What's Hot in Workers' Comp

Significant Workers' Compensation Case Summaries

MDW C&G ATTORNEYS-AT-LAW

Marshall, Dennehey, Warner, Coleman & Goggin

Volume 16 • No. 4 • April 2012

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)
and
G. Jay Habas, Esquire (814.480.7802 or gjhabas@mdwcg.com)

Francis X. Wickersham

G. Jay Habas

The three-year limitations period to correct an NCP bars the claimant from seeking to add PTSD as an original work injury. Doctrine of equitable estoppel does not toll statute of limitations without proof of fraud or misrepresentation. However, the claimant may assert an aggravation of pre-existing PTSD upon proof of injury caused by abnormal working conditions.

Dillinger v. WCAB (Port Authority of Allegheny County), No. 770 C.D. 2011 (Pa. Commw. filed March 1, 2012), opinion by Senior Judge Freedman

The claimant sustained a left shoulder strain when assaulted by a passenger on a port authority bus she drove for the employer. The claimant treated with a social worker for emotional complaints as a result of the assault, as well as continuing issues with abusive passengers. The employer paid for this treatment but did not acknowledge a mental health injury. The claimant ultimately signed a final receipt and supplemental agreement suspending her benefits. More than three years later, she filed a petition to review compensation benefits, alleging she suffered PTSD due to her original work injury. A claim petition was also filed, alleging an aggravation of PTSD due to continued interaction with the public as a bus driver for the employer.

The judge found the claimant established that she suffered PTSD as a result of her original work injury, which was exacerbated by her ongoing job duties. In particular, the judge acknowledged the claimant's fear that the assailant from the original incident had now been released from prison and had made threats against her. The judge concluded PTSD existed from the outset of the work injury and should have been listed on the NCP. The alternative claim petition was dismissed as moot.

On appeal to the Appeal Board, the judge's decision was reversed on the basis that the review petition was untimely, having been filed outside the three-year statute of limitations. The Commonwealth Court affirmed the decision of the Appeal Board, finding that under *Fitzgibbons v. WCAB*, 999 A.2d 659 (Pa. Cmwlth. 2011), a party must file a petition to correct the NCP within three years of the most recent payment of compensation. Since the claimant had clearly failed to file the review petition within the indicated time period, the review petition was untimely. The court also rejected the argument that, since the claimant had simultaneously filed a reinstatement petition as to her shoulder injury, this petition extended the time within which to seek review. This argument was rejected because the reinstatement petition, too, was not filed within three years of the last payment of benefits. The doctrine of equitable estoppel also did not apply to toll the statute of limitations since the claimant did not allege fraud on the part of the employer.

The Commonwealth Court did hold, however, that the Appeal Board erred in denying the cross-appeal of the judge's decision, which had found that the claim petition seeking aggravation of PTSD was moot. The court held that a claimant with a pre-existing injury is entitled to benefits by showing that the injury has been aggravated by a working condition. The court remanded this issue back to the judge to

determine whether the claimant's PTSD was caused by abnormal working conditions as required to establish a psychic injury. II

Side Bar

For the defense, this case is significant as the court found that the mere payment of medical expenses incurred for treatment of PTSD did not serve to toll the three-year statute of limitations on the claim where there was no evidence of fraud or misrepresentation. In many cases, insurers will pay medical expenses for treatment of injuries without formally acknowledging them in the NCP or a supplemental agreement. The court's decision emphasizes that it remains the claimant's burden to go forward and establish the causal relationship between all injuries and the original work injury within three years of the last payment of workers' compensation benefits. Where the claimant continues to be employed with the time-of-injury employer, however, they may be able to establish an aggravation of the pre-existing condition without facing the statute of limitations defense. In that situation, the claimant has the burden of proof as in a new injury situation.

The judge's rejection of URO is upheld based on a finding that further chiropractic treatment was not reasonable and necessary where the claimant had 450 sessions over three years with no improvement in and actual worsening of pain complaints. The court decided that a medical doctor is competent to judge chiropractic treatment.

Leca v. WCAB (Philadelphia School District), No. 679 C.D. 2011 (Pa. Commw. filed March 7, 2012), opinion by Judge McCullough

The claimant, a school police officer, injured his low back while trying to break up a fight. The employer accepted liability for the injury. Three-and-a-half years later, and following 450 chiropractic sessions, the employer filed a utilization review request to determine the reasonableness and necessity of ongoing chiropractic treatment. The utilization review found in favor of the claimant, and the employer appealed.

