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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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When a claimant's own physician is the source of medical evidence that the claimant can return to work, an additional Notice of Ability to Return to Work form from the employer is not necessary.

Judy Smith v. WCAB (Caring Companions, Inc. and Uninsured Employers Guaranty Fund); 417 C.D. 2012; filed Sept. 17, 2012; by Judge Covey

The claimant was employed as a home health aide when she suffered work-related injuries in October of 2008. Two months later, the claimant filed a Claim Petition against the employer and a Claim Petition seeking benefits from the Uninsured Employers Guarantee Fund (UEGF). In December of 2008, two weeks after these petitions were filed, the claimant received a job offer letter from the employer for a light-duty position. Thereafter, the claimant received a Notice of Ability to Return to Work form from the employer.

After the form was sent, the claimant was seen for an examination by a physician at the recommendation of her attorney. The physician concluded that the claimant could perform light-duty work on a permanent basis. Subsequently, the employer sent the claimant another letter offering her a light-duty position again and including in the letter the rate of pay and the number of hours per week. Prior to sending the letter, however, the employer did not forward a Notice of Ability to Return to Work form to the claimant.

The Workers' Compensation Judge granted the Claim Petition. However, he also determined that the employer was entitled to a modification of benefits with respect to the second job offer made to the claimant, which the Judge found to be a "good faith" offer to which the claimant did not respond. The claimant appealed to the Appeal Board, but the Board affirmed the Judge's decision.

On appeal to the Commonwealth Court, the claimant argued that a modification of benefits based on the second job offer made by the employer was improper since it was not preceded by a Notice of Ability to Return to Work form. According to the claimant, the second offer was made based on the release given by the claimant's physician and, therefore, triggered a duty on the part of the employer to send a new Notice of Ability to Return to Work form.

The court disagreed with this argument, holding that the Notice of Ability to Return to Work form was not necessary since the claimant's own physician determined that the claimant was capable of performing light-duty work. According to the court, the law recognized that there are circumstances where formal notification of a claimant's ability to return

Speaking Engagements

Jim Pocius *(Scranton, PA) will be speaking at the National Workers' Compensation and Disability Conference & Expo being held in Las Vegas between November 6 and 9, 2012. On November 6th, Jim will participate in the 'Pre-conference Symposium: WC Essentials for Executives and Risk Professionals.' On Wednesday, November 7th, he will have his own segment, 'Think Tank on Medicare Issues Related to Workers' Compensation.' On November 8th, he will join David Cooper, M.D., director of The Knee Center, in presenting 'MRIs and Knee Replacements: Two Easy Targets to Cut Medical Costs.' For more information, visit www.wcconference.com.*

to work is not necessary, such as when a claimant is actually performing work or where an employer has knowledge that a claimant is working part time at another job. II

Side Bar

Although there may be situations where it is not necessary for an employer to send the claimant a Notice of Ability to Return to Work form, and although the law provides employers with some protection for this, nevertheless, employers should consider the Notice of Ability to Return to Work form as the "Miranda Warning" of workers' compensation. In other words, if an employer receives information that a claimant has been released to return to work, the issuance of a Notice of Ability to Return to Work form should be virtually automatic. Employers should follow the axiom of "It's better to be safe than sorry." Even if the circumstances are such that the employer is not required to formally notify a claimant of the ability to return to work, there is no harm in doing so.

Supreme Court decides that the right of subrogation and reimbursement under Section 319 of the Act is precluded by the Section 213 provision of absolute governmental immunity such that a governmental entity is not subject to subrogation claims.

Frazier v. Workers' Compensation Appeal Board (Bayada Nurses, Inc.), No. 56 EAP 2010 (Pa. Supreme Court, Sept. 28, 2012), opinion by Justice Baer

The claimant fractured her right ankle when a public transit bus on which she was a passenger was involved in a motor vehicle accident. The injury occurred in the course and scope of her employment with the employer. She filed a workers' compensation claim for the injuries, which was granted by a Workers' Compensation Judge.

