MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 21 | NO. 12 | DECEMBER 2018

What's Hot in Workers' Comp

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2018

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

Paul V. Tatlow

1. The Superior Court affirms decision ordering the employer to reimburse the claimant for the full cost of his out-of-pocket expenses for medical marijuana, even though the total exceeded the amount ultimately found to be reasonable.

Giles and Ransome v. Patrick Kalix, (C.A. No. N17A-10-001 CEB – Decided Oct. 9, 2018)

This case illustrates some of the cutting-edge issues likely to arise with the emergence of medical marijuana usage by claimants. This claimant had chronic low back pain for which he had been on a number of narcotics. He requested and received a medical marijuana card from his treating physician, which he used at Delaware's first medical marijuana dispensary. For many months, he consumed amounts of marijuana that were far in excess of the 50 grams the Board determined to be a reasonable monthly amount. The employer challenged the amounts it was being requested to pay, arguing the claimant's high dosages amounted to drug abuse. The Board found in favor of the claimant, and the Superior Court affirmed. The decision points out that establishing the reasonableness of costs for medical marijuana is problematic since it is not within the Practice Guidelines nor is it part of the fee schedule. The court commented that in the absence of legislative guidance, the Board was well within its discretion to order the employer to reimburse the full expenses the claimant incurred while in the experimentation stage of determining the appropriate dosage and frequency.

2. The Superior Court reaffirms the Board's ability to rely on hearsay evidence in making its decisions.

Portia Garrett v. Amazon.com, Inc., (C.A. No. N17A-06-007 JAP – Decided June 1, 2018)

In her DCD petition, the claimant alleged she was sitting on a stool counting product when a co-worker operating a device known as a pick cart repeatedly pushed the cart into her, causing pain in her neck and left shoulder. In denying the petition, the Board relied on testimony from the employer's witness who stated that an accident recreation investigation took place. They were not able to recreate the incident in the way the claimant alleged it occurred, but the witness had not actually attended the investigation. The claimant moved to strike that testimony on hearsay grounds, but the Board denied the motion. On appeal, the Delaware Superior Court affirmed the Board's decision, stating the Board did not abuse its discretion in refusing to strike the testimony since the law is well established that the Board may disregard the strict application of evidentiary rules and consider hearsay evidence. Further, the court noted that there was no error of law since the Board's decision did not solely rely on hearsay evidence.

3. Personnel changes at the Industrial Accident Board during the past year.

The new Secretary of Labor is Cerron Cade. John Daniello, who was chair of the Board, and John Brady both retired during this year. The current Board members are Mark Murowany, who is the current chair, Mary Dantzler, William Hare, Robert Mitchell, Patricia Maull, Gemma Buckley, Peter Hartranft, Idel Wilson, Greg Fuller, Sr. and Vince D'Anna.

4. The employer is only required to reimburse for mileage, not tolls and parking expenses, incurred for attendance at medical appointments and picking up prescriptions and medical supplies.

Rebecca Failing v. State of Delaware, (IAB Hearing No. 1448351 – Decided June 6, 2018)

The claimant was seeking not only mileage reimbursement, but also tolls and parking expenses incurred in attending appointments with a treating physician. The employer argued that Section 2322(g), dealing with the reimbursement for attending appointments with a treating provider and obtaining medicine and supplies, clearly states "mileage" and not "travel expenses" and, therefore, does not include tolls and parking expenses. The Board agreed and distinguished this from other provisions in the Act that use the phrase "travel expenses," such as the one applicable to attending defense medical examinations. The Board's decision is currently on appeal to the Superior Court.

5. New workers' compensation rates.

The Delaware Department of Labor announced that the new workers' compensation rates effective July 1, 2018, establish an average weekly wage of $1,070.48. Accordingly, the maximum weekly compensation rate is now $713.65, and the minimum weekly compensation rate is $237.88.

6. Appellate courts clarify the evidence needed by the employer to successfully terminate the compensation benefits of an undocumented worker.

