MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 22 | NO. 11 | NOVEMBER 2018

What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

An airline employee who fell in a parking lot owned by the Department of Aviation was on the employer's premises and suffered a compensable injury.

Piedmont Airlines, Inc. and New Hampshire Insurance Company c/o Sedgwick Claims Management Services, Inc. v. WCAB (Watson); 468 C.D. 2018; filed Aug. 20, 2018; Sr. Judge Pellegrini

The claimant worked as a training supervisor for the employer and was given a badge that gave him access to certain areas of the Philadelphia International Airport, including employee parking lots. The Department of Aviation (DOA) issued the badges, and the employer paid a processing fee for them.

On the date of injury, the claimant was driven to an employee parking lot by his wife. The parking lot was owned, operated and maintained by the DOA. As the claimant walked through the lot towards the shelter to catch a shuttle, he slipped and fell on a pile of snow, injuring his right hand. After the injury, the claimant unsuccessfully attempted a return to work. Later, he filed a claim petition after the employer issued a denial, indicating that the claimant was not on the employer's premises at the time of injury.

A workers' compensation judge granted the claim petition, concluding that the claimant slipped and fell while walking in an employee parking lot that required an identification card for entry in order to board the shuttle. The employer appealed to the Workers' Compensation Appeal Board, which affirmed.

The employer appealed to the Commonwealth Court, arguing that the claimant was not injured in the course of employment because the employer did not require the claimant to use the parking lot. In addition, the employer argued that the claimant's presence in the lot was not required because he did not drive to work or park a car in the lot on the date of injury.

The Commonwealth Court rejected the employer's arguments and dismissed the appeal. In doing so, the court held under § 301(c)(1) of the Act, the claimant was on the employer's premises at the time of the injury. Although employees were not mandated to use the DOA parking lots, the claimant's presence in the parking lot to catch the employee shuttle bus was so connected with his employment relationship that is was required by the nature of his employment. II

The fee review arena lacks the jurisdiction to determine reasonableness and necessity of treatment. Evidence presented by an insured that billing from a provider was contrary to Medicare policy does not preempt the issue of reasonableness and/or necessity.

Workers' Compensation Security Fund v. Bureau of Workers' Compensation, Fee Review Hearing Office (Scomed Supply, Inc.); 429 C.D. 2018; filed Oct. 5, 2018; Sr. Judge Leadbetter

The claimant was using a neuromuscular electrical stimulation (NMES) device, for which the provider dispensed supplies, including two replacement lead wires, on a bi-monthly basis, four times in a

six-month period, and billed the insurer on the same basis. The insurer denied payment, stating that the provider was only entitled to an annual payment for lead wires.

The provider filed applications for fee review that were denied. The provider appealed to the Medical Fee Review Hearing Office. At that level, the insurer presented evidence in the form of a Medicare Advantage Policy statement, which said that lead wires would "rarely" be medically necessary more often than yearly. The hearing officer awarded payment for the lead wires, holding that the medical necessity and reasonableness of treatment is determined through the Utilization Review Process. According to the hearing officer, the fee review arena lacks the jurisdiction to determine the reasonableness and necessity of treatment.

The insurer appealed to the Commonwealth Court and argued that, because payment for lead wires supplied more often than annually is contrary to Medicare policy, this preempts the issue of reasonableness and/or necessity, removing it from the utilization arena and putting it into the medical fee review arena.

The Commonwealth Court disagreed. The court noted that the fee review process presupposes that liability has been established. According to the court, the insurer's remedy would have been through the utilization review process was not a defense in the fee review process. **II**

A claimant's change in disability status based upon an IRE still being litigated at the time of Protz II has retroactive application, and a decision modifying the claimant to partial disability status was properly reversed.