Before the judge, the employer offered medical evidence from orthopedic surgeons about the claimant's extensive degenerative disc disease, lumbar stenosis and radiculopathies, resulting in constant pain and numbness, despite ongoing, six-days-a-week chiropractic treatment that did not result in any overall improvement in the claimant's pain complaints. In granting the employer's petition, the judge found the medical reports of the orthopedic doctors credible and persuasive, citing to their qualifications and opportunity to physically examine the claimant.

The claimant challenged this decision, first arguing that the judge erred as the employer's experts did not evaluate the chiropractic treatment under review. The court rejected this point, finding that the chiropractic treatment was repetitive and ongoing and that the experts reviewed numerous records indicating that such treatment did not result in increased function or decreased pain. Moreover, under Section 306(f.1)(6) of the Act, prospective utilization review of treatment is appropriate.

The claimant also contended that the orthopedic experts' opinions should not be considered because they were not of the same discipline as the provider under review, as required by Section 306 (f.1)(6)(i) of the Act. In the court's opinion, that section applies only to the initial utilization review by the UR organization and not a challenge to the UR decision. Instead, as long as the physician is competent to testify in the area of medicine under review, a judge may consider such evidence. II

Side Bar

Challenges to the reasonableness and necessity of medical treatment have typically been rejected where the claimant offers evidence that such treatment provides some relief of symptoms, i.e. "palliative care." In this case, the claimant did not testify before the judge, which may have been a factor in the ruling. Instead, the claimant relied on the UR determination that the treatment prevented regression or increased reliance on symptoms, which hardly is an endorsement of ongoing chiropractic care. The fact that the UR reviewer stated that the treatment at issue "extends well beyond the typically observed standards of care" may have also influenced the court's decision as it supported the employer's medical evidence. The allowance of orthopedic doctors to challenge chiropractic care is a significant point, as it recognizes that a provider of the same discipline as the one under UR review is not needed in opposition to a UR determination.

The employer meets its burden of proof under Section 204(a) to claim an offset against workers' compensation benefits for pension benefits.

Glaze v. WCAB (City of Pittsburgh), No. 1122 C.D. 2010 (Pa. Commw. March 1, 2012), opinion by Judge Simpson

In an appeal of 38 consolidated petitions for review involving pension benefit offsets, the Commonwealth Court further reinforced the principle that an employer can meet its burden of proof in obtaining an offset against compensation benefits for its contribution to a claimant's defined benefit pension by offering credible actuarial evidence and does not have to identify the actual contribution to a claimant's pension.

The judge in this case was confronted with the issue of whether the City of Pittsburgh properly claimed offsets for pension benefits against the claimants' weekly workers' compensation benefits. In ruling in favor of the claimants, the judge found that the employer did not present reliable data for calculating the extent that the employer funded the claimants' pension benefits, including the amount contributed to each employee's pension benefit. The Appeal Board affirmed the judge's decision.

The Commonwealth Court strongly rejected the judge's finding, holding that it was clear error and contrary to the controlling law that an employer is not required to prove its actual contributions to any specific claimant's pension benefits. The court found this error to be so fundamental as to warrant a remand to the judge for reconsideration of the evidence.

The court further noted that the judge erred in applying the burden of proof in a review offset proceeding as the employer is permitted to use actuarial evidence to prove the extent of its contributions to a claimant's defined pension benefit plan. The judge's rejection of the employer's expert, based on the claimants' expert's criticism of the data used to calculate the contribution to the pension benefit, was also criticized by the court because the claimants neither established how the criticisms materially impacted the calculation of the employer's contribution nor offered their own calculation. **II**

Side Bar

The issue of defined pension benefit plan offsets against a claimant's workers' compensation benefits continues to gain attention in the Commonwealth Court, and this decision indicates that judges still have difficulty applying the rules. The court's decision emphasizes that the employer can legitimately claim an offset where it provides credible actuarial testimony, which can become quite complex, based on a variety of information, but that it is not necessary to prove specific contributions for each claimant. Of note is that the court did not resolve the issue raised by the claimants on appeal, whether the judge erred in refusing to order the employer to reimburse claimants for the offset previously taken, only finding that the judge was inconsistent in ruling the employer did not prove its entitlement to an offset yet not requiring any repayment to the claimants.

Important decisions pending before the Pennsylvania Supreme Court. Are the principles of work availability under Kachinski *still viable in workers' compensation or are they "an antiquated standard?"*

The Pennsylvania Supreme Court is set to decide a case which addresses whether the hallmark principles of work availability under *Kachinski v. WCAB* remain viable in workers' compensation or, as the Commonwealth Court stated, are they "an antiquated standard." In *Phoenixville Hospital v. WCAB (Shoap)*, the Court heard oral argument the first week of March whether the principles of *Kachinski* or the Act 57 amendments allowing an earning power assessment rather than an actual job offer should govern employer attempts to modify benefits. The claimant argued that Section 306 is unclear on what is meant that a job "exists" in the labor market if the claimant never receives an actual job offer. Counsel for the employer made the point that the law does not require a job referral to an injured worker, although he conceded that prior case law involving "actually available" jobs remains viable. The Commonwealth Court ruled in favor of the employer in this case, finding that Act 57 controlled such that an actual job offer is not necessary to modify benefits.