Magdalena Guardado v. Roos Foods, (C.A. No. S17A-05-003 RFS – Decided Feb. 7, 2018)

This was the second go-round on this case before the appellate courts. At the remand hearing before the Board, the employer presented testimony from both a vocational consultant concerning a Labor Market Survey as well as market evidence from a professor of economics regarding his research and data on the number of undocumented workers in Delaware. The Board granted the termination petition, and the Superior Court affirmed. The court stated that by combining the Labor Market Survey evidence and the reliable market evidence, the employer had established the appropriate nexus between actual jobs available and the prevalence of undocumented workers in those job categories. Thereby, they had successfully rebutted the claimant's showing that she was a *prima facie* displaced worker. The Delaware Supreme Court has more recently summarily affirmed the Superior Court's decision.

7. Legislature allows the Board to make use of secure email.

The legislature passed the bill effective July 17, 2018, amending the Act to include a provision allowing the Board to send hearing notices and decisions by secure email with an electronic receipt in place of the more costly and slower certified mail. This bill has the benefits of saving money for the state and allowing the parties and their counsel to receive much quicker notifications.

8. In a case of first impression, the Board denied the claimant's motion to assess a fine against the employer's medical expert on the basis that his expert fee exceeded the amount allowed under the Practice Guidelines.

Carol Streifthau v. Bayhealth Medical Center, (IAB Hearing No. 1432002 – Decided June 27, 2018)

The argument advanced by the claimant was that the $5,000 expert fee of the employer's medical witness violated the Act and was in excess of the amount permitted under the Practice Guidelines, which specifies that deposition testimony by a physician shall not exceed $2,000. The evidence showed that the fee in question included not only the deposition testimony but also the charges for reviewing records and conducting a pre-deposition conference. Further, the Board agreed with the employer's argument that the regulation in question putting a cap on expert fees is meant to limit the amount that an employer can be required to pay for a claimant's medical witness fees, which routinely occurs when the decision is in favor of the claimant. That provision is not meant to limit the amount an employer can choose to pay for its defense medical expert testimony. This case is currently on appeal before the Superior Court.

9. Interesting statistics from the Department of Labor.

The Department of Labor's *20th Annual Report on the Status of Workers' Compensation Case Management* shows that 7,760 petitions were filed in 2017, which continues an upward trend of filings for the fifth year in a row. The number of petitions heard by either a full Board or by hearing officers in 2017 were 4,505, a slight decrease of 75 hearings from the prior year.

The report comments that as far as Utilization Review requests in 2017, the Office of Workers' Compensation received 321 filings, a 13.7 percent decrease from the 372 filings made in 2016. Once again, chronic pain treatment and in particular pain medications continue to represent the treatment that was most challenged through the Utilization Review process. The report also indicates that the number of certified healthcare providers increased from 2,502 in 2016 to 2,755 in 2017, a 10 percent increase.

10. Statistics on appeals from Board decisions show that reversal rates continue to be extremely low.

The Annual Report from the Department of Labor gives the five-year cumulative summary of appeals from Board decisions. For the five-year period from 2013 through 2017, the Board rendered 1,931 decisions on the merits. From that number, only 186 were appealed, which is approximately 9.6 percent. Further, from that number of appeals taken, 178 were resolved and only 14 were either reversed and/or remanded in whole or in part. This represents a reversal rate of only 0.725 percent of all of the decisions made in that five-year period. It continues to be extremely difficult to overturn Board decisions on appeal. ||

TOP 10 DEVELOPMENTS IN FLORIDA WORKERS' COMPENSATION IN 2018

By Linda W. Farrell, Esquire (904.358.4224 or lwfarrell@mdwcg.com)

Linda W. Farrell

1. Rates continue to decrease despite *Castellanos* and *Westphal* cases from 2016.

The Florida Office of Insurance Regulation approved a 1.8 percent rate decrease that took effect on June 1, 2018. David Altmaier, Florida Insurance Commissioner, said: "National Council on Compensation Insurance has demonstrated through its rate filing that this decrease is an actuarially-sound response to the savings workers' compensation insurers have realized as a result of recent federal legislation." Another decrease of 13.4 percent proposed by the NCCI is expected to take effect at the beginning of 2019.

