What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

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Top 10 Developments in Pennsylvania Workers' Compensation in 2011

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1. Helmet inspector who left work complaining about pain but did not report injury as work-related and initially identified condition as involving non-work condition held to have provided sufficient notice of work injury, as precise description is not necessary considering totality of circumstances and later message of "work-related problem." *Gentex Corp. v. WCAB (Morack)*, 23 A.3d 528 (Pa.2011). ||

2. Abnormal working conditions sufficient to sustain work-related psychiatric injury were not established where liquor store clerk robbed at gunpoint, as the injury was the result of normal working conditions based on the frequency of such incidents in the area, *PA Liquor Control Board v. WCAB (Kochanowicz)*, 29 A.3d 105, (Pa.Cmwlth. 2011), and where state police officer involved in horrific death scene investigation of infant and later developed post traumatic stress disorder as investigation was normal, routine activity of job, *Washington v. WCAB (Commonwealth of Pennsylvania)*, 11 A.3d 48 (Pa.Cmwlth. 2011). ||

3. Employee suffered fatal heart attack at home two days after receiving letter of termination of employment following dispute over light-duty work assignment from accepted work injury; held that relationship to employment not established. *Little v. WCAB (B&L Ford/Chevrolet)*, 23 A.3d 637 (Pa.Cmwlth. 2011). ||

4. Termination petition may be granted despite surgery for work-related injury where credible medical evidence establishes that surgery completely resolves work injury or any aggravation of pre-existing condition without objective evidence of pain complaints. *Schmidt v. WCAB (IATSE Local 3)*, 19 A.3d 1171 (Pa.Cmwlth. 2010). ||

5. Employee on unpaid lunch at on-campus dining facility who jumps down flight of steps and injures legs held not to be within scope of employment as activity was totally foreign to employment. *Penn State University v. WCAB (Smith)*, 15 A.3d 949 (Pa.Cmwlth. 2011). ||

6. Acceptance of retirement pension and Social Security Disability benefits, combined with failure to seek work following work injury and receipt of Notice of Ability to Return to Work, held to support suspension of benefits based on voluntary withdrawal from workforce. *Dept. of Public Welfare/Norristown State Hospital v. WCAB (Roberts)*, 29 A.3d 403 (Pa.Cmwlth. 2011). (Compare to *Keene v. WCAB (Ogden Corp.)*, 21 A.3d 243 (Pa.Cmwlth. 2011), where the court held that failure to look for work for two years because of negative feelings about job-seeking process and receipt of Social Security Disability benefits was insufficient to establish voluntary removal from the workforce.) ||

7. Circumstances of sales manager's death from blunt force trauma in home-based office while unable to travel due to non-work injury were insufficient to establish injury within course and scope of employment. *Donald Werner v. WCAB (Greenleaf Service Corp.)*, 28 A.3d 245 (Pa.Cmwlth. 2011). ||

8. Medical opinion that a firefighter contracted Hepatitis C based upon a single note in his military records 30 years previous indicating claimant had Hepatitis B from drug use is not competent where there was no evidence of any subsequent drug use or link to Hepatitis C. *City of Philadelphia v. WCAB (Kriebel)*, 29 A.3d 762 (Pa. 2011). ||

9. Asphalt paver denied benefits for violation of positive work order when he ignored supervisor's oral warning to stop attempt at breaking a bowling ball with a sledge hammer while waiting for delivery. *Charles Habib v. WCAB (John Roth Paving)*, 29 A.3d 409 (Pa.Cmwlth. 2011). ||

10. Insurer entitled to Supersedeas Fund reimbursement for payment of medical bill after request for supersedeas denied where bill was for treatment received before supersedeas request made. *Department of Labor & Industry, Bureau of Workers' Compensation v. Crawford & Company*, 23 A.3d 511 (Pa. 2011). ||

Top 10 Developments in New Jersey Workers' Compensation in 2011

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

Dario J. Badalamenti

1. The merited criticism of an employee's job performance is insufficient to give rise to a finding of compensability in a psychiatric disability claim. *Wildstein v. Middlesex County Department of Weights and Measures*, Docket No. A-3389-09T1 (App. Div., decided June 17, 2011). ||

2. The spouse of an obese employee who died of a blood clot after sitting at her work computer for long hours is entitled to workers' compensation dependency benefits. *Renner v. AT&T*, Docket No. A-2393-10T3 (App. Div., decided June 27, 2011). ||

3. A Judge of Compensation may exercise jurisdiction over an insurance coverage dispute if ancillary to a claim currently before the Division of Workers' Compensation. *Sentinel Insurance Co. v. Earthworks Landscape Construction*, Docket No. A-0748-10T1 (App. Div., decided August 16, 2011). ||

4. The exclusive remedy provision of the New Jersey Workers' Compensation Act bars a third-party tortfeasor from seeking indemnification or contribution from a negligent co-worker for a plaintiff's injuries. *McDaniel v. Lee*, Docket No. A-5900-09T1 (App. Div., decided April 27, 2011). ||

5. A state-licensed foster parent is not an employee of the private, non-profit organization that places children in her care, but rather is an independent contractor ineligible for benefits under the New Jersey Workers' Compensation Act. *Williamson v. Crossroads Programs, Inc.*, Docket No. A-6048-09T1 (App. Div., decided May 19, 2011). ||

