What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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Pennsylvania Workers' Compensation

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Inconsistencies in the testimony of the employer's medical expert render the expert's opinion equivocal with respect to the issues of the claimant's full recovery and ability to return to work. The employer's issuance of a notice of compensation denial did not constitute an illegal supersedeas.

John Potere v. W.C.A.B. (KEMCORP); 1349 C.D. 2010; filed May 20, 2011; by Judge McCullough

The claimant was a tractor trailer driver and sustained injuries in an accident that occurred on January 22, 2005. The employer issued a Notice of Temporary Compensation Payable (TNCP) in February 2005. In March 2005, the claimant was seen for an IME, and the IME physician described the examination as normal. The employer then contacted the claimant, requesting a return to his pre-injury job in April 2005. The claimant advised that he was not capable of doing so. The employer issued a notice stopping temporary compensation and a Notice of Denial (NCD). The claimant then filed a Claim Petition.

The Workers' Compensation Judge granted the Claim Petition but found that the claimant had fully recovered as of the date of the IME. The judge also found the claimant had not sustained his burden of proving ongoing disability beyond April 20, 2005, the date he was asked to return to his pre-injury job. The claimant appealed, and the Appeal Board reversed the decision and remanded the case to the judge. On remand, the judge again granted the Claim Petition but concluded the claimant was capable of returning to his pre-injury job without restrictions as of the IME date. The judge also suspended the claimant's benefits as of April 13, 2005, based on the full-duty job offer made to the claimant, which he refused. The claimant appealed to the Appeal Board again, and this time, the Appeal Board affirmed.

The Commonwealth Court, however, partially granted the claimant's appeal, concluding the testimony given by the employer's medical expert was equivocal regarding the claimant's ability to return to his time-of-injury job as of the date of the IME. For example, although the employer's expert testified he thought the claimant was fully recovered, he also said the claimant was able to work in a light to moderate setting that would transition to a full-duty return to work in about four weeks after the claimant completed a physical therapy program. The court, therefore, remanded the case to the judge.

However, the court did reject an argument made by the claimant that the employer's issuance of the NCD constituted an illegal supersedeas. The court held that the issuance of the NCD by the employer was in compliance with the Act and was not an illegal suspension of the claimant's benefits. ||

In calculating a claimant's average weekly wage, §309 (d) applies when the claimant is a long-term employee. The WCJ properly subtracted depreciation from commission earnings in calculating the claimant's average weekly wage.

Gregory Pike v. W.C.A.B. (Veseley Brothers Moving); 1227 C.D. 2010; filed May 23, 2011; by Judge Cohn Jubelirer

In this case, a Workers' Compensation Judge issued a decision concerning the calculation of the claimant's average weekly wage

(AWW). In calculating the AWW, the judge included substantially lower earnings from periods prior to the time the claimant received a promotion to a much higher paying position and subtracted expenses the claimant listed on a federal income tax return, such as depreciation and home office business use deductions, rather than only those expenses actually paid. The deduction taken by the judge in calculating the claimant's average weekly wage represented the total amount claimed as business expenses on the claimant's income tax return. The judge also rejected the claimant's contention that the business expenses he declared for deductions should actually be added back onto his income for purposes of calculating the pre-injury AWW.

The Appeal Board affirmed the calculation of the AWW, and the claimant appealed to the Commonwealth Court. On appeal, the claimant argued that his AWW should have been calculated based on §309 (d.1), since his fourth quarter was most reflective of his new economic reality in light of his promotion. The claimant also argued that the judge improperly subtracted tax return deductions, which artificially lowered his earnings.

The Commonwealth Court rejected these arguments and affirmed the decision of the judge. According to the court, §309 (d.1) did not apply because the claimant was a long-term employee for whom a look-back period was appropriate. The court also held that there was no evidence that the claimant's earnings in the fourth quarter were indicative of what he would earn in commissions in the future. Finally, the court held that the judge properly subtracted depreciation from commission earnings in calculating the claimant's AWW and rejected the claimant's argument that depreciation deductions should be added to the total AWW calculation. **II**

The employer meets its burden of proof to take an offset for its contribution to defined benefit pension plan through actuarial testimony of the extent to which it funded the plan and the basis for the calculation of the offset.