2. Florida legislature amends statute to provide for first responders' PTSD.

In the wake of the mass shootings at the Pulse nightclub in Orlando, Florida, on June 12, 2016, which left 49 people dead and 53 wounded, the Florida legislature amended Fla. Stat. Section 112.1815 to provide medical care and benefits for first responders suffering from PTSD. Otherwise known as the First Responders' PTSD Bill, Section 112.1815 Fla. Stat. was recently amended to include, for the purposes of Florida's workers' compensation, that a first responder who suffered PTSD during the course and scope of employment sustains a compensable occupational disease within the meaning of s. 440.151(4) Fla. Stat. The statute identifies 11 specific requirements for the compensability of a first responder's mental or nervous injury, including that 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.

3. TPD case involving justifiable refusal of suitable employment favorable to the claimant was reversed by First District Court of Appeals.

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

The employer appealed an order awarding TPD 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 claimant was first hired in the employer's Tampa office. She transferred to Largo and then moved there to be closer to work. Following the work accident, she was offered a clerical position in Tampa. The judge found that her refusal of this position was justifiable because of a 17-mile commute; her language limitations; a single vehicle in the family, mainly used by her husband during his odd work hours; her unfamiliarity with public transportation; and her suggestion of dependence on other family members to drive from Tampa to Largo to pick her up, 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. The First District Court of Appeal reversed the Judge of Compensation Claims, simply stating that the record did not support the conclusion that the refusal was justifiable.

4. Judge of Compensation Claims may consider a claimant's financial need relative to a request for an advance.

Anderson v. Broward County Sheriff's Office and Gallagher Bassett Services, Inc., (Fla. 1st DCA, No. 1D17-5151, July 25, 2018)

The claimant, a deputy sheriff, suffered a compensable injury in 2014. She was ultimately released to full duty and returned to work. In 2017, she requested a $2,000 advance in order to pay for an IME. The claimant had a base salary of $75,000 and also earned overtime doing off-duty security. She had not worked overtime in the two years preceding her motion due to two pregnancies. The employer argued that the claimant failed to show a financial need for the advance. It was the claimant's contention that she established eligibility based on her one percent permanent impairment rating and the fact that the purpose of the advance was to pay the expenses of an IME to support her pending petition for benefits. The Judge of Compensation Claims denied the motion for an advance, holding that she failed to present evidence that her income was insufficient to pay for an IME nor did she otherwise demonstrate a financial need for the advance. The First District Court of Appeals affirmed. The court held that a Judge of Compensation Claims may consider a claimant's financial need for an advance, even when the purpose of the advance is to pay for expenses related to establishing compensability or entitlement to benefits.

5. Claimant unable to overcome presumption of marijuana intoxication.

Bonita Brinson v. Hospital Housekeeping Services, LLC and Broadspire, No. 1D-17-505 (1st DCA, June 22, 2018)

After slipping and falling while at work, the claimant's supervisor drove her to take a post-accident drug test before medical care was to be provided. The claimant tested positive for marijuana, and the confirmation test was positive as well. The employer denied her claim in its entirety pursuant to F.S. 440.09(3), which states that "compensation is not payable if the injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs…"

Even though the employer was not a qualified drug free workplace, the claimant had signed a stipulation when hired acknowledging the employer's drug testing policy, which said that all employees who are injured are subject to a drug test. The claimant had also signed a "Drug Free Awareness" policy acknowledging that she "may be asked to provide (if there is reasonable suspicion) body substance samples…to determine whether illicit or illegal drugs…have been or are being used."

