What's Hot in Workers' Comp
Significant Workers' Compensation Case Summaries
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Top 10 Developments in Pennsylvania Workers' Compensation in 2010

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1. Whether a Claimant Follows Through in Good Faith to Apply for Jobs Identified in a Labor Market Survey Is Not Relevant When an Employer Seeks to Modify Benefits Based on a Labor Market Survey.

In *Phoenixville Hospital v. W.C.A.B. (Shoap)*, 2 A.3d 689 (Pa. Cmwlth. June 30, 2010), the court held that the issue of a claimant's good faith attempt to follow up on positions identified by the vocational counselor in a Labor Market Survey and to actually receive a job offer is not relevant and does not preclude the employer from obtaining a modification of benefits.

Practice Pointer: This case is significant to employers as it holds that the former requirements of a job offer under the Kachinski standard do not apply to a modification petition based on a Labor Market Survey, thus giving greater strength to efforts to challenge benefits based on a Labor Market Survey. II

2. An Employer Does Not Need to Present Evidence of Earning Power to Change Status from Total to Partial Disability Under § 306(a.2) Based on an Impairment Rating Evaluation.

The court held in *Diehl v. W.C.A.B. (I.A. Construction)*, 5 A.3d 230 (Pa. September 29, 2010) that an automatic change in disability status based on an Impairment Rating Evaluation of less than 50 percent where the IRE is not requested within 60 days of the expiration of 104 weeks of total disability status does not require job availability or earning power. This reverses the portion of the decision in *Gardner v. W.C.A.B. (Genesis Health Ventures)*, 888 A.2d 758 (Pa. 2005) that required an employer to identify job availability pursuant to *Kachinski v. W.C.A.B. (Vacco Constr. Co .)*, 532 A.2d 374 (Pa. 1987) before changing disability status.

Practice Pointer: The IRE process does not require proof of job availability. II

3. A Claimant Seeking Reinstatement of Benefits Must Prove That Earning Power Is Again Adversely Affected by the Disability and That the Disability Is a Continuation of the Original Injury, but the Employer Has the

Burden to Show the Claimant's Loss of Earnings Is Not Caused by the Work Injury.

The decision in *Buford v. W.C.A.B. (North American Telecom)*, 2 A.3d 548 (Pa. August 17, 2010) reinforced the burdens of proof in a Reinstatement Petition in a situation where a claimant had voluntarily left a light-duty position for higher pay and a less physical job and worked for years before being laid off for economic reasons.

Practice Pointer: A claimant's burden of proof in seeking reinstatement does not require proof that the disability resulted from the work injury. ||

4. A Claimant's Review Petition to Amend a Notice of Compensation Payable That Is Not Filed Within the Statutory Limitations Period is Time Barred.

In *Fitzgibbons v. W.C.A.B. (City of Philadelphia)*, 999 A.2d 659 (Pa. Cmwlth. July 16, 2010), the court held that a party seeking to review a Notice of Compensation Payable or to modify and reinstate an NCP must file a petition within three years of the date of the most recent payment of compensation, or it is time barred under section 413 of the Act.

Practice Pointer: An attempt to modify an NCP has to be filed within three years of the date of injury or the last payment of compensation to be timely. ||

5. A Utilization Review Challenge to Physical Therapy Treatment Need Not Name Each Individual Therapist Who Provides Treatment.

In *MV Transportation v. W.C.A.B. (Harrington)*, 990 A.2d 118 (Pa. Cmwlth. February 25, 2010) the court recognized an exception to the requirement that a Utilization Review must be provider-specific in the case of physical therapy treatment since it is prescribed by a physician and may be carried out by different therapists.

Practice Pointer: This holding allows a single UR challenge to physical therapy treatment, and perhaps other types of treatment, provided by multiple therapists under a doctor's prescription. ||

6. A Notice of Ability to Return to Work Is Timely When Filed before the Employer Acts upon the Information Contained in the Medical Report.

It was held in *Edward Kleinhagan v. W.C.A.B. (KNIF Flexpak Corp.)*, 993 A.2d 1269 (Pa. Cmwlth. April 22, 2010) that an employer satisfies the requirements of §306(b)(3) of the Act when the claimant received a Notice of Ability to Return to Work before the employer attempted to modify benefits by acting upon the information contained in the medical information by extending a job offer to the claimant.

Practice Pointer: This decision confirms that a Notice of Ability to Return to Work must be issued before an employer extends a job offer to a claimant who is not working based on the medical evidence cited in the Notice of Ability to Return to Work. It is a good claims practice to issue a Notice of Ability to Return to Work to the claimant promptly upon receipt of medical evidence, particularly an IME report, that indicates that the claimant is capable of returning to work. ||

7. To Obtain an Offset against Compensation Benefits for Social Security Retirement Benefits, an LIBC 756 Must Be Submitted to the Claimant Every Six Months.

