MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 22 | NO. 10 | OCTOBER 2018

What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

Filing a reinstatement petition within three years of the date of the most recent payment of compensation entitles a claimant to seek a modificiation of disability status based on *Protz*, which struck the IRE process from the Act.

E.J. Timcho Jr. v. WCAB (City of Philadelphia); 158 C.D. 2017; filed Aug. 17, 2018; President Judge Levitt

The facts of this case are similar to those presented to the Commonwealth Court in a case from June of this year, *Whitfield v. WCAB (Tenet Health System Hahnemann, LLC)*, (Pa. Cmwlth., No. 608 C.D. 2017, filed June 6, 2018). Here, following a 2008 work injury, the employer asked the claimant to undergo an IRE on July 25, 2011. The IRE was performed pursuant to the 6th edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The IRE physician concluded the claimant had a 32 percent impairment rating. The employer then filed a modification petition, and on July 23, 2013, a Workers' Compensation Judge granted the petition. The claimant appealed to the Workers' Compensation Appeal Board, and the Board affirmed. The claimant then appealed to the Commonwealth Court. On appeal to the court, the claimant's sole argument was that the IRE physician did not comply with the AMA Guides. The claimant did not raise a constitutional challenge to § 306(a.2) (the IRE provisions of the Act). The Commonwealth Court affirmed the modification of the claimant's benefits, and the claimant filed no further appeals.

On January 5, 2016, following the Commonwealth Court's decision in *Protz v. WCAB (Derry Area School District)*, 124 A.3d 406 (Pa Cmwlth. 2015) (*Protz I*), the claimant filed a reinstatement petition, asserting that his total disability status should be reinstated because the *Protz I* court found § 306(a.2) of the Act unconstitutional. The employer then moved to dismiss the petition, arguing the claimant waived a constitutional challenge since he did not preserve that issue in his appeal to the Commonwealth Court. The employer's motion was granted, and the Board affirmed.

While the case was on appeal with the Commonwealth Court, the Pennsylvania Supreme Court issued its decision in *Protz II*, holding all of § 306(a.2) of the Act to be unconstitutional and striking it from the Act.

In light of *Protz II*, as well as the Commonwealth Court's decision in *Whitfield*, the court held that because the claimant filed his reinstatement petition within three years of the date of his most recent payment of compensation, he was entitled, as a matter of law, to seek modification of his disability status based on the *Protz* decisions. According to the court, the claimant did not waive the constitutional issue. The constitutional issue was not barred by the doctrine of administrative finality since the reinstatement petition was filed within three years of the date of most recent payment of compensation. The court remanded the case to determine whether the claimant continues to be disabled by his work injury. II

Delaware Workers' Compensation

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Paul V. Tatlow

The Board rules that the claimant did not commit fraud in certifying on the Workers' Compensation Fund eligibility form that he was not gainfully employed.

Donato Carmona v. WM Mechanical, (IAB No. 1370142 – Decided Aug. 22, 2018)

This case came before the Board on a motion filed by the Workers' Compensation Fund asserting that the claimant had committed fraud in certifying that he was not gainfully employed on February 22, 2016. Claimant's counsel opposed the motion and denied that any fraud had been committed.

Under the Delaware False Claims and Reporting Act, any person who knowingly presents a false claim, false record, or false statement will be subject to a civil penalty of not less than $5,500 and not more than $11,000 for each act constituting a violation. The Act defines the level of intent required to commit one of the offenses as "knowing" and "knowingly," meaning that the person who had the information had actual knowledge of it, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information. No proof of specific intent to defraud is required.

The Fund alleged that on or about February 22, 2016, the claimant knowingly provided a false statement when he indicated on the Workers' Compensation Fund Eligibility Certification Form that "I have not been gainfully employed due to my industrial accident."

In support of its claim, the Fund submitted a January 22, 2016, medical record in which the claimant's treating doctor indicated that the claimant did assist with a family tire business by doing administrative work. The claimant acknowledged there was a family tire business that was owned by his wife, but he denied having any ownership interest himself. The claimant further testified that in early 2016, he was in classes learning English, and he would go to the family business after class to do his homework. He also acknowledged that he would help customers locate tires once or twice a week, but he did not get paid for that work. He indicated it was only later in 2016 that he began working for the tire business 20 hours per week and began getting paid for that work.