Thereafter, the claimant filed a third-party lawsuit against the public transit company in which the employer, through its workers' compensation insurer, filed a notice to protect its subrogation rights under Section 319 of the Act. The third party case settled for $75,000, with the public transit company agreeing to "defend, indemnify and hold Claimant harmless with respect to any claim, suit, petition or other action brought against Claimant... for payment of the workers' compensation lien."

The employer filed a Claim Petition asserting its subrogation rights against the third party recovery, which the claimant challenged on the basis that the public transit company was immune from claims of subrogation or reimbursement from the third party tort recovery under Section 213 of the Act, which provides that a government entity shall "benefit from sovereign and official immunity from claims of subrogation or reimbursement from a claimant's tort recovery." The Judge agreed with the claimant, finding that Section 213 government immunity applies to both subrogation claims asserted by an employer against a government entity and reimbursement from settlement proceeds a government pays to an injured employee.

The Appeal Board reversed, holding that Section 213 immunity only extends to direct actions for recovery against a governmental entity. The Commonwealth Court affirmed the Board on the basis that Section 319 provides for an absolute and automatic right of subrogation.

On appeal to the Pennsylvania Supreme Court, the claimant argued that the plain language of Section 213 provides for immunity in two situations: (1) a direct suit against a government entity for subrogation and (2) claims for reimbursement from a tort recovery for a settlement with a government unit. The first level of immunity would be negated, the claimant asserted, if a third party recovery is subject to a subrogation claim such that the government entity then has to account for the amount of a workers' compensation lien in the third party settlement. The employer relied on the long-held automatic and absolute right to subrogation in order to prevent double recovery by the claimant and to preclude a negligent third party from escaping liability for which the employer is obligated to pay.

The Supreme Court found for the claimant, precluding subrogation from the third party recovery. In doing so, it had to decipher the legislative intent of the seemingly contradictory provisions of Sections 213 and 319 of the Act. In the Court's view, there was just one limitation on the right to subrogation – the immunity under Section 213 in tort cases involving the Commonwealth, its political subdivisions, agencies and employees. It found that there were two distinct type of proceedings where immunity applies – one for subrogation, where the employer and workers' compensation carrier step into the shoes of the claimant to recover from the third party tortfeasor, and reimbursement, which the Court characterized as an independent cause of action to the employer/insurer against an employee who receives a third party settlement or award. In so holding, the Court explained that immunity in reimbursement-type actions protects the public because "proper structuring" of settlement agreements prevents a double recovery, negligent governments do not escape liability for damages and public money is not used where an employer shoulders at least part of the claimant's compensation. II

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A key to the Court's decision was the manner in which the claimant and the transit company structured the third party settlement: it did not include any payment of workers' compensation benefits and provided a hold harmless clause against any claims for subrogation or reimbursement. The employer contended that the parties' agreement was in bad faith as it clearly sought to circumvent the right of subrogation. While the Court cautioned that the mere labeling of payments as not being for workers' compensation will not operate to frustrate an employer's subrogation rights, it ultimately decided that the record showed no basis for a finding of bad faith.

A workers' compensation insurer and employer can seek to avoid the result here and protect their right of subrogation under 319 in a case involving a third party government tortfeasor. The first way is by asserting, when the parties make any request for the carrier to identify the amount of the lien, that such request is an acknowledgment that the third party case and any settlement thereof is including and accounting for the workers' compensation subrogation lien and that any attempt to characterize all or part of the third party settlement as other than for reimbursement of the lien is in bad faith and will be challenged by the carrier. Another way is for the insurer/employer to file a Petition to Intervene in the third party lawsuit under Rule 1328 of the Pennsylvania Rules of Civil Procedure. This procedure allows a non-party to intervene and have all the rights of a party where, for instance, a determination in that case may affect a legally enforceable interest, *i.e.* subrogation.

New Jersey Workers' Compensation

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

Dario J. Badalamenti

Employee vs. Independent Contractor: Use of the "control test" and the "relative nature of the work test" to determine if a worker is eligible for benefits.