The court held in *Muir v. W.C.A.B. (Visteon Systems, LLC)*, 5 A.3d 847(Pa. Cmwlth. October 1, 2010) that an employer cannot take a credit for Social Security old age benefits unless it submits an LIBC 756 every six months to remind the claimant of the necessity to report such benefits.

Practice Pointer: This decision stresses the importance of sending the claimant an LIBC 756 on a timely, regular basis to identify the receipt of benefits to which the employer may take a credit. ||

8. The Employer Is Not Entitled to a Suspension of Benefits without Sufficient Evidence That the Claimant Has Intended to Retire.

City of Pittsburgh v. W.C.A.B. (Robinson), 4 A.3d 1130 (Pa. Cmwlth. September 22, 2010) and *Day v. W.C.A.B.* , 6 A.3d 633 (Pa. Cmwlth. October 18, 2010). In *City of Pittsburgh*, a claimant's application for and receipt of a disability pension from the employer following two work injuries was not sufficient to warrant a suspension of benefits on the basis that the claimant voluntarily withdrew from the work force where the court determined that the employer forced the claimant into retirement by eliminating its transitional duty program. However, the claimant was found to have retired in *Day* where the claimant applied for and received a Social Security pension, as well as a pension from the employer, and stopped looking for work.

Practice Pointer: Courts are reluctant to find that a claimant has retired or voluntarily withdrawn from the workforce without substantial evidence that, indeed, it was the claimant's intention as illustrated by application for and receipt of benefits associated with retirement and not looking for work. ||

9. A Notice of Ability to Return to Work Is Not Required Where the Claimant Returns to a Modified Duty Job with the Employer within the Doctor's Restrictions.

In *Ashman v. W.C.A.B. (Help Mates, Inc.)*, 989 A.2d 57 (Pa. Cmwlth. January 11, 2010) the court held that the notice requirement of the Act does not apply where the claimant actually returns to work and the claimant's physical restrictions remained fairly consistent during the period of the return to work.

Practice Pointer: It remains a good practice to issue a Notice of Ability to Return to Work when there is a change in a claimant's medical condition since such notice remains a requirement where the claimant does not return to work, as later held in Struthers v. W.C.A.B. (Skinner), 1136 C.D. (Pa. Cmwlth. March 12, 2010). ||

10. A Claimant Who Refuses to Undergo a Drug Detox Program to be Weaned off Medications Taken for a Work Injury, Where Medical Evidence Establishes That the Program Would Make it Possible for the Claimant to "Live, Work And Play," Is Subject to Suspension of Benefits.

Bereznicki v. W.C.A.B. (Eat 'N Park Hospitality Group), 989 A.2d 46 (Pa. Cmwlth. 2009)

Practice Pointer: A medical detox program that would enable a claimant to be weaned off extensive medications for treatment of a work injury may be utilized, with competent medical evidence, to seek a suspension of benefits. ||

Top 10 Developments in New Jersey Workers' Compensation in 2010

By Dario J. Badalamenti, Esquire (djbadalamenti@mdwcg.com or 973-618-4122)

Dario J. Badalamenti

1. Preexisting Disability and the Second Injury Fund.

In *Torres v. Verizon Communications*, Docket No. A-2777-08T3, 2009 N.J. Super. Unpub. LEXIS 2985 (App. Div., December 7, 2009), the petitioner alleged she was totally and permanently disabled as a result of a preexisting psychiatric impairment in combination with a diagnosis of reflex sympathetic disorder ("RSD") which was caused by her employment. The Appellate Division held that the Second Injury Fund was exempt from liability as the petitioner's RSD alone, irrespective of any previous condition or disability, rendered the petitioner totally and permanently disabled. "The whole of the medical expert testimony," the Appellate Division concluded, "seems to suggest that the psychological factors did not play a role in the genesis or progress of the illness." ||

2. Minor Deviations from Employment.

In *Cooper v. Barnickel Enterprises, Inc.*, 411 N.J. Super. 343 (App. Div. 2010), the petitioner, an off-site employee, who was faced with an extended wait at his union hall to consult with an expert concerning a work-related issue, was injured while driving for a cup of coffee, which the union hall did not provide to its members. The Appellate Division held that when an employee is assigned to work at locations away from the

employer's place of employment, eligibility for workers' compensation benefits generally should be based on whether or not the employee was performing his or her prescribed duties at the time. However, the Appellate Division found that accidents occurring during coffee breaks for off-site employees are minor deviations from employment which permit for recovery of workers' compensation benefits. ||

