabled from any and all work. The claimant's other expert, Dr. Sundararajan, a pain management physician, had treated the claimant six times. His opinion was that the claimant could possibly do some type of work but could not do it on a sufficiently consistent basis to obtain gainful employment.

The Board noted that, as the moving party, the employer had the burden of showing that the claimant was not completely incapacitated or, in other words, was medically employable. The Board resolved the dispute between the medical experts by accepting the claimant's evidence and finding that the employer had not met its burden of proving that the claimant was physically capable of returning to work. The Board did not agree with Dr. Rushton that the claimant could perform full-time sedentary work, but they also did not agree with Dr. Ginsberg that the claimant would never return to work and was permanently and totally disabled. Instead, the Board accepted the opinion of Dr. Sundararajan that, while the claimant may be able to perform some type of work, she could not do it on a regular basis. The Board reasoned that, while increased activity would be beneficial for the claimant, it was not yet the right time to put her in a structured work environment.

Interestingly, the Board did go to some length to criticize the claimant's current medical treatment. They pointed out that the recently started pain management treatment with Dr. Sundararajan was running the risk of falling into what they described as the "standard pain management medication malaise." The claimant was on a high dosage of Oxycodone. She testified that this medication makes her drowsy, which limits her activity. The Board stated that the claimant's current treatment plan is not serving her well. Instead, it should be focused on increasing her activity tolerance, weaning her off the narcotic medications and ultimately getting her to return to work. The Board went so far as to state that the lack of an attempt by the claimant or her treating physicians to implement a meaningful treatment plan designed to improve her functionality and ability to return to work will reflect negatively if the employer should refile for termination of benefits in the future. However, based on the current absence of any real attempts to address the issues that are preventing the claimant from a successful return to work, the Board concluded that she was, in fact, unable to return to work. The employer's petition was denied. ||

New Jersey Workers' Compensation

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Appellate Division concludes that Judge of Compensation is not bound by the conclusional opinions of any one or more, or all of the medical experts.

Kordek v. Innovative Manufacturing, Docket No. A-0006-16T3, 2018 N.J. Super. Unpub. LEXIS 665 (App. Div., decided Mar. 23, 2018)

On November 2, 2011, the petitioner injured his right shoulder and chest when the machine he was operating malfunctioned, causing a piece of rebar to strike him about the chest and shoulders. The petitioner filed a claim with the Division of Workers' Compensation, alleging injury to the "chest, hand, shoulder (right) and body resulting in orthopedic disability[.]" The claim did not specifically allege injury to the cervical spine. The respondent denied the claim as to the nature and extent of the petitioner's permanent disability of the right shoulder and chest, and in its entirety with regard to the allegations of causally-related disability of the cervical spine.

At the conclusion of trial, the Judge of Compensation entered an order awarding the petitioner 37.5% of permanent partial disability for the right shoulder and 5% of permanent partial disability as to the chest. On the issue of causal relationship as to the petitioner's cervical spine, the judge reached the following conclusion:

> Petitioner has failed to demonstrate by a preponderance of the evidence that his neck disability is causally related to the injuries he suffered in the November 2, 2011, accident. In reaching this conclusion, the Court did not find petitioner's testimony that he felt neck pain immediately following the accident to be credible or convincing given the absence of any such complaints in the records immediately following the accident. The January 13, 2012, office record [is] the earliest report wherein which it is noted that petitioner complained about injuries to his head and neck, resulting in . . . an MRI [which] revealed degenerative changes and disc disease throughout the cervical spine. [T]his pathology is unlikely to have been caused by the traumatic work accident that occurred only two months earlier.

As such, the judge dismissed the petitioner's allegations of causally-related permanent disability of the neck. The petitioner appealed the court's dismissal, contending the ruling was not supported by substantial and credible evidence in the record.

In affirming the Judge of Compensation's dismissal of the petitioner's cervical allegations, the Appellate Division found that the judge had undertaken a comprehensive review of the evidence and that her decision was based on that evidence, which she found to be credible. As the Appellate Division reasoned:

> [T]he medical experts on either side [had] dramatically different opinions. [Petitioner's expert was] of the opinion that petitioner did suffer an injury and disability to his cervical spine as a result of this accident, but that it was not the focus of immediate treatment[.] Respondent's expert assert[ed] that it [was] significant that petitioner failed to immediately disclose or seek medical attention for his neck pain . . . and concluded that any disability to the neck [was] unrelated to the accident. In light of the divergent expert medical opinions, the judge of compensation considered the objective medical evidence contained in the MRI of January 2012[,] the emergency room records from the date of the accident[,] and the absence of petitioner's complaints of neck pain until on or about January 23, 2012[,] in determining that petitioner had failed to sustain his burden of proof that his cervical spine condition was related to his November 21, 2011, work injury.