Horner v. W.C.A.B. (Liquor Control Board), 2155 C.D. 2010 (Pa. Cmwlth. June 14, 2011), Judge McCullough

The Commonwealth Court confirmed several recent court decisions holding that an employer may meet its burden of proof of the amount of its contribution to a defined benefit pension plan in order to obtain a § 204(a) offset through the presentation of evidence from an actuary of the amount of the employer's contribution to fund the plan. The court reaffirmed that the employer need not establish the actual dollar amounts of its contributions to the pension plan, but it may utilize actuarial testimony that calculates the contribution based on factors such as employee contributions, investment income, rates of return and interest rates. In upholding the decisions of the Workers' Compensation Judge and the Appeal Board, the Commonwealth Court accepted the determination that the actuarial evidence was credible and based upon sufficient information and explanation calculating the offset. **II**

An employer's job offer letter inviting a return to work to a previous job with modifications based on current medical restrictions, but without detailing the duties of the work, is sufficient to support a modification of benefits.

Vaughn v. W.C.A.B. (Carrara Steel Erectors), 1790 C.D. 2010 (Pa. Cmwlth. March 11, 2011), Judge Butler

Following an IME identifying that the claimant could return to work in a modified, medium-duty capacity, the employer notified the claimant simply that his work activities would be modified to accommodate the IME's work restrictions. When the claimant failed to report to work, the employer filed a modification/suspension petition, which was granted by the Workers' Compensation Judge and upheld by the Appeal Board.

On appeal, the claimant argued that the employer failed to provide sufficient notice of an available job under § 306(b)(2) of the Act and *Kachinski v. W.C.A.B. (Vepco Construction Co.)*. In finding that the job offer letter provided sufficient notice, the court stated that the job referral must be reviewed in a common sense manner, particularly where the offer relates to the employee's pre-injury position. The employer's offer letter clearly intended, according to the court, for the claimant to return to his pre-injury job with restrictions rather than an alternative position, and the testimony established that it would make further accommodations as necessary. The court found this was sufficient for the employer to meet its burden of proof. **II**

Hot topics at the 2011 Bureau of Workers' Compensation Conference

The Pennsylvania Bureau of Workers' Compensation's 10th Annual Workers' Compensation Conference, held June 1-2, involved discussion of several items important to those who handle Pennsylvania workers' compensation claims, including:

(1) New Notice of Workers' Compensation Denial, LIBC-496, effective June 21, 2011. The new form was designed to eliminate the use of a Notice of Denial to pay medical only claims without accepting a claim and to foster the use of the Medical Only NCP. Box 4 now provides for denial where "the employee has not suffered a loss of wages as a result of an already accepted injury," indicating that the NCD is to be used to deny wage loss in conjunction with a NCP. Box 6 of the form was also changed, and information regarding physician's reports was removed.

(2) Proposed extension of the period for payment of medical treatment with panel providers from 90 to 180 days.

(3) Continued emphasis on the use of voluntary or mandatory mediation to settle cases.

(4) Proposed legislation to expedite review of Medicare Set-Asides.

For details of these and other topics addressed at the seminar, please call any attorney in the Workers' Compensation Department at Marshall, Dennehey, Warner, Coleman & Goggin.

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwcg.com)

Dario J. Badalamenti

Is a state-licensed foster parent an employee or an independent contractor under the terms of the New Jersey Workers' Compensation Act?

Williamson v. Crossroads Programs, Inc., Docket No. A-6048-09T1, 2011 N.J. Super. Unpub. LEXIS 1295 (App. Div., Decided May 19, 2011)

The petitioner, a foster parent licensed in the state of New Jersey, filed a claim with the Division of Workers' Compensation after falling on the stairs during a foster parent training program presented by the respondent, a private, non-profit organization that contracts with the state to place children in foster care. At the time of her accident, the petitioner had been associated with the respondent for approximately six years and had one foster child in her care. The respondent filed an answer denying the petitioner's claim and brought a motion to dismiss, asserting the petitioner was not their employee but, rather, an independent contractor ineligible for workers' compensation benefits. The Judge of Compensation granted the respondent's motion and dismissed the petitioner's claim. The petitioner appealed.