3. Reimbursement Obligations Between Workers' Compensation Carriers.

In *Patry v. West Jersey (as self-insured) and West Jersey (as insured by Insurance Carrier)*, Docket No. A-0843-08T1, 2010 N.J. Super. Unpub. LEXIS 40 (App. Div., decided January 8, 2010), an insurance carrier moved for enforcement of an eight-year-old reimbursement obligation against a third party administrator ("TPA") for the cost of medical treatment as set forth in an Order of Total Disability to which both parties had consented. In affirming the lower court's granting of the insurance carrier's motion, the Appellate Division determined that neither of the TPA's asserted defenses of equitable estoppel or laches applied. As the Appellate Division reasoned, the insurance carrier neither engaged in concealment or misrepresentation of material fact to the detriment of the TPA nor did the insurance carrier's delay in asserting its right of reimbursement prejudice the TPA in any real fashion. As such, the Appellate Division found that the insurance carrier's right of reimbursement remained enforceable. ||

4. Jurisdiction and the New Jersey Division of Workers' Compensation—Part 1.

In *Catalano v. United Parcel Service*, Docket No. A-3845-08T3, 2010 N.J. Super. Unpub. LEXIS 493 (App. Div. decided March 9, 2010), the Judge of Compensation dismissed the petitioner's claim with prejudice for failure to establish New Jersey's jurisdiction. In affirming the lower court's dismissal, the Appellate Division found that the petitioner's accident occurred in New York; the employment contract was made in New York; the petitioner resided in New York; and all of the petitioner's route assignments and job duties emanated from the respondent's Staten Island, New York, facility. The Appellate Division found unconvincing the fact that the petitioner was assigned to a union local in New Jersey, as this did not detract from the clear evidence that the petitioner's employment relationship with the respondent was carried out in New York. ||

5. Psychiatric Disability and Termination of Employment.

In *Iatridis v. Georgeson Shareholders*, Docket No. A-0284-08T, N.J. Super. Unpub. LEXIS 692 (App. Div., decided March 31, 2010), the Appellate Division affirmed the lower court's dismissal of the petitioner's claim alleging she sustained a psychiatric injury resulting from the termination of her employment. "The risk of employment termination is so universal," the Appellate Division concluded, "and an emotional response to notice of termination so predictable, that this particular cause and effect relationship could not have been envisioned [by the Legislature] to be compensable." ||

6. Injuries Occurring at Home.

In *Chaverri v. Cace Trucking Inc.*, Docket No. A-3619-07T2, 2010 N.J. Super. Unpub. LEXIS 643 (App. Div., March 26, 2010), the petitioner was injured at his home while repairing his tractor trailer which he used to perform hauling duties exclusively for the respondent. In reversing the lower court's dismissal of the petitioner's claim as not compensable, the Appellate Division reasoned that the petitioner was required to maintain his tractor trailer—an essential item used in his work—in good condition. As his employer did not dictate a particular time or place for him to perform that maintenance obligation, the Appellate Division concluded that the maintenance of the petitioner's vehicle could be done at any time and place convenient to the petitioner, including his own home. ||

7. Penalties for Delay in Payment of Temporary Disability Benefits.

In *Qureshi v. ABC Corp.*, Docket No. A-1848-08T31848-08T3, 2010 N.J. Super. Unpub. LEXIS 91 (App. Div., decided May 28, 2010), the respondent failed to timely pay temporary benefits as required by court order. As permitted by N.J.S.A. 34:15-28.1, the petitioner moved for imposition of a penalty and other relief. Although the Judge of Compensation did assess a penalty of 25% of the temporary disability benefits owed to the petitioner, he declined to award counsel fees. In reversing the Judge of Compensation on the issue of counsel fees, the Appellate Division relied on the plain language of the statute and determined that the legislative intent of the statute was such that when a petitioner resorts to the remedy provided by N.J.S.A. 34:15-28.1 to address delinquent payment of temporary disability benefits, the Judge of Compensation must award both the statutory penalty and a reasonable counsel fee. ||

8. The Intentional Wrong Exception to the Exclusive Remedy Provision of the Workers' Compensation Act.

In *Calvano v. Federal Plastics Corporation*, Docket No. A-0353-09T1, 2010 N.J. Super. Unpub. LEXIS 2018 (App. Div.,

decided August 18, 2010), the plaintiff brought an action in tort alleging intentional wrongdoing on the part of the defendant as the machine on which the plaintiff was injured was not equipped with a safety device. In affirming the lower court's granting of summary judgment based on the exclusive remedy provision of the Workers' Compensation Act, N.J.S.A. 34:15-8, the Appellate Division found that a reasonable jury could not conclude that the defendant knew that there was a "substantial certainty" that the plaintiff would be injured, nor was the plaintiff's accident the type of circumstance which the Legislature contemplated would expose an employer to a common law negligence action rather than the workers' compensation remedy. ||