As the Appellate Division concluded, a Judge of Compensation is not bound by the conclusional opinions of any one or more or all of the medical experts. See *Kaneh v. Sunshine Biscuits*, 321 N.J. Super. 507 (App. Div. 1999). "Accordingly," the Appellate Division concluded, "we will not reverse a judgment simply because the judge gave more weight to the opinion of one physician over another." See *Smith v. John L. Montgomery Nursing Home*, 327 N.J. Super. 575 (App. Div. 2000). II

Side Bar

In finding that the petitioner's testimony as to his cervical pain lacked credibility, the Judge of Compensation relied heavily on the records of the petitioner's treatment with Dr. Seiler on December 5, 2011, and December 29, 2011. Although it was abundantly clear from the medical records that the petitioner made no mention of neck pain until on or about January 23, 2012, the absence of any complaints during this period of time did not seem to be dispositive here. Rather, the Judge of Compensation placed great weight on the fact that when explicitly questioned by Dr. Seiler on December 5, 2011, and again on December 29, 2011, the petitioner specifically denied having any neck pain and was shown to have a full range of motion of the neck. "The absence of any such complaints," the judge concluded, "is problematic."

Florida Workers' Compensation

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Linda W. Farrell

First District Court of Appeals holds 120-day rule is an affirmative defense that must be pled timely and specifically by claimant.

Harbor Freight Tools, Inc. and Safety National Casualty Corp./Corvel v. Patricia Whitehead, DCA#: 17-3194, Panel Judges: Lewis, Kelsey, Winsor

This claim involved a low back injury and request for fusion surgery. The employer/carrier asserted a major contributing cause defense. The claimant argued that the employer/carrier had not denied the claim or condition within 120 days. Therefore, it could not argue a major contributing cause defense. The employer/carrier argued that the claimant had not raised his defense timely.

The Judge of Compensation Claims pointed to an email exchange and doctor depositions where the 120-day argument had been discussed. The judge found that the employer/carrier was timely placed on notice of the the claimant's position. Therefore, the judge awarded the surgery and other benefits because the employer/carrier had not challenged the condition within 120 days.

The First District Court of Appeals reversed the judge's ruling. The court held that a claimant's defense of an employer/carrier's waiver to compensability of an accident or specific injury/condition outside of 120 days is an affirmative defense that must be timely raised and specifically pled. II

Update regarding Patriot National, Inc.

Patriot National founder Steven Mariano has entered into a consent judgment wherein he must pay creditors $1.67 million for personal loans he defaulted on in 2016 per a Broward County Circuit Court Judge.

Also, a judge has approved a Chapter 11 reorganization plan for Patriot National. The plan will result in the transition of ownership from its public shareholders to certain funds and accounts managed by each of Cerberus Business Finance, LLC and its affiliates (Cerberus) and TCW Asset Management Company LLC. Patriot National expects to emerge from Chapter 11 in the second quarter of 2018. II

CA Insurance Company suing to get back settlement funds based on fraud.

The Ninth U.S. Circuit Court of Appeals has reversed the dismissal of an action against former NFL player Brad Culpepper, now an attorney in Florida, for alleged fraud in a California workers' compensation case. This case stems from a 2000 date of injury that determined Culpepper was 89% disabled. The claim later settled for $175,000. Two years after settlement, Culpepper appeared on the TV reality show "Survivor," where he was seen running and kickboxing—contrary to his claimed disabilities. California had previously allowed athletes who visited the state to file workers' compensation claims. However, the state changed the law in 2013. A 2012 study showed that from the early 1980s, about 4,500 players had collectively obtained roughly $747 million from the California Insurance Guarantee Association. II

Two Honduran citizens indicted for workers' compensation fraud.

Fanny Melina Zelaya-Mendez (39, Jacksonville) and Roger Omar Zelaya-Mendez (33, Jacksonville) have been indicted on charges of conspiracy to commit wire fraud and illegally re-entering the United States after a prior deportation. Each wire fraud count carries a maximum penalty of 20 years in federal prison. The illegal re-entry count carries a maximum penalty of two years' imprisonment. The indictment also notifies the defendants that the United States intends to seek forfeiture of $1,075,180, the approximate amount of proceeds obtained as a result of the wire fraud offenses, as well as $286,135 and a pick-up truck that were seized from Roger Omar Zelaya-Mendez on April 6, 2018.