In affirming the judge's dismissal, the Appellate Division relied primarily on *Lesniewski v. W.B. Furze Corp.*, 308 N.J. Super. 270 (App. Div. 1998). In *Lesniewski*, the court utilized two separate and distinct tests—*i.e.*, the "control" test and the "relative nature of the work" test—to determine whether a petitioner was an employee eligible for workers' compensation benefits or, alternatively, was an ineligible independent contractor. The "control" test focuses on four factors:

(1) degree of control exercised by the employer over the means of completing the work;
(2) source of the employee's compensation;
(3) source of the worker's equipment and resources; and
(4) employer's termination rights.

Here, the petitioner herself maintained control over the day-to-day care of her foster child. She utilized her own home, was furnished with no equipment to be used in providing foster care, and received no compensation beyond reimbursement for the expenses she might incur in providing that care. Perhaps most significantly, the petitioner was not subject to termination by the respondent itself. Rather, as a state-licensed foster parent, only the state had the right to terminate the petitioner's status as a foster care provider.

The Appellate Division's analysis of the "relative nature of the work" test yielded similar findings. Under this test, an employer-employee relationship exists if a "substantial economic dependence" upon the employer is shown, as well as a "functional integration" of their respective operations. "Although Petitioner's 'work' could theoretically be considered an 'integral' part of the [Respondent's] regular business," the Appellate Division reasoned, "Petitioner's [ability to demonstrate] financial independence was required in order for her to receive a foster child into her home" in the first place. Accordingly, the Appellate Division concluded that the petitioner's contention that she was financially dependent upon reimbursement from the respondent for her own livelihood was wholly without merit and contrary to her status as a state-licensed foster parent. ||

What's Hot in Workers' Comp

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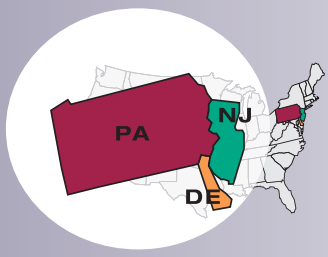

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Delaware Workers' Compensation

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Paul V. Tatlow

In a case where the employer filed a petition challenging a Utilization Review determination that chiropractic treatment was necessary and reasonable, the Board strongly suggested that by doing so, the employer waived its right to challenge that treatment on causation grounds.

Dermot Hagan v. Charles Moon Plumbing & Heating, Inc., (IAB Hearing Number: 1322490) Decided April 18, 2011

The claimant sustained injuries to his cervical and lumbar spine resulting from a work accident on May 19, 2008, when he was rear ended by a bus during the course of his employment. The injury was accepted as compensable, and the claimant received compensation benefits, including medical expenses and total disability payments. The litigation concerned a petition filed by the employer that was an appeal from a certification of chiropractic treatment for the time period from October 21, 2009, through May 19, 2010. The employer contended that the chiropractic treatment was outside of the health care practice guidelines, not necessary and reasonable, and no longer causally related to the work injury.

At the hearing held before the Board, both parties presented medical evidence, and the claimant also testified. The employer's medical expert testified that he disagreed with the Utilization Review determination and pointed out that the reviewer had failed to recognize that the claimant had been receiving chiropractic treatment as far back as 2004 and received that treatment on a fairly regular basis as recently as one week prior to the work injury. The claimant's medical expert, on the other hand, testified that the claimant's symptoms were different and more intense after the work accident, and he expressed the opinion that the treatment was necessary, reasonable and related to the accepted injury.

The Board indicated that the employer, as the party that filed the petition, had the burden of proof and must demonstrate by a preponderance of the evidence that the chiropractic treatment in question was not reasonable and necessary. The Board held that the employer did not meet that burden of proof since they accepted the testimony of the claimant and his expert as being more credible.

The Board did discuss the fact that the employer's expert had contended that the treatment was no longer causally related to the work injury when they pointed out that the claimant had been receiving chiropractic care as recently as one week before the incident and had been receiving that treatment from as far back as 2004. The Board questioned whether the employer had waived its right to challenge the compensability of the treatment on causation grounds by invoking the utilization review process. The Board focused on the statute dealing with utilization review, which is to be used only where the work injury has been acknowledged as compensable, and suggested that the more appropriate procedure would be for the employer to first challenge causation at the Board level and then later, if necessary, seek a Utilization Review as to the necessity and reasonableness of the treatment. The decision by the Board found that the chiropractic treatment in question was compensable, and the employer was directed to pay the bills in accordance with the Practice Guidelines. ||