The claimant's case focused on attacking the limits of drug testing and the Act's reliance upon drug testing results. She presented two doctor witnesses who testified that the presence of drug metabolites does not conclusively indicate that drugs were active in the bloodstream or caused impairment. However, the First District Court of Appeals held that the claimant's experts also left open the question of whether she was under the influence when the accident occurred. The court stated, "Because their testimony didn't present clear and convincing evidence, she failed to rebut the presumption. Nor did the claimant argue that she had been tripped by a careless doctor or pushed by an unruly patient. She did not argue that the marijuana in her system was merely inactive residue of some fairly recent usage." If arguments along these lines were true, the court found, they may have rebutted the statutory presumption. The court affirmed Judge Lazzara's order denying benefits based on positive post-accident drug testing and found that the claimant failed to rebut the presumption that her injury was due to intoxication.

6. 1st DCA rules that statute of limitations was not tolled by fusion surgery hardware.

Ring Power Corp. and USIS v. Andrew Murphy, No. 1D17-1316, 1st DCA Fla., Feb. 23, 2018

The employer appealed a ruling from Judge of Compensation Claims, Thomas W. Sculco, in which he held that the statute of limitations was tolled by rods and screws from a fusion surgery. A few months after his 2006 work injury, the claimant had a fusion surgery where rods and screws were used to stabilize his spine while the bone grew back together. Within one year, the fusion was solid. Therefore, it was argued that they no longer performed any function, although they remained attached and inside of the claimant.

The employer last provided workers' compensation benefits in 2013. Later in 2016, the claimant filed a petition for benefits. The employer asserted a statute of limitations defense. The claimant cited Section 440.19(2), which states that the time period is tolled "for a period of one year from the payment of compensation or furnishing of remedial treatment." The claimant cited *Gore v. Lee County School Board*, 43 So.3d at 849, where the First District Court of Appeals held that the "continued use" of a medical apparatus will toll the statute of limitations. *Gore* involved a claimant who used a knee prosthesis and the court opined that the prosthesis counted as continual, remedial treatment. Judge Sculco agreed with the claimant and held that the statute of limitations was tolled due to the fusion hardware.

On appeal, the First District Court of Appeal said that *Gore* does not apply here because the claimant was not "using" the rods and screws. According to the court, the "rods and screws were used for a temporary purpose, but for years they have served no function at all. Therefore, their placement does not toll the statute of limitations."

7. One-time change case favoring the employer.

McClelland v. Highlands County School Board and Ascension Insurance, No. 1D17-4256, 1st DCA, July 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. On March 31, 2017, the employer sent authorization and records to another physician, and on March 23, that doctor agreed to see the claimant. A fax was sent to the alternative physician with an authorization, and a fax was also sent to claimant's counsel with information on a March 24, 2017, appointment.

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 timely authorize a replacement once the initial doctor has refused to provide care. Here, the employer did just that. The claimant appealed, but the First District Court of Appeals affirmed without a written opinion.

8. The 120-day rule is an affirmative defense that must be pled timely and specifically by the claimant.

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

The claimant suffered a low back injury and requested fusion surgery, to which the employer asserted a major contributing cause defense. The claimant argued that the employer had not denied the claim or condition within 120 days and, therefore, could not argue a major contributing cause defense. The employer argued that the claimant had not raised his defense timely. The Judge of Compensation Claims pointed to an email exchange and his doctor depositions where the 120-day argument had been discussed. Therefore, the judge found that the employer was timely placed on notice of the claimant's position and awarded the surgery and other benefits because the employer had not challenged the condition within 120 days.

The First District Court of Appeals reversed the judge's ruling, holding that a claimant's defense of an employer'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.