Luz Lukasik v. Marguerite Holloway, Docket No. A-5913-10T3, 2012 N.J. Super. Unpub. LEXIS 1995 (App. Div., decided August 22, 2012)

In December of 2006, the respondent contacted the petitioner after receiving the petitioner's business card advertising cleaning services. At that time, the petitioner was cleaning six other houses and an office building on a regular basis. The petitioner visited the respondent's home to provide an estimate for her cleaning services based on the size of the house and the services required. The petitioner told the respondent what services she would and would not provide. They agreed that the petitioner would clean the respondent's house one day per week for $100 starting on a date to be set by the respondent. The specific day of the week was not discussed by the parties.

The respondent contacted the petitioner several weeks later and arranged for her to do her initial cleaning on January 16, 2007. The petitioner arrived at the respondent's home on that date with a friend who assisted her in performing her cleaning services. The petitioner and her friend used cleaning supplies provided by the respondent. The petitioner was given no specific instruction on how to do the cleaning. Within the first hour, the petitioner fell from a stool while dusting and injured her hand and was taken to the hospital by ambulance.

In the weeks after the accident, the petitioner returned to the respondent's home on one other occasion. Although the petitioner's injury prevented her from doing any actual cleaning at that time, she did supervise while her friend cleaned the respondent's home.

On March 27, 2007, the petitioner filed a claim with the Division of Workers' Compensation alleging injury to her hand as a result of her January 16, 2007, fall while cleaning the respondent's home. The respondent denied liability on the basis of her assertion that the petitioner was not her employee. Following a bifurcated trial on the issue of employment only, the Judge of Compensation concluded that the petitioner was an employee of the respondent under the so-called "control test." As basis for his decision, the Judge cited the fact that the respondent set the day for the petitioner to clean her house, had an expectation that the petitioner would provide her cleaning services on a regular basis and had the ability to direct the petitioner's work if she so chose.

In reversing the Judge's ruling, the Appellate Division relied on *Lesniewski v. W.B. Furze Corp.*, 308 N.J. Super. 270 (App. Div. 1998), in which the court adopted two distinct legal tests to be applied in workers' compensation cases to determine whether a claimant is eligible for compensation as an employee or ineligible as an independent contractor – *i.e.*, the "control test" and the "relative nature of the work test."

Under the control test, an employer-employee relationship exists when the employer retains the right to control not only what work is done but how the work is done. Although the respondent did retain some control of the petitioner's performance of cleaning services, such as when she would begin the cleaning work, the Appellate Division found that, "[Respondent] did not control how [Petitioner] would do the cleaning, what supplies she would use, or, in fact, who would do the cleaning. Petitioner was not even required to clean the house personally but had the ability to bring other workers to the job to perform the cleaning services."

The Appellate Division found that the respondent did not control the petitioner's work to the extent that an employer controls the work of an employee. As such, the Appellate Division concluded that the control test in the instant matter did not establish an employer-employee relationship.

The Appellate Division also found that the relative nature of the work test did not support a finding that the petitioner was an employee. Under the relative nature of the work test, an employer-employee relationship exists if the evidence establishes a substantial economic dependence of the employee upon the employer and a functional integration of the employer's and employee's respective businesses. As the Appellate Division reasoned, "Petitioner had other clients and continued to clean their premises and earn income from them. Furthermore, Petitioner's cleaning of Respondent's home was not an integral part of the regular business of Respondent."

Rather, the Appellate Division found that the respondent was simply a homeowner who was a client of the petitioner's business services and that the petitioner was an independent contractor responsible only for the results of her labor. Accordingly, the petitioner was not entitled to benefits under the New Jersey Workers' Compensation Act. ||

Side Bar

Neither the "control test" nor the "relative nature of the work test" alone are dispositive of the issue of employment but, rather, must be considered in tandem. The control test is based on a theory that an employer retains the right to control the means and methods by which an employee performs his work. The relative nature of the work test is the more modern of the two tests. It was designed to address efforts on the part of employers to avoid labor costs associated with the employer-employee relationship by relinquishing a considerable degree of control over their employees. As such, the relative nature of the work test looks not to the issue of control but, instead, to the economic dependence of the worker upon the business he serves and whether or not he is an integral part of that business.