Dana Holding Corporation v. WCAB (Smuck); 1869 C.D. 2017; filed Oct. 11, 2018; Judge Cohn Jubelirer

Following an April 6, 2000, work injury, the claimant underwent an IRE on June 20, 2014. The IRE physician gave the claimant an 11 percent impairment rating, using the Sixth Edition of the American Medical Association's (AMA) Guides to the Evaluation of Permanent Impairment (Guides). The employer filed a modification petition, which the claimant contested. Before the workers' compensation judge issued a decision, the Commonwealth Court issued its decision in *Protz v. WCAB (Derry Area School District)*, 124 A.3d 406 (Pa. Cmwlth. 2015) (*Protz I*), holding certain IRE provisions in § 306 (a.2) unconstitutional. However, because the court permitted IREs to be performed using the Fourth Edition of the Guides, the employer asked to reopen the record and introduce a new IRE, using that edition. The judge granted the request, and the IRE physician arrived at a 15 percent impairment rating, using the Fourth Edition of the Guides. The judge then granted the employer's modification petition. Appeals to the Appeal Board were filed by the claimant and the employer.

While the appeal was pending, the Pennsylvania Supreme Court issued their decision in *Protz II (Protz v. WCAB, Derry Area School District*, 161 A.3d A27 (Pa. 2017)). The Appeal Board therefore concluded that a reversal of the workers' compensation judge's decision was required since the judge relied on the now unconstitutional provisions of § 306(a.2).

The employer appealed to the Commonwealth Court, which affirmed the Appeal Board's dismissal of the judge's decision. In doing so, the court noted that the determination of the claimant's disability status was far from final and was being actively litigated when both *Protz* decisions were handed down. Additionally, while the appeal with the Board was pending, the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision that § 306(a.2) of the Act was unconstitutional and struck the section from the Act, entirely. The employer's modification petition was still being actively challenged at the time *Protz II* was decided. The court further rejected an argument made by the employer that they should receive a credit for the three years of temporary disability from the date of the June 20, 2014, IRE to the date of the *Protz II* decision on June 20, 2017. The court pointed out that this argument does not take into consideration that the IRE determination was never final and, in fact, the employer acknowledged it would not have been entitled to any credit if the IRE was ultimately overturned on the merits. Finally, the court also rejected the employer's argument that the claimant waived his right to challenge the unconstitutionality of the IRE because it was not raised before the workers' compensation judge or the Appeal Board. The court said that it clearly became an issue once *Protz I* was decided, noting that the employer made it an issue by seeking to reopen the record to introduce a new IRE that complied with *Protz I*. Moreover, the court indicated the constitutionality of a statute need not be raised before an administrative agency. **II**

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board denies the claimant's DACD petition seeking a 42 percent increase in the permanency to the left lower extremity where the evidence shows that, although the claimant underwent left knee replacement surgery, her condition remained the same thereafter.

Evelyn Cubbage v. Adecco/Procter-Gamble, (IAB No. 1353534 – Decided Sept. 12, 2018)

The employer in this case was successfully represented by my colleague, Linda Wilson. The claimant had injured both of her knees in a compensable work injury on November 9, 2009. The claimant filed a DACD petition seeking compensation for a 42 percent increase in the permanency to her left lower extremity. The hearing took place before the Board on August 31, 2018.

The evidence showed that in addition to her job with the employer, the claimant also worked as a pre-school teacher, where her duties required teaching and playing with students and cleaning the classroom. The claimant worked for the employer in order to supplement her income, and she worked there from 2003 until 2010, at which point she left that job since there was no light-duty work available.

The medical evidence showed that following the work injury, the claimant had a left knee arthroscopic surgery in 2010 and a similar procedure of the right knee later that same year. The claimant was out of work for about eight weeks following the first surgery and never returned to work with the employer following the second surgery. Eventually, the claimant had left knee replacement surgery on June 29, 2016, but testified that it did not relieve her pain. She was out of work for three months following that surgery and then returned to work at the pre-school job. She reported that she had the same problems both before and after the knee replacement surgery: not being able to get on the floor with her students, climb on the chairs in the classroom, or chase and play with the students. The claimant testified that at the time of the hearing, she was attending school to pursue a degree in early childhood education. She took over-the-counter medications as needed but was not taking any prescription medications. The claimant, who was 63 years old, testified that she had problems going up and down stairs both before and after the total knee replacement surgery.