9. Judge of Compensation Claims offices on the move.

The Judge of Compensation Claims office in Panama City relocated to:

600 Grand Panama Boulevard, Suite 201
Panama City Beach, FL 32407.

The Orlando office has moved to:

225 S. Westmonte Drive, Suite 3300
Altamonte Springs, FL 32714

The Jacksonville Judge of Compensation Claims office has moved to:

1300 Riverplace Boulevard, Suite 300
Jacksonville, FL 32207

10. Judges of Compensation Claims update.

Timothy Stanton is now the judge in Gainesville, and Jacqueline Newman is our new Tallahassee judge. In April 2018, six Judges of Compensation Claims were re-appointed: Judges Almeyda and Forte of Miami, Judge Dietz of Sebastian/Melbourne, Judges Pitts and Sojourner of Orlando, and Chief Judge Langham. In August 2018, three current Judges of Compensation Claims, Holley and Humphries of Jacksonville and Winn of Pensacola, were nominated for re-appointment. Applicants have been nominated for the two Judge of Compensation Claims openings in Tampa and for one vacancy in Fort Lauderdale. II

TOP 10 DEVELOPMENTS IN NEW JERSEY WORKERS' COMPENSATION IN 2018

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Dario J. Badalamenti

1. Injuries sustained by an over-the-road truck driver while 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 Appellate Division found that applying the definition of "off-premises employment" in N.J.S.A. 34:15-36 and *Jumpp v. City of Ventnor*, 351 N.J. Super. 44 (2001), indicates that the petitioner was not entitled to workers' compensation benefits. At the time of his injury, the petitioner was putting on his boots after showering, not "performing his . . . prescribed job duties." Thus, he was not engaged in the "direct performance of duties" assigned or directed by the employer and was not in the course of his employment.

2. Judge relies on the opinion of the respondent's treating physician in finding that the petitioner failed to sustain her burden of proof and denying her motion for medical and temporary benefits.

Lebednikas v. Zallie Supermarkets, Inc., Docket No. A-2859-16T1 (App. Div., decided July 24, 2018)

In affirming the judge of compensation's ruling, the Appellate Division found that the judge considered the petitioner's physician's contrary opinion, but found the respondent's treating physician's opinion on causation to be more credible and persuasive. As the judge of compensation stated:

> [Respondent's physician's] education, training and experience along with his very clear and detailed testimony clearly reveals that he is an accomplished orthopedic surgeon who has specialized knowledge with regard to knee pathology, the causes for such pathology and the types of surgery to address it. [Respondent's physician's] explanation of petitioner's treatment, his use of the anatomic model to describe the knee condition and his explanation of the age-related breakdown of the prior, partial knee replacement hardware was credible and easy to understand.

3. Respondent ordered to pay for medical marijuana despite objection that New Jersey's medical marijuana law is preempted by federal law designating marijuana as a controlled substance.

Steven McNeary v. Freehold Township, Claim Petition Nos. 2007-10498, 2008-8094 and 2014-10233 (N.J. Division of Workers' Compensation, decided June 28, 2018)

The judge of compensation expressed particular concern over the potential to abuse the opioid drugs the petitioner's physicians found to be the only treatment alternative. As the judge concluded:

> I believe that medical marijuana is safer, it's less addictive, it is better for the treatment of pain. It is better for, in this particular case, the muscular spasticity which Mr. McNeary suffers from. The long term prognosis is better and, quite frankly, it is cheaper for the carriers. I think it's the right thing to do and I feel no moral or legal hesitancy in that.

4. "Control test" and "relative nature of the work test" used to find that the petitioner was the respondent's employee within the meaning of New Jersey's workers' compensation act.

Hopkins v. Capone Transportation, LLC, Docket No. A-5180-14T2, 2018 N.J. Super. Unpub. LEXIS 871 (App. Div., decided Apr. 16, 2018)

In affirming the judge of compensation's holding, the Appellate Division relied on *Pollack v. Pino's Formal Wear & Tailoring*, 253 N.J. Super. 397 (App. Div. 1992), where the court set forth two tests to determine if a party is an "employee" within the meaning of the New Jersey workers' compensation statute—i.e., the "control test" and the "relative nature of the work test." The control test considers whether the employer has the right to direct the manner in which the work shall be done and the results to be accomplished. The relative nature of the work test is essentially an economic and functional one, where the determinative criteria is the extent of economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.

5. Deference to the treating physician's medical opinion in granting motion for medical and temporary disability benefits was merited as the treating physician's credibility was heightened due to his familiarity with the petitioner's medical care.

