What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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Pennsylvania Workers' Compensation

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The Act Does Not Require a Workers' Compensation Carrier to Pay the Full Amount of a Medical Provider's Bill if It Does Not Downcode the Bill within 30 Days of the Date It Was Submitted.

Dr. Jeffrey Yablon & Dr. Vincent Ferrara v. Bureau of Workers' Compensation Fee Review Hearing Office; 2042 C.D. 2010; filed April 21, 2011; opinion by Judge Pellegrini

In this case, Jeffrey Yablon, M.D. and Vincent Ferrara, M.D. appealed a determination made by a fee review hearing officer that the workers' compensation insurer (insurer) did not lose the right to "downcode" charges because more than 30 days had passed after the bill had been submitted. The bills submitted for payment by the providers were for VAX-D treatment. The bills used an unlisted code, but the insurer downcoded the bills to that of mechanical traction, which resulted in a smaller fee paid to Drs. Yablon and Ferrara. The insurer did not notify the physicians of the intent to downcode until after 30 days from submission of the bills had passed.

At the fee review level, the providers argued that once the 30 days for payment had passed, the insurer was barred from downcoding and was required to pay the full amount of the bill. The hearing officer disagreed, finding that the violation of the 30-day limitation would result in interest payments to the providers, not a bar to the ability to downcode.

The Commonwealth Court agreed with the hearing officer and dismissed the appeal filed by Drs. Yablon and Ferrara. According to the court, the penalty provided for in the regulations for an insurer's failure to institute the downcoding procedure within 30 days is the same as non-payment of the bill—interest on the unpaid balance at 10%. ||

A Prior Utilization Review Determination, Finding Treatment the Claimant Received from the Same Chiropractor To Be Reasonable and Necessary, Does Not Estop the Employer from Requesting Utilization Review of that Same Treatment in the Future.

Susan Gary v. WCAB (Philadelphia School District); 1736 C.D. 2010; filed April 21, 2011; by Judge Cohn Jubelirer

In this case, the employer filed a Utilization Review (UR) Request concerning the reasonableness and necessity of chiropractic treatment being provided to the claimant beginning December 31, 2007. Previously, a decision had been issued by a Workers' Compensation Judge in November of 2003, ordering the employer to pay for the claimant's treatment with the chiropractor on and after June 11, 2002. In 2007, the employer sought UR of the same chiropractor. A determination was issued finding that the ongoing treatment was unreasonable and unnecessary. The claimant filed a petition challenging the determination, which was dismissed by the Workers' Compensation Judge.

The Workers' Compensation Appeal Board affirmed the decision of the Workers' Compensation Judge, as did the Commonwealth Court. The court rejected the claimant's argument that the 2003 UR decision, ordering the employer to pay for chiropractic treatment on

and after June 11, 2002, precluded the employer from re-litigating the issue of whether the claimant was improving from the treatment since that argument was previously rejected as not credible. The court pointed out that in the first UR petition, a request was made for review of the reasonableness and necessity of medical treatment after June 11, 2002, and the second petition sought review of the reasonableness and necessity of medical treatment after December 31, 2007, a difference of five years and six months. Moreover, the court found that there was credible evidence in the record showing that there was a change in the claimant's condition since the prior 2003 UR decision. ||

The Claimant's Failure to Seek Employment Does Not Establish Voluntary Retirement from the Workforce So as to Warrant Suspension of Benefits. The Employer Must Prove That the Claimant Has Indisputably Retired, Accepted a Retirement Pension or Refused Suitable Employment, after Which the Claimant Can Maintain Disability Benefits by Showing Pursuit of Employment or That the Work Injury Caused Retirement.

Keene v. W.C.A.B. (Odgen Corporation); No. 1421 C.D. 2010; filed May 19, 2011; Opinion by Senior Judge Friedman

The claimant sustained a work-related knee injury and then underwent knee replacement surgery, after which she was limited to performing only full-time sedentary work. The claimant initially looked for suitable work and applied for every job lead, but she was not hired. For a period of two years, the claimant did not apply for work because of her negative feelings about the job seeking process. The employer used this testimony to file a suspension petition, contending that she had voluntarily removed herself from the workforce.

After the employer filed the petition, the claimant applied for work but was not hired. The Workers' Compensation Judge denied the petition, finding that the claimant had not voluntarily removed herself from the workplace. On appeal, the Appeal Board reversed, finding that the failure to apply for work based solely on negative feelings about the job seeking process established withdrawal from the workforce.