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board grants the employer's motion to suspend the claimant's TTD benefits. Claimant was incarcerated and still awaiting trial on violation of probation charges but had already been convicted of the underlying criminal charges that had put him on probation.

Ronald Rogers v. Perdue Farms, (IAB # 1365241-Decided 9/7/12)

This case dealt with the application of Section 2353(d) of the Act, which provides that a claimant who is receiving disability benefits can have them suspended when he is incarcerated by the state after an adjudication of guilt. As of March 2011, the claimant was receiving ongoing TTD benefits for his work injury. The claimant was later charged with offensive touching and pled guilty on June 2, 2011. He was given one year of probation. Later that year, he was arrested and charged with violation of probation and incarcerated from November 18, 2011, thru December 8, 2011, while awaiting trial. The claimant pled guilty on December 9, 2011, and remained incarcerated for that sentence thru January 5, 2012. The claimant still had charges pending on another arrest and remained in jail until January 24,2012, when he pled guilty to menacing but was given a suspended sentence.

The employer filed a motion to suspend the claimant's benefits for the entire time of the incarceration. The claimant would only concede that a suspension was permitted for the period from December 9, 2011, thru January 5, 2012, after the guilty plea. As to the other periods of incarceration, the claimant argued they were the result of not being able to pay bail while awaiting trial. The Board held that the claimant's TTD benefits should be suspended pursuant to the statute for the period from November 18, 2011, thru January 5, 2012. As to the initial period of jail time, the Board reasoned that, although the claimant was awaiting trial on the violation of probation charge, he had already been convicted of the underlying charge resulting in probation in the first place. Thus, the statute's requirements were satisfied. ||

Side Bar

The incarceration statute is a useful provision that employers should keep in mind in cases where ongoing disability benefits are being paid. The suspension only lasts during the period of incarceration following an adjudication of guilt, which would, of course, include a guilty plea. Copies of the criminal adjudication should be produced as evidence where this remedy is sought. The *Rodgers* case also shows that a prior adjudication of guilt can serve as the basis for a suspension where it is the basis for the claimant currently being in jail.

News from Marshall Dennehey

On December 12, 2012, **Paul Tatlow** (Wilmington, DE) will participate in a National Business Institute continuing education program entitled *Handling the Workers' Compensation Case From Start to Finish*. For more information about this seminar, visit NBI's web site at http://www.nbi-sems.com.

Angela DeMary (Cherry Hill, NJ) obtained an order of dismissal with prejudice on the respondent's motion to dismiss for failure to comply with the statute of limitations in the New Jersey Division of Workers' Compensation. The matter involved a denied occupational exposure claim alleging pulmonary, permanent disability as a result of the petitioner's alleged exposures while working in the construction industry as a laborer. Although the respondent denied that the petitioner sustained any work-related condition/injury, the respondent also filed a motion to dismiss for failure to comply with the statute of limitations. After extensive oral argument, the Judge of Compensation granted the respondent's motion and dismissed the claim in its entirety.

Tony Natale (Philadelphia, PA) successfully defended a heavily disputed Penalty Petition. The claimant alleged that he settled his workers' compensation claim with our client, the insurance carrier, some six years ago. Despite failing to contact the court or the attorneys involved in the settlement, the claimant alleged that he was never paid the settlement funds and requested a 50 percent penalty on those funds plus interest (for the past six years) and unreasonable contest attorney fees. There was also a surreptitious warning delivered by claimant's attorney to the effect that the insurer would be reported to the insurance commission for this alleged blatant, purposeful oversight. Tony was able to subpoena bank records documenting the claimant's receipt of the settlement check. He then filed a cross claim alleging the claimant was attempting to defraud our client and the system by falsely claiming non-receipt of the settlement funds. The petition was voluntarily dismissed by the Workers' Compensation Judge.

Greg Bartley (Roseland, NJ) won a case with its dismissal by the court. The petitioner had filed an occupational claim against the respondent after filing an Application for Modification of Award against a previous employer for a work accident. Greg convinced the court that, because the petitioner's employment began and ended prior to his employment with our client, he could not sustain the burden of proof required to make a case against the respondent on the occupational case. ||