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What's Hot in Workers' Comp

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2013

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

1. Workers' Compensation Act does not cover occupational diseases, such as mesothelioma, that manifest more than 300 weeks after employment ends.

Tooey v. AK Steel, ARMCO Steel, Crown Cork & Seal, et al., 2013 Pa. LEXIS 2816

2. An employer's burden of proof when seeking a modification of benefits based on a labor market survey requires showing the existence of open jobs the claimant is capable of filling, not simply the existence of jobs that are already filled.

Phoenixville Hospital v. WCAB (Shoap), 2013 Pa. LEXIS 2810

3. A Pennsylvania state trooper who struck and killed a woman with his patrol car was entitled to benefits for a psychic injury due to abnormal working conditions.

Payes v. WCAB (Commonwealth of Pennsylvania State Police), 2013 Pa. LEXIS 2588

4. Section 413 (a) of the Act allows claimants to retain the right to petition for any modification that they hold at the time of any workers' compensation payment for a minimum of three years from the date of that payment. Where such payments have been suspended due to a return to work or an attempted return without a loss in earnings, § 413 (a) extends the right to petition for the entire 500-week period during which compensation for partial disability is payable. In the event payments are resumed after a suspension of benefits, claimants continue to retain the right to petition for any modification they hold at the time of any payment received subsequent to suspension for a minimum of three years from the date of payment. In the event that a period of suspension comes to an end upon the resumption of payments, claimants retain the right to petition for modification as set forth in § 413 (a).

Gina Cozzone, Executrix of The Estate of Andrew Cozzone v. WCAB (Pa. Municipal/East Goshen Township), 73 A. 3d 526 (Pa. 2013)

5. A claimant's receipt of pension benefits is not a presumption of retirement but is, instead, an inference that must be considered in connection with the totality of the circumstances.

City of Pittsburgh and UPMC Benefit Management Services, Inc. v. WCAB (Robinson), 67 A.3d 1194 (Pa. 2013)

6. Grace period payments made to the claimant are considered compensation under the Act, and the employer is entitled to reimbursement of them from the Supersedeas Fund.

Department of Labor and Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board, (Excelsior Insurance), 58 A.3d 18 (Pa. 2012)

7. Massage therapy provided by an LPN not licensed in massage therapy is, nevertheless, reasonable and necessary.

Kevin Moran v. WCAB (McCarthy Flowers and Donegal Mutual Insurance), 2013 Pa. Commw. LEXIS 421

8. An impairment rating given for a condition not part of the recognized work injury will not bar the employer from obtaining a termination for the official work injury.

Richard Harrison v. WCAB (Auto Truck Transport Corp.), 2013 Pa. Commw. LEXIS 391

9. A claimant is not in the course and scope of employment at the time of injury when the claimant abandons his employment to work on his child's go-cart.

Trigon Holdings, Inc. v. WCAB (Griffith), 74 A.3d 359 (Pa. Cmwlth 2013)

10. Denial of fatal claim petition because decedent's death did not occur within 300 weeks of the date of the original work injury was proper, even where the injury was later expanded by a judge's decision.

Jamie Whitesell v. WCAB (Staples, Inc.), 74 A.3d 297 (Pa. Cmwlth 2013) II

TOP 10 DEVELOPMENTS IN NEW JERSEY WORKERS' COMPENSATION IN 2013

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

Dario J. Badalamenti

1. An employee whose job required that he travel from his home to various schools was denied benefits for injuries resulting from a motor vehicle accident while driving home from work as he was not specifically compensated for mileage or travel time by his employer for time spent traveling to and from his job site.

Terebush v. Creative Safety Products, Docket No. A-3179-11T2, 2012 N.J. Super. Unpub. LEXIS 2771 (App. Div., decided December 19, 2012)

According to N.J.S.A. 34:15-36, the so-called "going and coming rule," employment commences when an employee arrives at the employer's place of employment and terminates when the employee leaves the employer's place of employment. A finding that an employee is specifically compensated for mileage or travel time by an employer for time spent traveling to and from a remote job site will often be sufficient to trigger the "travel time exception" to the going and coming rule.

2. A workers' compensation carrier's cancellation of a policy due to the insured's refusal to permit a loss control audit was nullified by the Judge of Compensation because the carrier's cancellation notice did not specifically advise the insured that it could reinstate its insurance policy by permitting the carrier to conduct the requested audit.

Osorto v. FMF Construction, Docket No. A-3236-11T1, 2013 N.J. Super. Unpub. LEXIS 252 (App. Div., decided January 25, 2013)

N.J.S.A. 34:15-81 is the controlling statute in determining if a workers' compensation policy has been properly cancelled.

3. A specific medical connection between a work-related event and an injury is not required to trigger the notice requirement under N.J.S.A. 34:15-17.