9. Parking Lot Injuries and the "Premises Rule."

In *Hope v. Eberle & BCI Services, LLC*, Docket No. A-0617-09T2, 2010 N.J. Super. Unpub. LEXIS 2263 (App. Div., decided September 15, 2010), the petitioner was injured when, after clocking-out, she slipped and fell on ice in the parking lot adjacent to the building in which she worked. The parking lot was not owned, maintained or otherwise controlled by the respondent, and employees were neither required nor encouraged to utilize it. In affirming the lower court's dismissal of the petitioner's claim, the Appellate Division examined the so-called "premises rule" of the Workers' Compensation Act, N.J.S.A. 34:15-36, and found that the petitioner's accident occurred beyond the respondent's place of business. The Appellate Division concluded that in the absence of evidence that the respondent exercised any control over the parking lot in which the petitioner was injured, there could be no finding that the petitioner's accident arose out of and in the course of her employment. ||

10. Jurisdiction and the New Jersey Division of Workers' Compensation—Part 2.

In *McGlinsey v. George H. Buchanan Company*, Docket No. A-4653-08T3, 2010 N.J. Super. Unpub. LEXIS 2384 (App. Div., decided September 30, 2010), the petitioner filed an occupational disease claim with the New Jersey Division of Workers' Compensation based on over 25 years of employment in Pennsylvania, followed by less than 16 months of employment in New Jersey. In affirming the Judge of Compensation's dismissal of the petitioner's claim for lack of jurisdiction, the Appellate Division reasoned that any exposure the petitioner might have sustained in New Jersey was trivial in the context of his overall period of employment. "Manifestation of the petitioner's multiple conditions occurred long before he set foot in this state," the Appellate Division reasoned, "[and] the record is barren of competent evidence that the petitioner's employment thereafter actually contributed to or aggravated his multiple preexisting conditions. ||

Top 10 Developments in Delaware Workers' Compensation in 2010

By Paul V. Tatlow, Esquire (pvtatlow@mdwcg.com or 302-552-4035)

Paul V. Tatlow

1. The Board for the first time imposed a fine under section 2322F against an insurance carrier in the amount of $1,000.00 for failing to comply with the Health Care Practice Guidelines by neither paying nor submitting properly submitted medical bills to utilization review within 30 days. *Joseph Rabaszkiewicz v. A-Del Construction Co.*, IAB # 1309246 (decided 1/14/10). ||

2. Effective June 22, 2010, the Department of Labor stated the new average weekly wage was $914.73 (this was actually a decrease for probably the first time from the 2009 figure of $916.00), resulting in a maximum compensation rate of $609.82. ||

3. On March 3, 2010, the Department of Labor released its 12th Annual Report on the Status of Workers' Compensation Case Management which showed that there are now 2,689 certified health care providers in the state with 725 of them having been added in 2009. ||

4. The Annual Report of the Department of Labor for the state of Delaware dealing with the prior year's statistics stated that in 2009, there were 447 utilization review requests filed as compared to only 16 from May thru December 2008, which it attributed to the parties becoming more familiar with the process. ||

5. According to the Annual Report, among the six Practice Guidelines, the low back was by far the one most challenged through utilization review, accounting for 198 of the filings in 2009. ||

6. The Board granted the claimant's petition, finding that she was within the course and scope of her employment when she fell on aircraft steps while attending a business conference in Ireland based on evidence showing the employer had approved her attending the conference, paid her regular salary during the trip and did not require her to take vacation leave. *Felecia Morinelli v. Blue Cross Blue Shield of DE*, IAB # 1335306 (decided 4/13/10). ||

7. The Annual Report showed that for the most recent statistics in the year 2009, there were a record number of 8,037 petitions filed with 577 petitions listed as pending. The Department of Labor interprets this as showing that it has "no backlog" status since it defines a backlog as more than four months' worth of petitions. ||

8. There were a total of 7,614 petitions taken to hearings in 2009 according to the Annual Report. From that amount, 1,940 were conducted by a hearing officer rather than the full Board, an 18% increase from the prior year. The parties must stipulate to having a case heard by a hearing officer, and generally many claimants' counsel are not willing to do so because they believe they are more likely to receive a favorable decision from the full Board. ||

9. The average time for disposing of a petition from its filing to the issuance of a decision is now 228 days. The Annual Report attributes this time lag to, among other things, the increased number of hearings and the increased complexity of the cases. ||

10. The Annual Report comments that for the five years from 2005 through 2009, the Board issued 2,272 decisions on the merits. Of these decisions, 358 were appealed, and from that amount, 39 were reversed or remanded by the appellate court. This is a reversal rate of only 1.7% of all of the decisions issued in that five-year span. The lesson here is that it is clearly best to put forth a full effort to win these cases at the Board level. ||