The Board found the claimant's testimony credible; that he was not being paid for helping with the tire business in early 2016. The claimant had credibly explained that he would go to the business to do his homework but that his help with the business was minimal and unpaid. The Board further found that the medical record from the claimant's doctor containing the January 22, 2016, notation was not sufficient evidence that the claimant was "gainfully employed" at the time he completed the Eligibility Certification Form. According to the Board, the medical record showed that the claimant reported being enrolled in a college degree program and assisted with the tire business, which the Board indicated was the same explanation to which the claimant had credibly testified at the motion hearing. Therefore, the Board found that the evidence and all reasonable inferences to be drawn from it, considered in the light most favorable to the Fund, was insufficient to support a finding that the claimant had knowingly falsified a government document. II

Florida Workers' Compensation

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Linda W. Farrell

National Council on Compensation Insurance proposes a 13.4% decrease in Florida rates.

The National Council on Compensation Insurance (NCCI) proposed another decrease in workers' compensation rates to the Florida Office of Insurance Regulation. If approved, the 13.4 percent decrease would go into effect at the beginning of 2019. Despite two significant Florida Supreme Court cases that were decided in 2016, NCCI states that improvement in loss experience has offset the combined cost increases from these decisions. It will take years to realize the full effect of the court decisions. It is important to note that this year's filing is based on information received from policy years' 2015, 2016 and year-end 2017 data. II

Another one-time change case in favor of employer/carrier.

McClelland v. Highlands County School Board and Ascension Insurance, No. 1D17-4256, 1st DCA, Jul. 17, 2018

The claimant requested a one-time change in orthopedic physician on February 15, 2017. On the same day, the employer sent authorization and medical records to the one-time change doctor. Also on that same day, an email was sent to claimant's counsel granting the change and naming the new physician. The employer followed up on February 28, March 14 and March 17, 2017, with that physician. However, on March 21, 2017, the employer sent authorization and records to another physician, who agreed on March 23, 2017, to see the claimant. A fax was sent to the alternative physician with authorization. A fax was also sent to claimant's counsel with appointment information on March 24, 2017.

The Judge of Compensation Claims said that the narrow issue presented was, "What constitutes *authorization* of a change of physician?" Section 440.13(2)(f), Fla. Stat., says only that "the carrier shall *authorize*…" The judge held that each case must be reviewed in the "totality of the circumstances surrounding the request and authorization." The judge went on to say that the employer must act diligently in obtaining the agreement to treat by the named physician or must timely authorize a replacement once the initial doctor has refused to provide care. Here, the employer did just that. The claimant appealed, and the First District Court of Appeal affirmed without a written opinion. II

Side Bar

The carrier should name the physician within five days, and then work diligently to obtain an appointment.

Claimant attempted another constitutional challenge.

Lazaro Garcia-Ruiz v. Royal Pool/AIG Claims, No. 1D18-0858, 1st DCA, Aug. 24, 2018

The claimant attempted to challenge the constitutionality of assessing costs against a claimant when the employer/carrier prevails. The First District Court of Appeal affirmed the Judge of Compensation Claim's ruling assessing costs without a written opinion. II

TPD case involving justifiable refusal of suitable employment favorable to claimant reversed by 1st DCA.

Employbridge and Gallagher Bassett Services, Inc. v. Viviana Llanes Rodriguez, No.1D17-4424, 1st DCA, Sept. 7, 2018

The employer appealed an order awarding Temporary Partial Disability after the Judge of Compensation Claims found that the claimant's refusal to accept suitable employment offered by the employer was justifiable under Section 440.15(6), Fla. Stat. The First DCA reversed, simply stating that the record did not support the conclusion that the refusal was justifiable.

In a concurring opinion by Judge Thomas, he opined that a claimant's refusal must have some "plausible nexus" to the workplace injury or persuasive evidence that the refusal is necessary to protect the employee's health or safety. He felt that the employer had met its burden of proving that suitable employment was offered. Judge Osterhaus also issued a concurring opinion, pointing out that the claimant began working for the employer in its Tampa office, transferred to Largo and moved there to be closer to work. Following the work accident, she was offered a clerical position in Tampa. The Judge of Compensation Claims said her refusal was justifiable because of a 17-mile commute, language limitations, a single vehicle in the family mainly used by her husband during his odd work hours, no familiarity with public transportation, and the suggestion of dependence on other family members—to drive from Tampa to Largo to pick up the claimant, take her back to Tampa and then back to Largo at the end of the workday. Judge Osterhaus opined that the claimant offered ordinary, manageable and self-imposed commuting limitations rather than reasonable justifications for refusing the suitable work offered by the employer. A dissenting opinion by Judge Bilbrey indicated that the judge's ruling should be upheld because the judge believed that his view of the facts and conclusions led to an opinion that was supported by evidence in the record. II