Ader v. Lebanon Township, Docket No. A-0383-11T2, 2013 N.J. Super. Unpub. LEXIS 555 (App. Div., decided March 11, 2013)

N.J.S.A. 34:15-17 requires that an employee seeking compensation notify his employer of injuries sustained in a work-related accident within a maximum period of 90 days.

4. A school bus driver injured while cleaning the interior of her bus—off premises and between runs—was acting in the scope and course of her employment as the cleaning of the bus was an integral part of her job for which she received additional compensation.

Benvenutti v. Scholastic Bus Company, Docket No. A-3732-11T1, 2013 N.J. Super. Unpub. LEXIS 739 (App. Div., decided April 4, 2013)

There must generally be a finding that the off-premises employee was performing his or her work responsibilities at the time of the injury. However, an employee may not need to be actually performing the work of the employer to be protected under the New Jersey Workers' Compensation Act. The so-called "minor deviation doctrine" provides that injuries sustained while employees are engaged in personally motivated, but customary or reasonably expected activities, such as smoking, eating or using the bathroom, are also compensable.

5. The employer, who knowingly ignored various safety precautions and regulations by removing a safety mechanism from a wood grinder, was not subject to liability in tort because this behavior did not constitute an "intentional wrong" sufficient to overcome the exclusive remedy provision of the Workers' Compensation Act.

Lemus v. Caterpillar Corporation, Docket No. A-4069-11T2, 2013 N.J. Super. Unpub. LEXIS 1181 (App. Div., decided May 16, 2013)

Although N.J.S.A. 34:15-8 provides the exclusive remedy available to employees injured by accident during the scope of their employment, an employee may bring an action against his employer at common law for any act or omission that is an intentional wrong. This is the so-called "intentional tort" exception.

6. An employee who knew he had a significant knee injury, who was aware of the inevitability of knee replacement surgery, and who believed that his knee pathology was the result of his employment had the requisite knowledge of the nature of his disability and its relation to his employment sufficient to begin running of the statute of limitations for filing a claim under N.J.S.A. 34:15-34.

Lattoz v. New Jersey Turnpike Authority, Docket No. A-4335-11T2, 2013 N.J. Super. Unpub. LEXIS 1348 (App. Div., decided June 5, 2013)

N.J.S.A. 34:15-34 provides that, "Where a claimant knew the nature of the disability and its relation to the employment, all claims for compensation or compensable occupational disease . . . shall be barred unless a petition is filed . . . within two years after the date on which the claimant first knew the nature of the disability and its relation to the employment."

7. An injury sustained by a personal trainer on her employer's premises did not arise out of her employment because she was not training anyone at the time of the accident, had changed out of her uniform and into her own workout clothes, and was working out on her own when the accident occurred.

Patterson v. The Atlantic Club, Docket No. A-0657-12T1, 2013 N.J. Super. Unpub. LEXIS 1716 (App. Div., decided July 11, 2013)

For compensation under the New Jersey Workers' Compensation Act to apply, an employee's injuries must have been caused by an accident both arising out of and in the course of employment. The "in the course of employment" inquiry looks to time, place and circumstances of the accident, while the "arising out of employment" inquiry looks to the causal nexus between the accident and the employment.

8. An employer may recover a faultless overpayment of workers' compensation benefits from an employee when it can establish unjust enrichment and an absence of circumstances making it inequitable to require the employee's reimbursement of the overpayment.

Weiner v. Elizabeth Board of Education, Docket No. A-0627-12T2, 2013 N.J. Super. Unpub. LEXIS 1729 (App. Div., decided July 15, 2013)

The Judge of Compensation is to determine if the employee was unjustly enriched under settled principles of unjust enrichment, an issue for which the employer has the burden of proof. If successful in doing so, the employer may then institute enforcement proceedings in Superior Court.

9. A Judge of Compensation may draw an "adverse inference" from a petitioner's failure to produce either the testimony or records of his treating physician when the records and opinion of the treating physician would be highly relevant and probative.

Donato v. Jersey City Municipal Utilities Authority, Docket No. A-5984-11T4, 2013 N.J. Super. Unpub. LEXIS 2074 (App. Div., decided August 21, 2013)

"Adverse inference" refers to a circumstance wherein the finder of fact concludes that evidence was not produced because it would be unfavorable to the non-producing party.

10. An employer who pays workers' compensation benefits to an employee is entitled to a lien against her third party settlement pursuant to N.J.S.A. 34:15-40 of the Workers' Compensation Act, even though it was ultimately determined that the employee's injury was not compensable.

Greene v. AIG Casualty Co., Docket No. A-6278-11T4, 2013 N.J. Super. LEXIS 149 (App. Div. October 16, 2013)

Although N.J.S.A. 34:15-40 permits an injured worker to both collect compensation benefits and pursue an action against a third-party tortfeasor, the employer is entitled to reimbursement from the proceeds of any such third party action. **II**

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2013

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

Paul V. Tatlow

1. Legislature enacts a 45-day time limit for a party to file a petition appealing a Utilization Review decision.

Christiana Care Health Services v. Cecil Palomino, et al., (Decided April 11, 2013)

The Supreme Court held that the 45-day time limit for appealing an adverse Utilization Review determination was invalid since it was in a regulation and conflicted with the five-year statute of limitations contained in § 2361 of the Act. Subsequent to this decision, the legislature remedied this problem by amending § 2361 (c) of the Act to provide that any Utilization Review decision would be final unless appealed within 45 days from the date of receipt of the decision to the Board for a hearing de novo.