According to the indictment, Fanny Melina and Roger Omar Zelaya-Mendez facilitated the employment of undocumented aliens illegally living and working in the United States by establishing shell companies that provided workers to construction contractors and subcontractors. By obtaining and paying the workers through the defendants' shell companies, the contractors and subcontractors avoided responsibility for ensuring that: (1) the workers were legally authorized to work in the United States; (2) required state and federal payroll taxes were paid; and (3) adequate workers' compensation insurance was provided.

The Zelaya-Mendezes applied for workers' compensation insurance policies to cover estimated payrolls of a set amount at the shell companies. They then "rented" those insurance policies to numerous construction contractors and subcontractors who employed hundreds of workers. The contractors and subcontractors wrote payroll checks to the defendants' shell companies for the work performed by the undocumented alien workers. The Zelaya-Mendezes then cashed those payroll checks and distributed the cash to the construction crew leaders, who in turn paid the workers in cash. The defendants kept 4% of the amount of each payroll check as a "rental" fee for the workers' compensation insurance policies.

The Zelaya-Mendezes cashed payroll checks totaling $26,979,514, and their "rental fees" totaled $1,075,180. Had a workers' compensation policy been purchased for a payroll of $26,979,514, the policy would have cost $6,683,481. The policies the defendants purchased and then "rented" out were for estimated payrolls of between $85,800 and $120,800, and the insurance company issued those policies for annual premiums ranging from $16,787 to $27,581. II

News from Marshall Dennehey

Greg Bartley (Roseland, NJ) successfully defended a national home improvement store in the litigation of a claim petition. The petitioner alleged that, as a result of his employment with the retailer, he developed back problems and was in need of medical treatment. Greg was able to call into question the petitioner's credibility, as well as that of the petitioner's expert doctor. The Judge of Compensation found that the petitioner did not sustain the burden of proof. Therefore, both the motion for medical and temporary benefits and the claim petition were dismissed, with prejudice.

Ross Carrozza (Scranton, PA) obtained a favorable Federal Black Lung decision. The claimant, a miner with more than 23 years of coal mine employment, had two expert opinions placed into evidence, while the defense also placed two expert opinions into evidence. The judge determined that one of Ross's defense experts provided the most credible opinion and evidence-of-record based on his thorough review of tests and records and the thorough history and examination he conducted. The claimant's medical expert witnesses were not found to be the most credible due to the flawed histories they secured concerning the claimant's past smoking history and last coal mine employment duties, which Ross pointed out during his cross-examination. As a result, Ross was able to secure a favorable decision denying the Federal Black Lung benefits in this matter.

Tony Natale (Philadelphia, PA) defended a New England-based research and management firm in the litigation of a penalty petition that involved issues of quasi-first impression in the Commonwealth of Pennsylvania. The case arose in the form of a penalty petition filed by the aggrieved medical provider who alleged a large sum of medical billings remained unpaid after the underlying litigation of a serious and permanent workers' compensation injury had been settled 12 years earlier. The judge held oral argument on the issues of constitutionality, laches and legal standing regarding the petition. The parties formulated an evidentiary record and prepared briefs on the issues involved. The judge ruled that laches applies to a Pennsylvania workers' compensation claim and that the inactivity of the aggrieved provider for 12 years after the settlement of the case prevented a finding of a reasonable cause of action for alleged non-payment of medical bills.

Michele Punturi (Philadelphia, PA) successfully prosecuted a Supersedeas Fund reimbursement recovery action with legal and factual issues of first impression, resulting in a $1 million recovery on behalf of a nationally recognized insurance carrier.

Michele Punturi (Philadelphia, PA) successfully defended a nationally-known car company in the litigation of claim and termination petitions. The claimant worked for the employer as an inventory clerk. While collecting parts and operating a company vehicle, the claimant was involved in an accident resulting in soft tissue injuries to the lumbar spine and chest. The claimant treated with the company physician and was released to return to work. Work was available, but the claimant failed to continue working. He then treated with a panel physician, who released him to return to work and who expanded the diagnosis to the neck and left shoulder. The claimant's attorney referred him to yet another doctor, who expanded the diagnosis further with respect to the teeth, neck, shoulder, lumbar spine and head. Michele established through dental records that the claimant had significant pre-existing dental issues and that the ER records contemporaneous to the accident failed to support any injuries to the mouth, teeth, neck, shoulder or head. The records also established that the claimant had a long-standing history of non-work-related lumbar complaints, which he failed to reveal during the litigation. The Workers' Compensation Judge ultimately found that the claimant fully recovered from the work-related injury of a soft tissue and chest contusion based upon the IME. He further concluded that the claimant failed to meet his burden of establishing any injuries beyond those injuries and/or that he was entitled to any disability benefits, other than for a few weeks, based upon the competent medical and factual evidence presented by the employer. II