Dr. Rodgers, who is a well known permanency expert, testified as the claimant's expert. He examined the claimant on January 23, 2012, and January 3, 2018. At the time of his initial exam, Dr. Rodgers concluded that the claimant had a permanent impairment to the left lower extremity of 8 percent using the Fifth Edition of the AMA Guides. When he later evaluated her on January 3, 2018, which was following the left knee replacement surgery, Dr. Rodgers again used the Fifth Edition of the Guides and considered the three categories for total knee replacement surgery, which are good results at 30 percent impairment, fair results at 50 percent impairment and poor results at 75 percent impairment. Dr. Rodgers concluded that the claimant's results were best characterized as fair. Therefore, he rated her with a 50 percent impairment, a 42 percent increase from the prior 8 percent permanency rating. However, Dr. Rodgers did agree that the only difference between the claimant's initial exam and her more recent exam with him was that her left knee flexion was 100 degrees at the initial one and 90 degrees at the recent one. All other portions of his 2012 and 2018 exams of the left knee were the same.

The employer's medical expert was Dr. Andrisani, who is board certified in orthopedic surgery. He examined the claimant on two occasions: June 24, 2016 and April 30, 2018. At his initial exam, which was just before the claimant underwent the left knee replacement surgery, Dr. Andrisani determined that the claimant had degenerative arthritis of both knees that was likely exacerbated in the work injury. He further was of the opinion that the claimant's pain in her knees was disproportionate to the degree and severity of her arthritis. He concluded that the claimant's source of pain was mostly neurological and that further surgery would not be likely to benefit her. At his second exam of the claimant on April 30, 2018, Dr. Andrisani concluded that the condition of the claimant's left knee was the same as it was prior to the June 2016 left knee replacement surgery. His opinion was that the claimant's 8 percent permanency rating, given to her prior to the left knee total replacement surgery, remained appropriate.

The Board reconciled the conflicting medical evidence by concluding that they accepted Dr. Andrisani's conclusions as being more credible than those of Dr. Rodgers. The Board noted that when Dr. Andrisani saw the claimant in 2018, she reported having undergone the left knee replacement surgery in June 2016 and thereafter had participated in physical therapy, but that this had not alleviated her pain. She reported no general changes in her left knee following the replacement surgery, although she had been able to maintain her employment as a pre-school teacher. Importantly, the Board accepted the testimony from Dr. Andrisani that at his 2018 exam, he found the claimant's condition to be the same as it had been prior to the 2016 left knee replacement surgery. Dr. Andrisani was found credible in testifying that the surgical procedure alone did not warrant an increased permanency rating and that the 8 percent permanency rating the claimant had been given prior to the surgery remained appropriate. The Board also noted that the claimant's own testimony indicated there had been no worsening of her left knee condition or any additional loss of use following the knee replacement surgery to warrant an increased permanency rating.

In conclusion, the Board stated that there was simply no objective evidence that the claimant's condition had worsened following the knee replacement surgery as to warrant any increase in her permanency rating. To the contrary, the evidence showed that the claimant's condition had remained substantially the same following the 2016 left knee total replacement surgery. Therefore, the Board concluded that the claimant had not met her burden of proof since there was no additional permanency impairment to the left lower extremity. The claimant's DACD petition was accordingly dismissed. ||

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division finds that injuries sustained by an over-the-road truck driver at a truck stop were not compensable as he was not engaged in the direct performance of his job duties at the time.

