MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Delaware Workers' Compensation

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Paul V. Tatlow

Board grants employer's termination petition, finding that employer offered claimant a modified-duty job within her restrictions which claimant rejected since she had moved out of state for personal reasons.

Michelle Howard v. Avalanche Strategies, LLC, (IAB Hearing No. 1497645- Decided May 6, 2021)

The claimant suffered a compensable work injury on March 30, 2020, when she was lifting boxes and felt left shoulder pain. On August 3, 2020, she underwent left rotator cuff surgery with Dr. Pillai. Ten days later, she was released by the treating physician to work with no use of the left arm. The employer offered the claimant a modified-duty job that required use of the right arm only. The claimant, at that point, had moved for personal reasons to Pennsylvania and was living three hours away. She declined the job offer.

The employer filed a termination petition, alleging the claimant was capable of working with restrictions at no loss of wages. Dr. Schwartz testified, as the employer's medical witness, that he had examined the claimant on March 11, 2021, and believed she was physically capable of working full time in a one-handed duty capacity consistent with the restrictions from Dr. Pillai. In addition to evidence of the bona fide job offer, the employer also presented testimony from a vocational consultant regarding a Labor Market Survey, which showed that 10 jobs—mostly cashier positions—were available to the claimant in the area where she now lived in Pennsylvania. This evidence showed that the prospective employers would accept an application from someone with the claimant's background, medical capabilities, and restrictions and that the jobs would allow for lifting with one hand only or did not require any lifting at all.

Claimant's counsel did not present any medical evidence but had the claimant testify on her own behalf. Her testimony revealed that she currently had neck pain and tingling and numbness in her right hand while doing physical therapy. The claimant did concede that in the work injury she had injured her left upper extremity, but was now having problems involving her neck and right arm. She testified that she was looking for work where she now lived, but had not yet found a job. The claimant only started looking for work in January 2021, when her attorney sent her the Labor Market Survey documents, and did concede that she had been released to restricted work by Dr. Pillai back on August 13, 2020.

The Board found that the claimant was no longer totally disabled based on its acceptance of Dr. Schwartz's opinion that the claimant was physically capable of

working in a one-handed duty capacity. The claimant did not contend that she was a displaced worker but, rather, argued that she should receive ongoing total disability benefits. The Board did not agree. The Board concluded that since the employer had offered the claimant a job within her restrictions at no wage loss, which she declined for personal reasons, she had no entitlement to partial disability benefits. The Board also addressed the vocational evidence and found that the Labor Market Survey showed jobs for which the claimant was physically and vocationally suited that were available in the open labor market. Those jobs had a low average weekly wage but in excess of the pre-injury average weekly wage; therefore, the claimant was not entitled to any partial disability benefits. Finally, the Board found that the claimant had not conducted a reasonable job search since she did not do so until her attorney sent her the Labor Market Survey documents. The Board characterized the claimant's actions as being a reactionary job search, as it was done only in anticipation of and in preparation for litigation rather than to actually find a job.

Florida Workers' Compensation

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Linda W. Farrell

A party's IME doctor must provide a written report for his or her opinions to be considered by the judge at the final hearing.

Wilbur Jenkins v. Hillsborough County Aviation Authority and Florida Municipal Insurance Trust, Florida League of Cities/Workers' Compensation Claims Dept., OJCC# 17-006953, Ft. Myers District, JCC Weiss; Decision Date: May 12, 2021

The claimant suffered a compensable work injury on December 25, 2016. After treating with multiple physicians, he was involved in a subsequent, intervening motor vehicle accident in August 2019. Upon receipt of pain management records from September 24, 2019, the carrier issued a denial for all future medical treatment due to the subsequent, intervening motor vehicle accident.

The employer/carrier obtained an IME physician, who reviewed extensive medical records from 2013 to 2019. That doctor opined that no further medical treatment was related to the work accident and same was 90% due to the motor vehicle accident. During his deposition, however, he altered his opinion, changing it to 60% for degenerative conditions predating the industrial accident and 40% to the motor vehicle accident.

At the final hearing, the claimant sought to have his IME physician testify live. The employer/carrier objected, arguing the claimant had selected a different IME doctor. They further argued that the claimant had failed to show entitlement to an alternative IME doctor under the statute. Since the employer/carrier failed to provide any evidence that the claimant had actually seen IME doctor number one, the judge felt that the claimant was allowed to substitute an IME physician of his choice and that this doctor was not considered an alternative.