New Jersey Workers' Compensation

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

Dario J. Badalamenti

Payment for petitioner's unauthorized psychiatric care does not constitute the "last payment of compensation" for purposes of satisfying the two-year statue of limitations under N.J.S.A. 34:15-51.

Toth v. Princeton Health Care, Docket No. A-4847-10T2, 2012 N.J. Super. Unpub. LEXIS 285 (App. Div., decided February 10, 2012)

The petitioner was a social worker employed by the respondent. On July 23, 2004, she suffered a serious head injury as a result of hitting her head on her car door while bending down to retrieve her security badge. The compensability of the petitioner's injury was undisputed, and she received approximately six months of authorized orthopedic and neurologic treatment, the costs of which were paid entirely by the respondent's workers' compensation carrier. The petitioner was discharged from care on January 28, 2005.

In the months following the accident, the petitioner sought counseling with a psychiatrist for the psychological consequences of her injury. The petitioner testified that she deliberately withheld any information regarding this counseling from the workers' compensation carrier. The costs of her counseling were paid by her insurance carrier under a group health policy provided through her employer. The petitioner's psychiatric care continued until March of 2007.

On November 6, 2008, the petitioner filed a claim with the Division of Workers' Compensation for permanent partial disability arising out of her July 2004 injury. The respondent moved to dismiss the claim on the grounds that it was filed beyond the two-year statute of limitations as set forth in N.J.S.A. 34:15-51 of the Workers' Compensation Act, which provides, "Every claimant for compensation . . . shall . . . submit to the Division of Workers' Compensation a petition . . . within two years after the date on which the accident occurred . . . or in case a part of the compensation has been paid by the employer, then within two years after the last payment of compensation[.]"

The Judge of Compensation found that the "last payment of compensation" was made by the respondent's workers' compensation carrier on January 28, 2005, the date on which the petitioner was discharged from authorized care and that the petitioner's claim was therefore untimely. He accordingly granted the respondent's

motion and dismissed the petitioner's claim. On appeal, the petitioner argued that the last payment to her psychiatrist by her health insurer in March of 2007 should be considered the "last payment of compensation" for the purposes of determining the timeliness of her claim.

In affirming the Judge of Compensation's dismissal, the Appellate Division relied on *Sheffield v. Schering Plough Corp.*, 146 N.J. 442 (1996), in which the Supreme Court concluded, "Where medical treatment which could have been required under the workers' compensation statute is actually furnished by the employer, such treatment is considered "payment of compensation" and a claim petition filed within two years of such payment is within the appropriate time frame. Conversely, where the employee obtains medical treatment in the absence of any authorization by the employer, the treatment generally will not constitute payment of compensation extending the limitations period."

The Appellate Division found that the petitioner was well aware that the manner in which to resolve any issue concerning medical treatment was to communicate with the workers' compensation carrier's representative with whom the record clearly demonstrated she had extensive previous direct dealings. Rather, the petitioner deliberately failed to disclose to the workers' compensation carrier that she was receiving psychiatric treatment which was being paid for by her health insurer. "As it was Petitioner herself who made the decision to continue receiving payments from that source," the Appellate Division concluded, "those payments did not extend the two-year statute of limitations period established by N.J.S.A. 34:15-51." ||

Side Bar

In New Jersey, a respondent's right to control a petitioner's treatment imposes on the petitioner a corresponding obligation to request authorization from the respondent's workers' compensation carrier prior to seeking medical care. The petitioner's obligation will not be found to have been satisfied unless the procedure for obtaining authorization has been strictly adhered to. In a footnote to its main opinion, the Appellate Division cited the petitioner's argument that, although she failed to inform the workers' compensation carrier of her psychiatric counseling, her having made mention of her treatment to a supervisor at the respondent was tantamount to a request for authorization. In rejecting the petitioner's assertion, the Appellate Division found that it was not within the scope of her supervisor's responsibility to advise her as to whom she should seek payment from for her medical treatment, but that only the respondent's workers' compensation carrier could make a determination as to what treatment was authorized.