The Commonwealth Court rejected the Appeal Board's decision and in doing so emphasized that the *Kachinski* standard for obtaining a suspension of benefits requiring proof of the availability of suitable work by referral to a then open job must be met unless the employer can prove that the claimant has voluntarily retired from the workforce. The employer's burden is met only upon proof of either undisputed retirement, acceptance of a retirement pension or acceptance of pension and refusal of suitable work. At that point, the court held, a claimant can still maintain disability benefits by showing that they are seeking employment after retirement or that they were forced into retirement because of the work injury.

In this case, the court was quick to note that the claimant's failure to look for work for two years was irrelevant since the employer did not meet its initial burden of showing voluntarily retirement from the workforce. The court also noted that the claimant has no duty to seek work until the employer meets that burden. In a footnote, the court mentioned that the claimant's receipt of social security disability benefits is not evidence by itself that the work injury caused removal from the workforce. ||

A Termination Petition May Be Granted Despite Surgery for the Work-Related Injury Where the Credible Medical Evidence Establishes That the Surgery Completely Resolved the Work Injury or Any Aggravation of a Pre-Existing Condition and the Doctor Did Not Find Objective Evidence to Support Pain Complaints.

Schmidt v. W.C.A.B. (IATSE Local 3); No. 1100 C.D. 2010; filed as Memorandum Opinion December 15, 2010, published as Opinion April 26, 2011; by Judge Leavitt

In an important decision concerning the necessary medical evidence to support a termination of benefits, the Commonwealth Court held that despite the fact that the claimant underwent surgery for a work-related lumbar disc herniation, a termination was warranted where the medical evidence credited by the Workers' Compensation Judge established that the surgery resolved the work injury, that pre-existing degeneration and spondylolisthesis was not aggravated by the work injury, and that the surgery resolved a pre-existing spinal defect in the spine which the injury had aggravated.

The court also noted that, while the IME physician acknowledged that the claimant reported ongoing pain, he did not report objective evidence to support the complaints. In so finding, the court distinguished this case from the situation where the medical expert accepts the fact that a claimant suffers from pain. The employer's medical evidence noted that the claimant should stretch his back regularly because of the surgery, that he might have occasional back pain with changes in the weather, and that he might require Ibuprofen or a hot shower on some days due to the back. The court agreed with the Workers' Compensation Judge that these statements were irrelevant to the doctor's overall opinion that the claimant was fully recovered. In so doing, the court reinforced prior decisions which upheld termination despite medical evidence that the claimant might need future care for the work injury and had ongoing complaints that restricted his activities where the evidence, taken as a whole, supported the conclusion of a full recovery and return to work without restrictions. ||

Special Alert – Bureau Issues New Notice of Denial Form That Substantially Alters Prior Form.

The Bureau of Workers' Compensation has revised LIBC-496 Notice of Denial to be used exclusively as of June 20, 2011. The form adds a legend: "Do not use this form to accept a Medical-Only Claim." The form revises the language of Box 4 to state: "Employee has not suffered a loss of wages *as a result of an already accepted claim.*" The form further strikes the previous language at Box 6 that stated: "Failure to obtain medical confirmation of injury will not be considered good cause to deny benefits if caused by dilatory conduct of insurance carrier or employer." The information regarding physicians' reports has also been removed.

A copy of the new form is available online in the *Forms* area of the Bureau of Workers' Compensation website. ||

New Jersey Workers' Compensation

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Dario J. Badalamenti

A Third-Party Tortfeasor May Not Seek Indemnification and Contribution from a Negligent Co-Worker for a Plaintiff's Injuries.

McDaniel v. Lee, Docket No. A-5900-09T1, 2011 N.J. Super. LEXIS 75 (App. Div., Decided April 27, 2011)

The plaintiff was employed as a field technician. On September 23, 2008, while in the course of his employment, the plaintiff was driving an employer-owned vehicle. He stopped at a red light, and his co-worker, who was operating another employer-owned vehicle, stopped directly behind the plaintiff. An eighteen-wheel truck, operated by the defendant, was behind the co-worker in the same lane of travel and failed to stop at the intersection, rear-ending the co-worker's vehicle which, in turn, struck the plaintiff's vehicle, causing it to lunge forward.

The plaintiff and the co-worker filed separate claims with the Division of Workers' Compensation for their respective injuries arising out of the accident. Additionally, the plaintiff and co-worker filed complaints in Superior Court against the defendant and his employer. In addition to answering the plaintiff's complaint, the defendant filed a third-party complaint against his co-worker, alleging that his negligent operation of his employer's vehicle contributed to the plaintiff's injuries. This third-party action sought indemnification and contribution from the co-worker. The plaintiff moved to dismiss the defendant's third party action pursuant to N.J.S.A. 34:15-8, the selection of remedies provision of the Workers' Compensation Act (the Act). That section provides, in relevant part, that:

> A person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

The plaintiff's motion asserted that the third-party suit must be dismissed as it was tantamount to the plaintiff's prosecuting a negligence claim directly against a co-worker. The court denied the plaintiff's motion, and he appealed.