However, the judge sustained the employer/carrier's alternative objection and agreed that allowing the claimant's IME doctor to testify would result in trial by ambush, where the employer/carrier did not know the IME had occurred and had never received the report, and the claimant had listed the doctor to testify via deposition and not live at the final merit hearing. The claimant countered that IME doctor number two was not required to prepare a report and that there is no requirement that an expert witness prepare a report.

The judge sustained the objection by the employer/carrier and held:

> Claimant disclosed IME doctor number two exactly 30 days before the final merit hearing, even though he was aware that he wanted an IME doctor five months prior to the final merit hearing when he disclosed IME doctor number one; claimant did not satisfy the 15-day requirement, nor was the claimant able to show that the IME occurred greater than 10 days prior to the final merit hearing.

The judge also rejected the claimant's argument that his expert does not have to prepare a report. Rule 60 Q .6–114 states that depositions of witnesses may be taken and used in the same manner as provided in the Florida rules of civil procedure. Rule 1.360 (b)(1) provides that the party who obtains an examination of a person "shall deliver to the other party a copy of a detailed written report of the examiner setting out the examiner's findings," and "if an examiner fails or refuses to make a report, the tribunal may exclude the examiner's testimony if offered at trial."

However, the judge disagreed with the employer/carrier when they argued that there had been a break in the chain of causation with the subsequent, intervening motor vehicle accident. Because their IME physician testified that the motor vehicle accident was only 40% responsible for the claimant's ongoing need for treatment, the employer/carrier failed to demonstrate a break in the chain of causation. Per their own IME physician, the motor vehicle accident was not the major contributing cause of the need for treatment. The employer/carrier also tried to argue that the claimant's pre-existing condition was the major contributing cause, but the evidence failed to show that the employer/carrier had ever denied treatment because of a pre-existing condition.

The judge also held that the employer/carrier had waived their misrepresentation defense by stipulating to the payment of indemnity on the eve of trial.

New Jersey Workers' Compensation

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Kiara K. Hartwell

The New Jersey Supreme Court addresses medical marijuana in workers' compensation cases.

Hager v. M&K Constr., 246 N.J., 1247 A.3d 864 (2021) and Calmon v. Pepsi Bottling Group, No. A-2160-19, (App. Div. May 11, 2021)

In *Hager v. M&K Constr.*, the respondent, M&K Construction, appealed a workers' compensation order to reimburse the petitioner for medical marijuana, which was prescribed after a work-related injury. The petitioner was injured in August 2001 while employed as a laborer for M&K. He underwent two back surgeries, but due to persistent pain, he took opioid medication. He began treating with Dr. Joseph Liotta in 2016, when he was enrolled in the medical marijuana program as an alternative pain treatment and a means to wean him off opioids. Although he started with an ounce per month, his dose increased to the maximum allowed—two ounces—which cost more than $600.00 per month.

At trial, Dr. Liotta testified for the petitioner, noting that he suffered adverse side effects from opioids and was "motivated" to stop, which happened a month after starting medical marijuana. Dr. Liotta indicated there is a smaller risk of addiction to marijuana and fewer serious side effects. The petitioner also testified that it helped him wean off opioids, lessened his pain and helped with muscle spasms. In addition, Dr. Cary Skolnick testified for the petitioner that he needed long-term pain management as a result of the August 2001 injury and that he was 100% permanently and totally disabled, apportioning 65% for the back injury and 35% due to medication effects.

On the other hand, Dr. Gregory Gallick testified for the respondent, finding the petitioner to be 12.5% permanently disabled and still capable of certain jobs. Dr. Robert Brady also testified in describing side effects and risks of medical marijuana. He noted both medical marijuana and opioids were equally psychologically addictive, though opioids were more physically addictive. He opined that medical marijuana was not proven effective for conditions such as the petitioner's and, rather, the best form of relief would be physical therapy and home exercise.