6. An employer may negotiate the retention of its Section 40 lien rights as part of a Section 20 resolution. *Calle v. Hitachi Power Tools and American Style Construction, Inc.*, Docket No. A-1015-09T1 (App. Div., decided February 15, 2011). ||

7. In determining the usual, customary and reasonable allowance for services rendered by a medical provider, it is appropriate to consider all payments made to the medical provider including self-pay, government programs, HMOs and commercial carriers. *Burn Surgeons of St. Barnabas v. Shop Rite*, CP #2009-16548 (N.J. Division of Workers' Compensation, decided August 24, 2011). ||

8. An employee can sue a general partnership after receiving workers' compensation benefits from her employer who is a partner in the partnership. *Whitfield v. Bonanno Real Estate Group*, 419 N.J. Super. 547 (App. Div. 2011). ||

9. The remedies currently contained in the Workers' Compensation Act and related regulations of the Division of Workers' Compensation constitute the exclusive remedy available to an aggrieved petitioner arising out of the willful noncompliance of an employer or its insurer with an order of the court. *Stancil v. ACE/USA*, 418 N.J. Super. 79 (App. Div. 2011). ||

10. There is no requirement in the context of an occupational exposure claim that a Judge of Compensation hear expert testimony before ruling on a motion to dismiss based on the statute of limitations. *Russo v. Hoboken Board of Education*, Docket No. A-1861-10T4 (App. Div., decided November 29, 2011). ||

Top 10 Developments in Delaware Workers' Compensation in 2011

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

Paul V. Tatlow

1. In the significant case of *Watson v. Wal-Mart Associates*, Del. Supr. No. 442, 2010 (10-21-11), decided by the Delaware Supreme Court on October 21, 2011, more stringent requirements were imposed on employers in order to obtain a termination of total disability compensation. The Court reversed the lower court as well as the Board, which had granted the termination petition and awarded the claimant only partial disability benefits by finding that the claimant was a displaced worker. The full upshot of the *Watson* remains to be seen. It is our interpretation that it does not require the employer to find an actual job for the claimant in order to terminate the total disability benefits, but will require using an experienced vocational expert familiar with Delaware law. ||

2. Effective June 13, 2011, the Department of Labor announced that the new average weekly wage would be $933.08. This results in a maximum compensation rate of $622.05 per week. The new minimum rate is $207.35 per week. The maximum counsel fee, which is capped at 10 times the average weekly wage, is now $9,330.80. ||

3. The lower extremity was added to the *Healthcare Practice Guidelines* as of June 13, 2011. There are now a total of seven practice guidelines, with the others being carpal tunnel, chronic pain, cumulative trauma, low back, shoulder and cervical spine. ||

4. The *Annual Report of the Department of Labor* was issued giving highlights for 2010, the year with the most recent statistics. The report stated that there were a record setting number of 629 decisions issued. It further noted that each of the nine Hearing Officers wrote more decisions than the actual number of hearings in which they participated. This was attributed to the hard work done in an effort to reduce the level of outstanding decisions. ||

5. There were 580 requests for utilization review filed, a 30% increase over the prior year in which there were only 447 such requests. The annual report attributed this dramatic increase to the increasing familiarity of insurance carriers and self-insured employers with the UR process. It was also noted that there has been an increase in UR requests dealing with proposed medical treatment. ||

6. According to the annual report, the "chronic pain" practice guideline was the one most frequently challenged through the utilization review process, replacing the "low back" guideline which had previously led the pack. Within that category of chronic pain, the most common treatment challenged was that of prescription pain medication. ||

7. The number of petitions filed in 2010 was 7,457, a decrease from the record number filed in 2009 of 8,037. This decrease, according to the annual report, is attributed to the increased use of the utilization review process, which led to a reduction in the number of Petitions to Determine Additional Compensation Due dealing with medical bills and treatment. ||

8. As of December 12, 2011, the new rules before the Board will go into effect. These rules were the result of a several-year process in order to have the Board rules in compliance with the provisions of the workers' compensation statute. In addition, effective that same date, the Office of Workers' Compensation issued new and revised petitions and forms. One of the more significant is the new petition known as Utilization Review Appeal Petition to Determine Additional Compensation Due. This petition is meant to deal specifically with UR appeals, which previously did not have a separate form. ||

9. In the case of *Cynthia Bailey v. Acme*, (IAB# 1261158, Order issued 11/9/11), the Board denied the claimant's motion to direct the insurance carrier for the employer to pay her compensation checks by way of direct deposit. The Board agreed with the employer there was nothing in the statute that gave it such authority to order a carrier to change its business practice, which was not set up to make direct deposits for the convenience of a particular claimant. ||

10. The annual report showed that for the year 2010, the average dispositional speed for processing petitions was 213 days. This was the amount of time that it took from the filing of the petition up until the actual issuance of the decision. The report did note that this was a decrease from the prior year's figure of 228 days. The report further commented that in regards to appeals from Board decisions, for the five years up through 2010, there were 2,449 decisions issued on the merits. From that amount, 324 of them, or 13.2%, were appealed, but only 39 of the decisions appealed were either reversed or remanded, which represents a very low reversal rate of only 1.59%. It remains true in workers' compensation, as in most other areas of litigation, that the place to win your case is at the trial level. ||