Kamenetti v. Sangillo & Sons, LLC, Docket No. A-0394-16T3, 2018 N.J. Super. Unpub. LEXIS 1883 (App. Div., Decided Aug. 8, 2018)

The petitioner was employed as an over-the-road truck driver by the respondent, an interstate trucking company headquartered in Manalapan, New Jersey. In October of 2015, the petitioner was hauling a time-sensitive load of produce from California to New Jersey. He stopped at a small truck stop in Wyoming, where he slept in his truck for the night. After waking the following morning, the petitioner drove to a larger truck stop that was equipped with a full-service station and a shower. He purchased 50 gallons of fuel, parked his truck and went into the facility where he took a shower. As he was dressing, he sat on a bench to put on his boots, and the bench collapsed. The petitioner fell to the ground and was injured. He filed a claim with the Division of Workers' Compensation, along with a motion seeking medical treatment and temporary benefits.

At the conclusion of trial, the Judge of Compensation found that the petitioner's injuries arose out of and in the course of his employment and granted the petitioner's motion. The judge referred to N.J.S.A. 34:15-36 which provides that:

> [W]hen the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer.

The judge reasoned that a truck driver who stops to fuel and to shower is doing so, so that he can continue the safe and efficient performance of his duties and, as such, is acting within the scope of his employment. As the judge explained:

> The very nature of the employment dictates that the facilities offered by interstate truck stops be used by interstate truckers. [O]wners of interstate trucking companies are fully aware of the degree to which both their trucks and their drivers are dependent on the frequent and efficient use of truck stops to facilitate the movement of goods they are transporting.

The respondent appealed. In reversing the Judge of Compensation's holding, the Appellate Division relied on *Jumpp v. City of Ventnor*, 351 N.J. Super. 44 (2001), in which an employee, whom the City required to drive from site to site to perform his duties, was permitted by the City to make "brief stops at local establishments for food and beverages or to use the restroom" and to "retrieve his personal mail from a local post office." One day, he went to the post office to check his mail, and he slipped while walking back to his vehicle. The *Jumpp* court found that his injury was not compensable, because "an employee who deviates from the temporal and spacial limits of his . . . employment tasks for the sole purpose of engaging in a personal errand or activity is simply not engaged in the direct performance of duties as required by the statute."

The Appellate Division found that applying the definition of "off-premises employment" in N.J.S.A. 34:15-36 and *Jumpp* indicates that the petitioner could not claim workers' compensation benefits. When he was injured, he was putting on his boots after showering, not "performing his . . . prescribed job duties at the time of the injury." Thus, he was not engaged in the "direct performance of duties" assigned or directed by the employer and was not in the course of employment. His injury, the Appellate Division reasoned, was non-compensable because the statute states that off-premises employees are to be compensated only for accidents occurring in the direct performance of their duties. As the Appellate Division concluded:

> [T]he statute means exactly what it says. In order to obtain compensation for an off-premises accident, the employee must demonstrate that his injuries were sustained in the direct performance of the duties assigned to him or directed by the employer. ||

Side Bar

In granting the petitioner's motion, the Judge of Compensation, in part, cited to cases under the "minor deviation" exception. Again, the Appellate Division relied on *Jumpp* in addressing this aspect of the judge's holding. In *Jumpp*, the Supreme Court held that in cases involving an alleged minor deviation, the question is whether that employee has embarked on a personal errand that would have been compensable if carried out by an on-premises employee. The Appellate Division in the instant case concluded that:

> Under *Jumpp*, Kamenettis's showering was not a minor deviation because it would not have been compensable if carried out by an on-premises employee in his home every day before going to work. Such employees are not in the course of their employment if they slip in the shower or fall while putting on their clothes. Rather, they are engaged in personal hygiene and personal grooming, each a quintessentially "personal errand or activity" excluded from coverage by the statute and *Jumpp*.

The Appellate Division reasoned that nothing in the statute or *Jumpp* suggests that off-premises employees are to be treated differently from on-premises employees in this context.

Florida Workers' Compensation

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Kelly M. Scifres

The Florida legislature has made it easier for first responders suffering from PTSD to receive medical care under workers' compensation.