In reversing the lower court's ruling, the Appellate Division opined that N.J.S.A 34:15-8 was designed to further the Act's fundamental premise that employers bear the expense of workers' injuries in exchange for immunity from tort action. That same statutory provision also imposes an immunity bar to foreclose suit against a negligent co-worker. As the Appellate Division reasoned, the purpose of the Act's co-worker immunity provision was not so much to protect the fellow servant from liability as it was to protect the employer from paying twice, once through compensation and a second time through indemnification of the fellow servant against the injured employee's judgment.

The Appellate Division accordingly concluded that there was no discernable difference between the nature and purpose of the Act's grant of immunity to bar suit against an employer or against a co-worker. "Without question," the Appellate Division held, "and regardless of his degree of fault, [the co-worker], like the employer, is immune from any suit brought by Plaintiff." ||

What's Hot in Workers' Comp

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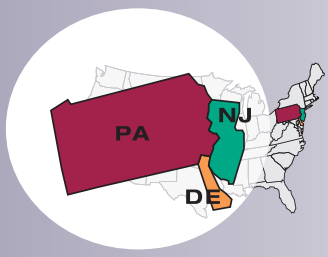
Scranton 570.496.4600
King of Prussia 610.354.8250
Williamsport 570.326.9091

New Jersey

Cherry Hill 856.414.6000
Roseland 973.618.4100

Delaware

Wilmington 302.552.4300



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Delaware Workers' Compensation

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The Supreme Court Holds that Where a Claimant Worked Less Than 26 Weeks Prior to the Work Injury, the Average Weekly Wage Calculation Should Be Based Only on the Actual Weeks Where the Claimant Was Working and Should Not Include Weeks Where the Claimant Was Employed But Not Working.

Shirley Taylor v. Diamond State Port Corp., 287 DE Supreme Ct. 2010; decided February 16, 2011

This case involved the statutory interpretation of §2302(b) of The Act which deals with the average weekly wage calculation. The undisputed facts show that on August 2, 2007, the claimant suffered an injury while working as a laborer for the employer, sustaining injuries to her head, neck, back and right ankle. The claimant received compensation for her injuries which included total disability, temporary partial disability, permanency and medical expenses. The claimant had been a 12-year employee with the employer and had what was described as a sporadic work schedule. Importantly, for the 26 weeks prior to the work injury, the claimant had worked only 16 of those weeks, and for the other ten weeks, either the employer had no work or the claimant missed work due to other health conditions.

The dispute involved the correct calculation of the claimant's average weekly wage. The employer contended that the correct average weekly wage was $485.00, based on the claimant's total wages for the 26 weeks prior to the work injury divided by 26. On the other hand, the claimant contended that her average weekly wage should be $788.12, which was based on the total wages received during the 26 weeks prior to the work injury divided by the actual 16 weeks that she worked.

A hearing took place before the Board in which they agreed with the employer's calculation. The Superior Court affirmed that decision.

The Supreme Court reversed and held that the claimant's interpretation was the correct one. The applicable statute which is §2302(b) provides as follows:

> (b) the average weekly wage shall be determined by computing the total wages paid to the employee during the 26 weeks immediately preceding the date of injury and dividing by 26, provided that:
>
> > (1) If the employee worked less than 26 weeks, but at least 13 weeks, in the employment in which the employee was injured, the average weekly wage shall be based upon the total wage earned by the employee in the employment in which the employee was injured, divided by the total number of weeks actually worked in that employment.

The Supreme Court noted at the outset that this statute was ambiguous and they would, therefore, need to ascertain the legislative intent underlying it. The Court rejected the employer's contention that use of the term "worked" as used in the statute was synonymous to "was employed." Instead, the Court agreed that the claimant's interpretation that "worked" for purposes of that statute was synonymous with "work actually performed." In reaching this conclusion, the Court noted that the purpose of the statute is to compensate employees for lost earning capacity rather than actual lost wages and the result it was reaching, therefore, did not create a windfall in favor of the claimant. Since the use of the term "worked" in the statute means the times that the claimant actually "performed work," her average weekly wage must be calculated by using only the 16 actual weeks out of the 26 weeks preceding the injury where she performed work and had wages. ||