Staikos v. Fairview Board of Education, Docket No. A-0723-16T3, 2018 N.J. Super. Unpub. LEXIS 389 (App. Div., decided Feb. 21, 2018)

In affirming the judge of compensation's holding, the Appellate Division relied on *DeVito v. Mullen's Roofing Co.*, 72 N.J. Super. 233 (App. Div., 1962), where the court held:

> It is generally recognized that a treating physician is in a better position to express an opinion as to cause and effect than one making an examination in order to give expert medical testimony.

As the Appellate Division noted, the trial record contained ample evidence that the judge of compensation discredited the testimony of the respondent's medical expert, which was based primarily on the review of records of other providers, while finding the petitioner's treating physician's credibility to be greatly enhanced by the level of familiarity with the petitioner's care, which he achieved during their lengthy treating relationship. Accordingly, the Appellate Division found sufficient and credible evidence to support the judge of compensation's ruling.

6. The Appellate Division relies on *Cunningham* in affirming a denial of claim to temporary disability benefits because the petitioner was unable to demonstrate actual lost wages.

Kocanowski v. Township of Bridgewater, Docket No. A-3306-15T2, 2017 N.J. Super. Unpub. LEXIS 171 (App. Div., decided Dec. 11, 2017)

In affirming the judge of compensation's denial, the Appellate Division relied on *Cunningham v. Atlantic States Cast Iron Pipe Co.*, 386 N.J. Super. 423 (App. Div., 2006), where the court found that actual lost wages are a prerequisite to a temporary disability award. The Appellate Division found that the judge's ruling was in accord with *Cunningham*, stating, "Although a volunteer firefighter is entitled to temporary benefits[,] there first must be an entitlement by the volunteer to payment of temporary benefits. That payment depends on proof of lost wages." Since the petitioner provided no proof of lost wages, the Appellate Division concluded she was not entitled to temporary disability benefits.

7. Cervical spine excluded from an award of permanent and total disability due to petitioner's failure to sustain the burden of proof in establishing causal relationship between the cervical injury and work-related accident.

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

In citing her opinion, the Appellate Division found that the judge of compensation undertook a comprehensive review of the evidence and based her decision on the evidence she found credible:

> [p[etitioner 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. The court did not find petitioner's testimony to be credible or convincing given the absence of any such complaints in the records immediately following the accident. Moreover, the court finds that in light of the diagnosis of multilevel disc degeneration and stenosis, even at the level of the herniation, this pathology is unlikely to have been caused by the traumatic work accident that occurred only two months earlier.

8. Dismissal of asbestosis claim affirmed due to the petitioner's failure to provide evidence sufficient to causally relate his lung cancer to asbestos exposure.

Lomet v. Lawes Coal Co., Docket No. A-1169-16T1, 2018 N.J. Super. Unpub. LEXIS 1635 (App. Div., decided July 11, 2018)

In examining the record, the Appellate Division found that there was no evidence of substance causally linking the petitioner's lung cancer to asbestos or other chemicals to which he may have been exposed while working for the respondent. Although the petitioner's expert testified that it was not unreasonable to conclude that his lung cancer was caused by exposure to asbestos, the judge of compensation found the petitioner's expert's opinion to be conclusory. Rather, the judge reasonably credited [respondent's expert's] testimony that if petitioner's cancer had been caused by asbestos, evidence of such exposure would have appeared on, but was conspicuously absent from, his radiographical and pathological studies.

9. The judge of compensation errs in making findings as to the nature of the injury despite bifurcation of the issue of compensability and without allowing the respondent an opportunity to present evidence.