A recent amendment aims to make medical care easier to access under workers' compensation for first responders suffering from PTSD. In the wake of the mass shootings at the Pulse nightclub in Orlando, Florida on June 12, 2016, leaving 49 people dead and wounding 53 others, the Florida Legislature amended Fla. Stat. Section 112.1815—First Responders' PTSD Bill—in 2018 to provide medical care and benefits for first responders suffering from PTSD.

Section 112.1815 Fla. Stat. was recently amended to include that a first responder who suffers PTSD during the course and scope of his or her employment sustains a compensable occupational disease within the meaning of section 440.151(4) Fla. Stat. The statute identifies 11 specific requirements for the compensability of a mental or nervous injury of a first responder, including: the worker witnessed a specific event, such as a deceased minor, or provided medical treatment or transportation to a deceased or injured minor; witnessed a death, including a suicide or homicide; or observed a deceased person who suffered grievous bodily harm that shocks the conscience. All of the requirements involve the death of an individual either before, during or after treatment by the first responder alleging PTSD.

Previously, a mental illness or injury had to be accompanied by a physical injury to be compensable pursuant to section 440.093 Fla. Stat. However, an amendment in 2007 to section 112.1815 expanded coverage to first responders only by providing medical care for any work-related mental illness, including PTSD, without an accompanying physical injury. The bill amended the section and added subsections 5 and 6 specifically for PTSD, further expanding coverage and benefits to first responders.

There is no requirement for an accompanying physical injury to meet the per se criterion for compensability of PTSD under the bill. The bill specifically indicates that compensable PTSD is not subject to apportionment for any pre-existing PTSD, is not limited to the 1 percent permanent impairment rating previously imposed on psychiatric conditions under section 440.15(3), or any limitation on temporary benefits under section 440.093. The notice period under the bill is the same as in other occupational diseases, extended to a period of 90 days from one of the qualifying events or manifestation of the disorder, whichever is later, but no later than 52 weeks after the qualifying event. The bill also requires employment agencies of first responders to provide training related to mental health awareness, prevention, mitigation and treatment.

Although most can agree the new bill will provide much needed care to workers affected by mass shootings and other mass tragedies, it is not without criticism. Many attorneys are already pointing out issues in the statutory language that will likely be the subject of litigation in the future. Further, it is unclear how specific provisions of the bill will be interpreted by the courts and read together with other sections of the statute, which may require further clarification by the legislature. II

Judge of Compensation Claims awards emotional support animal.

Evangeline Torain v. Duval County Public Schools/Johns Eastern Company, Inc., OJCC No. 16-003854RJH (Decision issued Sept. 14, 2018)

A Jacksonville District Judge of Compensation Claims has ordered an employer to reimburse an injured worker $2,370.50 for the purchase of an emotional support animal. The judge found that the employer waived its right to challenge medical necessity, citing the *Parodi* self-help case in support of the decision.

The claimant sustained a compensable injury in 2015 when she intervened in a fight between students and injured her right arm and shoulder. The claimant requested authorization of an emotional support animal upon recommendation from the authorized treating psychiatrist with whom she was treating for PTSD and anxiety symptoms. The employer obtained an IME, who opined the emotional support animal was not medically necessary. Thereafter, the employer sought the appointment of an EMA. The claimant argued against the EMA, citing the medical necessity of the request for medical care was established by operation of law per section 440.13(3) Fla. Stat., which requires the carrier to respond to a request for authorization from an authorized heath care provider by the close of the third business day after receipt of the request, otherwise the carrier consents to the medical necessity of such treatment.

Due to the conflicting medical opinions of the authorized treating provider and the employer's IME, the judge appointed an EMA, but permitted the claimant to argue her medically necessary position at the final hearing. The EMA opined that the emotional support animal was not medically necessary, and the opinion was challenged under cross-examination by the claimant. However, the judge declined to rule on the EMA's testimony, finding the employer waived its right to contest medical necessity pursuant to section 440.13(3) and *Parodi*.