Ask Our Attorneys

Q: *Are Pennsylvania workers' compensation benefits payable for time missed from work to attend doctor's appointments, physical therapy, etc., for treatment of the work-related injury?*

A: *In Pennsylvania, an employee is not entitled to partial disability benefits for time away from work to seek medical treatment for a work injury when the treatment is readily available during non-work hours. See:* CPV Mfg v. WCAB, 805 A.2d 653 (Pa. Cmwlth. 2002).

Judd Woytek, Esq.
484.895.2307 | ajwoytek@mdwcg.com

Q: *Does the use of a resignation letter in a Pennsylvania workers' compensation settlement preclude a claimant from asserting a UC claim?*

A: *According to the Commonwealth Court, if claimant's sole reason for voluntarily quitting via resignation letter is to effectuate a workers' compensation settlement, then that is not a necessitous and compelling reason to overcome the voluntary quit, and a UC action is barred.*

Tony Natale, Esq.
215.575.2745 | apnatale@mdwcg.com

Q: *In a New Jersey workers' compensation case where a petitioner is receiving payment of a partial total award, but the benefits have not fully accrued and, therefore, the award is being paid out over time, and the petitioner dies from a cause unrelated to the compensation case, are the petitioner's dependents entitled to receive the balance of the award that has not yet accrued?*

A: *Yes. However, if the petitioner dies without dependents, then the petitioner's estate is NOT entitled to the remaining unaccrued benefits?*

Greg Bartley, Esq.
973.618.4120 | gcbartley@mdwcg.com

Send your questions about Pennsylvania, New Jersey or Delaware workers' compensation to **tamontemuro@mdwcg.com**.

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board abused its discretion by allowing the claimant to testify about her job search efforts where she had previously provided no information on this subject in response to the employer's discovery request.

Delaware Home & Hospital v. Edith Martin, Superior Court/Kent County (C.A. No. K11A-07-001) Decided February 21, 2012

The claimant was employed as a dietary aid and on August 15, 2007, sustained a work injury to her knees which was accepted as compensable. Several years later, on January 21, 2011, the claimant had knee surgery, and her treating physician put her on total disability status. The claimant filed a petition to determine additional compensation due, seeking payment for the period of total disability. The employer argued the claimant was not entitled to those benefits since she had left her employment voluntarily. The claimant then countered that, although she had not worked since May 2008, she had attended a business school and attempted to find work with several employers. The employer objected to this testimony on the basis that, in response to its discovery requests which sought information including any job search efforts by the claimant, no such information had been provided. The Board allowed the testimony over the employer's objection and further found that the claimant was entitled to total disability benefits for the period at issue and concluded that the claimant had not voluntarily withdrawn from the workforce.

The employer filed an appeal with the Superior Court, which reversed and remanded the Board's decision on the basis that the Board had abused its discretion by allowing the claimant's testimony. The court reasoned that the Board had expressly considered the claimant's testimony as to her school and job search efforts in concluding that she had not voluntarily withdrawn from the workforce. The employer had made valid discovery requests and could not effectively cross-examine the claimant without having been aware of the claimant's job search efforts. The claimant argued that the information as to her job search efforts was not discoverable since it was not memorialized in any document and was rejected out of hand by the court. The court commented that this sort of razor thin distinction being made by the claimant was once referred to as "unhandsome dealing" and that not having the information in a written form is clearly not the same as not having the information at all. Accordingly, the case was sent back to the Board for further proceedings. **II**

Side Bar

This case illustrates the importance of serving a request for production on claimant's counsel at the outset of the litigation. It is further critical to follow up on those discovery requests, and if certain relevant information is not provided, a basis then exists to object and preclude any testimony on that issue at the Board hearing.

News from Marshall Dennehey

On June 8, 2012, **Niki Ingram** and **Mary Kohnke Wagner** of our Philadelphia office will participate in the Pennsylvania Chamber of Business & Industry's *Workers' Compensation Roundtable*. Niki will give a presentation "Understanding Workers' Compensation Benefits." Mary will give a presentation "What' s Happening Now in Workers' Compensation" and "The Top 10 Things Companies Do Wrong Before Going to WC Litigation." This seminar is open to non-members. For more information about this event, visit http://www.pachamber.org/www/conferences/conference.php?ID=1220.

Michele Punturi of our Philadelphia office has been invited to join the prestigious Claims and Litigation Management Alliance, a non-partisan alliance comprised of thousands of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. Through education and collaboration, the organization's goals are to create a common interest in the representation by firms of companies and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

Shannon Fellin and **Kacey Wiedt** of our Harrisburg office were the featured speakers at the March monthly meeting sponsored by the Susquehanna Human Resources Management Association in Lewisburg, Pennsylvania. Their presentation addressed workers' compensation from an employer's perspective. **II**