Moran v. Cosmetic Essence, LLC, Docket No. A-2588-16T1, 2018 N.J. Super. Unpub. LEXIS 573 (App. Div., decided Mar. 14, 2018)

The Appellate Division found that the judge of compensation had mistakenly exceeded the limits of the bifurcation agreement:

> [T]he parties agreed, with the judge's acquiescence, to bifurcate the issues so the judge might first determine whether a compensable injury occurred before the parties and the court invested time and energy on other issues necessary to reach if the judge answered the preliminary question in petitioner's favor. Despite bifurcation, the judge found that petitioner was entitled to temporary disability benefits and appears to have made other findings about the nature of the injury. These other issues were decided without warning and deprived respondent an opportunity to present evidence or to confront the evidence upon which the judge relied.

10. U.S. District Court dismisses tort claim against the employer as the petitioner failed to plead any facts, when construed in his favor, sufficient to trigger the intentional wrong exception under the Workers' Compensation Act.

Pue v. Charter Inc. BKA International Housekeeping, Civil Action No. 17-5094-BRM-DEA, 2018 U.S. Dist. LEXIS 29051 (U.S. Dist., decided Feb. 23, 2018)

Under N.J.S.A. 34:15-9, the Division of Workers' Compensation is granted exclusive and original jurisdiction of all claims for workers' compensation benefits and is the proper forum in which an injured employee should initially pursue any remedies available to him or her. The Act's exclusivity can be overcome if the case satisfies the statutory exception for an intentional wrong. *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985). If an employee can demonstrate an "intentional wrong" by the employer, he or she can bring a claim directly against the employer, rather than rely on the remedies and compensation provided by the Workers' Compensation Act. As the U.S. District Court concluded:

> Petitioner's allegations represent physical injuries which must first be presented to the Division of Workers' Compensation, because Pue has failed to plead any facts, even when construed in his favor, alleging defendants deliberately tried to harm him. Namely, Pue fails to satisfy the exception available to establish an intentional wrong under the Workers' Compensation Act. ||

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2017

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

Francis X. Wickersham

1. The Supreme Court of Pennsylvania holds that the Act does not allow for a refund of unreasonable contest attorney's fees to the employer by claimant's counsel.

County of Allegheny v. WCAB (Parker), 177 A.3d 864 (Pa. 2018)

The court held that Section 440 of the Act did not allow disgorgement of an unreasonable contest attorney's fee award that was previously paid to a claimant's counsel. The Pennsylvania General Assembly, in enacting the Act, did not provide any mechanism by which employers can recoup erroneously awarded counsel fees, once paid.

2. A flight attendant was in the scope of her employment when she was injured on a shuttle bus for airport employees she was using for transport to the employee parking lot.

US Airways, Inc. and Sedgwick Claims Management Services, Inc. v. WCAB (Bockelman), 179 A.3d 1177 (Pa.Cmwlth. 2018)

The claimant, a flight attendant, was injured in a fall while riding in a shuttle bus from the terminal to the employee parking lot. The Workers' Compensation Appeal Board properly found she was injured in the course and scope of her employment. While her employer did not own the bus, she used it to enter and exit the workplace. Thus, it was such an integral part of the employer's business as to be part of its premises, and her presence on the bus was a necessary part of her employment.

3. The Supreme Court of Pennsylvania 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), 184 A.3d 958 (Pa. 2018)

The State Police were not entitled to subrogation of benefits that a trooper, who was injured in a motor vehicle accident, was eligible to receive under the Act against the trooper's recovery from a third-party tortfeasor pursuant to the Motor Vehicle Financial Responsibility Law. There was no basis upon which to conclude that a mere acknowledgement in a Notice of Compensation Payable of a work injury transformed an injured employee's Heart and Lung benefits into workers' compensation benefits. All of the benefits that the claimant received were Heart and Lung benefits, not workers' compensation benefits.

4. The Supreme Court of Pennsylvania holds that the Construction Workplace Misclassification Act only applies to individuals who work for a business entity that performs construction services, not to an employer that is not in the business of construction.

Department of Labor and Industry, Uninsured Employer's Guaranty Fund v. WCAB (Lin and Eastern Taste), 187 A.3d 914 (Pa. 2018)

A worker injured while renovating a restaurant was not eligible for compensation under the Act because he was an individual contracted by the restaurant owner and so did not fall within the definition of a worker "in the construction industry." The worker's interpretation would have led to the absurd and unreasonable result of making the Construction Workplace Misclassification Act applicable to all contractual arrangements that property owners typically have with painters, plumbers, electricians, carpenters and other remodelers.