The judge found the request for care was sent to the employer on November 30, 2017, and was received on December 12 or December 13, 2017, but the carrier never responded. A petition requesting the recommend care was filed on December 22, 2017, and the employer filed a response on January 2, 2018, denying the requested benefit based on medical necessity. The judge held that by the time the response was filed, the employer had already waived its three-day and ten-day limitations, which had passed as of December 23, 2017.

The judge noted in the order that, although the employer does not have to authorize the requested care in the 3/10 timeframe, the employer does have to respond. The judge also overruled the employer's objections that an emotional support animal is not medical treatment under the statute, finding it was recommended as a form of treatment by the authorized treating physician and based on the testimony on the authorized provider, the employer's IME, and the EMA. II

News from Marshall Dennehey

Marshall Dennehey Warner Coleman & Goggin has been named a "2019 Best Law Firm" in multiple practice areas, both nationally and across numerous regions of the country, by U.S. News – Best Lawyers®. Additionally, the firm's Appellate Advocacy and Post-Trial Practice Group was ranked both nationally and in the Philadelphia region for the very first time as an outstanding practice.

Michele Punturi (Philadelphia, PA) successfully defended a contracting and demolition company in Montgomery County, Pennsylvania. The claimant alleged that repetitive trauma, due to his job duties, resulted in an aggravation of his degenerative back and leg conditions, requiring surgery and bone grafting. According to the claimant, he worked 8 to 10 hours a day, five days a week, and his duties included: bending; carrying blocks, bags of concrete and mortar; shoveling; operating equipment, including jumping jacks and jack hammers; and lifting between 90 to 100 pounds. The claimant acknowledged that he had treatment for his back and leg symptoms prior to the work injury and that he last treated for back issues six months before beginning his work with the employer. He testified that his pain significantly increased after working with the employer. The claimant's medical expert opined that: (1) the claimant's physical labor and work activities resulted in the progression of his degenerative condition; (2) surgery was reasonable and necessary: and (3) he was completely disabled indefinitely. On cross-examination, however, this medical expert admitted that he had not reviewed the claimant's medical records dating back multiple years, nor had he compared pre- and post-inury records in rendering any opinions. Michele presented two fact witnesses who confirmed that the claimant failed to report a work injury, or that his work activities caused pain, or that the scheduled surgery he reported was in relation to his job. The workers' compensation judge concluded that, based upon the testimony of Michelle's fact witnesses and defense medical expert—who did review all pre- and post-medical records—the claimant failed to meet his burden of proof.

Michele Punturi (Philadelphia, PA) successfully defended a manufacturing company in the litigation of a termination petition. The claimant suffered a compensable right knee injury for which he received a period of total disability benefits. He ultimately returned to work with the use of a brace; yet he still complained of ongoing pain. The IME physician, a Board certified orthopedic surgeon, conducted a comprehensive physical examination and reviewed all the medical records, including the claimant's MRIs and x-rays, and concluded that the claimant had fully recovered from the work injury. The claimant failed to present any medical evidence because it was his position the employer did not meet its burden of proof. The termination petition was granted with no award of litigation costs to the claimant's counsel.

Tony Natale (Philadelphia, PA) successfully defended a Northeastern Pennsylvania manufacturing and supply company in an appeal involving high medical and indemnity exposure. The claimant suffered a shoulder strain while lifting at work. She returned to the job only to allege a recurrence of her shoulder disability shortly thereafter. She filed a reinstatement petition that was denied when the workers' compensation judge accepted Tony's defense that the recurrence was due to a non-work-related motor vehicle accident. Thereafter, the claimant travelled to Florida and underwent cervical disc surgery. Nearly a year after the surgery, she filed a petition alleging that the cervical disc herniation was caused by the original work injury, and the neck surgery and resultant disability were work related. The judge found the cervical disc herniation was not caused, aggravated, accelerated or worsened by the work injury, and the surgery was not payable. The claimant then filed an appeal to the Workers' Compensation Appeal Board, arguing that the judge disregarded substantial evidence of causation. The Board heard oral argument and ruled that the judge's ruling is free of error. II