2. Chronic pain treatment is the most frequently challenged guideline in Utilization Review requests.

The Department of Labor's *Annual Report*—which gives statistics for the prior year—indicates that in 2012, there were 536 requests filed for Utilization Review, a 9% increase from the prior year. The report further shows that out of the seven Healthcare Practice Guidelines, the one for chronic pain treatment was by far the most challenged, being represented in 61% of the filings. In particular, the most challenged treatment for chronic pain was that of prescription pain medications.

3. Important change made on use of the employer's modified duty availability report.

Effective June 27, 2013, the use of this employer form was changed to provide that, within 14 days of the issuance of an agreement as to compensation for any period of total disability, the employer is required to provide to the health care provider most responsible for treatment of the claimant's work injury the report of the modified duty jobs that may be available to the claimant. In addition, the employer's carrier is required to send this report to the employer for completion and has an independent responsibility to provide the completed report of modified duty jobs to the health care provider.

4. Limitations created on use of prescription medications.

Effective September 11, 2013, a Preferred or Non-Preferred Medication List was established and put onto the Department of Labor's website. A provider is required to complete a Justification for Use of Non-Preferred Medication form in order to deviate from the preferred drug list. The medications Oxycontin, Oxycodone extended release, Actiq and Transmucosal Fentanyl are not on either the preferred or non-preferred medication lists, and these medications may only be used with prior written approval by the employer or its insurance carrier. The only exception to this is that Oxycontin is allowed if the claimant was on a stable dose of it prior to the effective date of this regulation, in which case the claimant may continue that medication.

5. Delaware Supreme Court allows carriers to supply medications through their preferred vendor.

Patricia Boone v. Syab Services, Capital Nursing, (Decided July 16, 2013)

The Supreme Court held that the lower court had correctly determined that employers, through their carriers, do have the right to direct claimants to obtain their prescribed medications from the preferred pharmacy chosen by the employer. The court interpreted § 2323 of the Act and concluded that, while it gives claimants an absolute right to choose the physicians or other providers with whom they treat for a work injury, this does not extend to a pharmacist or a pharmacy.

6. Delaware Supreme Court holds that medical bills of a non-certified provider are not compensable where preauthorization was not obtained.

Wyatt v. Rescare Home Care, (Decided November 20, 2013)

The Supreme Court held that medical bills of a non-certified provider are not compensable absent preauthorization. The only exception is that treatment for the first visit is compensable, but in this case, a major surgery performed by the non-certified provider at a later visit was held not compensable since preauthorization had not been obtained.

7. Workers' compensation carrier's subrogation lien does not extend to a recovery by the claimant under an uninsured motorist policy.

Simendinger v. National Union Fire Insurance Co. and Philadelphia Indemnity Insurance, (Decided March 19, 2013)

This case dealt with the subrogation rights of a workers' compensation carrier to a third-party recovery. The Supreme Court held that the subrogation rights under § 2363 of the Act do not extend to the claimant's recovery of underinsured motorist benefits, even though the UIM policy in question had been purchased by the employer.

8. Employee who was not medically cleared by a physician to return to work was ineligible to receive unemployment compensation benefits.

Custis v. Staffmark Inv. LLC, C.A. No. N12A-08-008 JRJ (Del. Super. May 1, 2013)

The Superior Court held that the Unemployment Insurance Appeal Board had properly denied the employee's claim for unemployment benefits where he could not physically lift his arm above chest level and where no medical clearance had been received by a physician for the employee to work.

9. The Delaware Workers' Compensation Inn of Court holds its inaugural membership meeting.

On November 13, 2013, the inaugural meeting and dinner took place for the Randy J. Holland Delaware Workers' Compensation Inn of Court. The starting membership for this newly created organization was 109 members, which represents approximately 85% of the members of the Workers' Compensation Committee in the Delaware Bar. With this impressive number, this Inn of Court has the distinction of having the largest inaugural membership of any of the American Inns of Court that have been established to date.

10. The five-year statistics on appeals from Board decisions show that reversal rates continue to be extremely low.

The *Annual Report* from the Department of Labor gives a five-year cumulative summary of appeals from Board decisions. For the five-year period from 2008 through the end of 2012, the Board rendered 2,437 decisions on the merits. From that number, 332 were appealed, which is an average of 66.4 per year. Further, from that total number of appeals taken, only 42 were either reversed and/or remanded, which represents a reversal rate of 1.7% of the decisions issued in that five-year period. **II**