5. A C&R Agreement cannot be used to set aside a fee review determination. Rather, a determination in favor of a provider may be set aside only by following the proper procedure set forth in the Act.

Armour Pharmacy v. Bureau of Workers' Compensation Fee Review Hearing Office (National Fire Insurance Company of Hartford), 192 A.3d 304 (Pa.Cmwlth. 2018)

A pharmacy petitioned for review of a Hearing Officer's adjudication vacating a Fee Review determination that the pharmacy was entitled to be paid $6,644.30, plus interest, for prescription cream medication it had dispensed to a claimant. The court concluded that a 2016 C&R agreement required the claimant's employer to pay for all reasonable and necessary medical expenses incurred prior to hearing, and that it was for the Utilization Review Organization to decide whether the compound cream treatment was reasonable and necessary.

6. The Supreme Court of Pennsylvania holds that use of the term "installments of compensation" in Section 319 of the Act limits an employer's future credit for purposes of subrogation to disability benefits only and does not apply to medical benefits.

Craig M. Whitmoyer v. WCAB (Mountain Country Meats), 186 A.3d 947 (Pa. 2018)

The Commonwealth Court erred in affirming an order by the Workers' Compensation Appeal Board which found, inter alia, that an injured employee's medical expenses were compensation payments subject to subrogation rights against the employee's recovery from a third party and subject to credit toward future compensation. The term "installments of compensation," as used in § 319 of the Workers' Compensation Act, was related to "periodical" payments made in the nature of wages, not payments that occurred "as and when needed," in the nature of medical expenses.

7. Governor Wolf signs bill restoring IREs into law.

On October 24, 2018, Governor Tom Wolf signed House Bill 1840 that will result in the return of Impairment Rating Evaluations (IREs) in Pennsylvania Workers' Compensation cases. In the 2017 case of *Protz v. WCAB (Derry Area Sch. Dist.)*, 161 A.3d A27 (Pa. 2017), the Pennsylvania Supreme Court declared the IRE provisions of the Pennsylvania Workers' Compensation Act to be unconstitutional. With the new bill, the threshold percentage of disability has been changed from the prior 50 percent impairment to a 35 percent impairment. The bill also states that the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment will be used for IREs. Previously, the law required the most recent edition of the AMA Guides be used.

8. An electrician's motor vehicle accident en route to work was not in the course and scope of employment because was he was not a traveling employee.

Kush v. WCAB (Power Contracting Company), 186 A.3d 1047 (Pa. Cmwlth. 2018)

For purposes of the "coming and going" rule, the workers' compensation judge's dismissal of a union electrical worker's claim petition, arising from injuries sustained in a vehicle accident while driving to work, was properly affirmed by the Workers' Compensation Appeal Board because the worker was commuting to a fixed job location.

9. 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), 2018 Pa. Commw. LEXIS 602

The Workers' Compensation Appeal Board properly found that the employee sustained a work injury while on the premises for which the employer was responsible under the Act. He was injured on the employer's premises, his presence was required due to the nature of his employment, and the condition of the premises caused the injury.

10. An employer's issuance of Supplemental Agreements to a claimant during a period that the claimant is receiving benefits pursuant to a notice of temporary compensation payable is not an admission of liability for the alleged work injury.

LifeQuest Nursing Center v. WCAB (Tisdale), 190 A.3d 811 (Pa. Cmwlth. 2018)

The Workers' Compensation Appeal Board erred in finding that, as to a claimant's work injury arising from her trip and fall over a patient's wheelchair at work, Supplemental Agreements between the parties were an admission of liability for the injury because they were merely filed to document the change in her benefits based on her return to work. As the agreements did not admit liability and the employer timely filed its notices, it retained all of its rights and defenses as to the underlying claim. ||