The Workers' Compensation Judge found 65% permanent partial disability, apportioning 50% for the orthopedic condition and 15% due to medical marijuana effects. In choosing between medical marijuana and opioids, the court noted medical marijuana was the "clearly indicated option" and ordered M&K to reimburse the petitioner for its costs. The judge found Dr. Liotta and the petitioner's testimony to be more credible than that of Dr. Brady, specifically emphasizing the petitioner's ability to wean off opioids. The court indicated that "the

Legislature intended to make available the benefits of medical marijuana to persons displaying a medical need, despite the federal attitude toward the substance." Finally, the judge rejected the notion that M&K was like a private health insurer or government medical benefit program, which would not be required to reimburse medical marijuana costs.

The Appellate Division affirmed the workers' compensation court's findings and further went on to analyze whether the New Jersey Jake Honig Compassionate Use Medical Cannabis Act (Compassionate Use Act) was preempted by the federal Controlled Substances Act (CSA). In doing so, the Appellate Division found the Compassionate Use Act did not require employers to "possess, manufacture, or distribute" marijuana per the CSA. In addition, the Appellate Division concluded there was no aider-and-abettor liability for assisting in the petitioner's possession as M&K did not have the requisite intent and, thus, did not face a credible threat of federal prosecution.

The Supreme Court then granted M&K's petition for certification. First, the Supreme Court considered M&K's argument that it should not have to reimburse the petitioner for costs of medical marijuana under the Compassionate Use Act and N.J.S.A. 24:6I-14 as it exempts "a government medical assistance program or private health insurer" from reimbursement. The court rejected this argument, citing to the plain language of the statute and indicating a workers' compensation carrier does not fall into either category. Furthermore, the court looked to the legislative intent in not specifically including workers' compensation insurance in the Compassionate Use Act, as other states have done. Because the Legislature did not exclude workers' compensation carriers and included "chronic pain" as a qualifying medical condition, M&K was not exempt from reimbursing the petitioner.

Next, the Supreme Court rejected M&K's argument that medical marijuana was not a "reasonable and necessary treatment." The court looked to a prior decision in *Squeo v. Comfort Control Corp.*, 99 N.J. 588 (1985), where construction of an injured worker's apartment was found to be reasonable and necessary. The *Squeo* court not only considered the petitioner's loss of use of his arms and legs, but also the possible psychological harm due to the petitioner's multiple suicide attempts after an offer for placement in a nursing home. Similarly, in this case, the court recognized a potential harm to the petitioner in continuing to use opioids. In addition, reimbursement of medical marijuana was noted to be much less unique than the construction of an apartment found in *Squeo*.

In returning to the first point, as the Supreme Court found M&K was obligated to reimburse the petitioner under the Compassionate Use Act and the workers' compensation statute, the court then analyzed whether the federal CSA quashed M&K's state law obligations. After finding guidance from the United States Supreme Court and several circuit courts, the court determined M&K could follow both the Compassionate Use Act and CSA, as the first does not create any obstacles in accomplishing congressional objectives. The court also acknowledged that its decision differed from other state supreme courts, but it noted they were not binding and that its decision was in line with legislative intent, an analysis of federal authorities and the principles of preemption.

Finally, the Supreme Court discussed M&K's contention that reimbursing medical marijuana costs would be aiding and abetting the petitioner's possession of marijuana. The court initially noted that M&K was not "electing" to aid the petitioner's possession of marijuana but, rather, that it was being compelled by court order. Further, the court indicated M&K failed to demonstrate specific intent to aid-and-abet. Again, it was reiterated that M&K was being compelled by the court and, thus, could not be considered as intentionally committing an offense.

Approximately a month after the Supreme Court's decision in *Hager*, the Appellate Division in *Calmon v. Pepsi Bottling Group* affirmed the workers' compensation order to reimburse the petitioner for medical marijuana prescribed for a work-related back injury. As *Hager* addressed the same issues raised by Pepsi Bottling Group, the Appellate Division issued this decision after relying on *Hager*.

Pennsylvania Workers' Compensation

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Francis X. Wickersham

Under § 204(a) of the Act, a state employer is entitled to take a credit for contributions to the State Employees' Retirement Systems made by another state employer.

Frank Gillen v. WCAB (Pennsylvania Turnpike Commission); No. 1681 C.D. 2019; filed May 12, 2021; Judge Leavitt

In this case, the claimant began working for the Pennsylvania Turnpike Commission in 2008. Prior to that, he worked for the Port Authority for 18 years. In September of 2013, the claimant sustained a work injury and was paid workers' compensation benefits. Later, in October of 2016, State Employees' Retirement Systems (SERS) granted the claimant a disability pension. Subsequently, the Turnpike Commission issued a Notice of Workers' Compensation Benefit Offset, stating it would take a pension credit against the claimant's weekly disability compensation payment and deduct an additional $50.00 from the claimant's weekly benefit rate to recover an overpayment of over $30,000.00. The claimant filed a review petition and a penalty petition, taking the position that the Turnpike Commission was not entitled to an offset of the SERS' pension to the extent his pension was funded by the Port Authority.

The Workers' Compensation Judge denied the claimant's petitions, holding that the Turnpike Commission was entitled to an offset credit and recoupment of its overpayment. The judge found that the claimant's 18-year employment with the Port Authority was irrelevant to the actuarial analysis performed by the Turnpike Commission. The claimant appealed to the Appeal Board, which affirmed.

On appeal to the Commonwealth Court, the claimant argued that § 204(a) of the Act does not entitle a state employer to take a credit for the contributions to SERS made by another state employer. The claimant further argued that the the Turnpike Commission violated the Act by taking a credit for a pension benefit funded in large part by the Port Authority.

The court rejected the claimant's arguments and dismissed his appeal. In doing so, the court held that, although the claimant worked for two separate state agencies during his career, the Commonwealth was the claimant's "employer" and is entitled to an offset against its payment of workers' compensation disability benefits to the claimant under § 204 (a) of the Act. The court additionally found that the Turnpike Commission did not violate the Act for taking an offset for the claimant's disability pension benefits. The Board's denial of the claimant's penalty petition was also affirmed.

Commonwealth Court holds that a suicide was not intentional and, therefore, the fatal claim was compensable.

South Eastern Transportation Authority (SEPTA) v. WCAB (Hansell); 464 C.D. 2020; filed May 24, 2021; Judge Cohn-Jubelirer

In this case, the decedent sustained a work injury to his low back on June 17, 2016. The injury was acknowledged by the employer via a Notice of Compensation Payable (NCP). The decedent attempted a return to light-duty work, but was unable to continue doing so. On March 19, 2017, the decedent committed suicide and, thereafter, the claimant filed a fatal claim petition alleging that the decedent's work injury caused mental stress which led to his suicide.

The Workers' Compensation Judge granted the petition and, in doing so, found the testimony of the claimant's psychiatric expert to be more credible and persuasive than the employer's. The judge rejected the opinion of the employer's expert, that the suicide was unrelated to the work injury and due to ongoing psychiatric problems that predated the injury by many years. The judge pointed out that the employer's expert admitted there was no indication of depression in the medical records until November of 2016, after the work injury, and that the decedent was never diagnosed with depression or reported a suicidal thought before the work injury. The Board affirmed.

On appeal to the Commonwealth Court, the employer argued that compensability of the claim was barred by § 301(a) of the Act, as the evidence established that the

decedent's suicide was intentional. Section 301(a) states that no compensation shall be paid for an injury or death that is intentionally inflicted. However, the law allows compensability in a suicide case where there was initially a work-related injury that caused the employee to be dominated by a disturbance of the mind of such severity as to override normal rational judgement and the disturbance resulted in a suicide.

Although the court acknowledged the decedent's actions showed some planning of the suicide on his part, they rejected the employer's contention that it was meticulously planned and executed and, thus, intentional. The court further rejected the employer's argument that the Workers' Compensation Judge erred in applying a physical-mental standard for a psychiatric injury instead of a mental-mental standard, which would have required a showing of an abnormal working condition. According to the court, the mental standard did not apply because the decedent's psychological injury was not the result of a psychological stimulus.

News

Four attorneys from our Pennsylvania offices have been selected to the 2021 edition of Pennsylvania Super Lawyers magazine.* Our 2021 Pennsylvania Super Lawyers include: **Raphael Duran**, **Niki Ingram**, **Michele Punturi**. Our 2021 Pennsylvania Super Lawyer Rising Stars include: **Ashley Eldridge**.

Kiara Hartwell (Mount Laurel, NJ) co-authored the article "Consulting the Crystal Ball: What Does the Future Hold for Current COVID-19 Workers' Compensation Claims?" that was published in the June 2021 edition of *CLM Magazine*.

To read the entire article, click here: https://736506f6.flowpaper.com/CLMJune2021/#page=14.

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