MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 18 | NO. 3 | MARCH 2014

25th Year in Publication!

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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

Francis X. Wickersham

An employer will not be penalized for a utilization review organization's (URO) failure to timely issue a determination in accordance with the Act, because the URO was not a party to the utilization review petition.

Lancess Womack v. WCAB (School District of Philadelphia); 1137 C.D. 2013; filed 1/14/14; by Judge Brobson

Following a decision from a Workers' Compensation Judge finding that the claimant sustained work-related injuries, the employer filed a request for utilization review (UR) of the provider's treatment for the period beginning August 19, 2010, and ongoing. A UR determination was issued on November 15, 2010. The reviewer found that the treatment was unreasonable and unnecessary. The provider then filed a UR petition. The Judge issued a decision dismissing the UR petition and finding that the treatment was not reasonable or necessary. The claimant appealed to the Board, which affirmed.

At the Commonwealth Court level, the claimant argued that the UR determination was null and void since it was not issued by the URO in a timely manner. The court noted that a request for UR is considered complete upon the URO's receipt of pertinent medical records or 35 days from the assignment of the matter by the Bureau of Workers' Compensation, whichever is earlier. At the latest, a URO has 65 days from the date of assignment to issue a written report. Here, the assignment to the URO was made on September 21, 2010. The URO then received records on October 5, 2010, which meant that the URO had until November 4, 2010, to issue its written determination. It did not do so, however, until November 15, 2010. The court, however, rejected the claimant's argument that the UR determination should be null and void. It pointed out that the employer did not fail to follow any prescribed statutory time period in either the Act or the regulations. The court held that the entity that failed to comply with the statutory and regulatory requirement was not a party, nor was it under the control or supervision of a party. They rejected the claimant's request to penalize the employer for a dereliction that was not of their doing. **II**

The Workers' Compensation Judge properly granted a claim petition even though the claimant's medical expert testified that he thought the claimant's condition would continue to improve and projected the claimant's ability to return to work.

Pennsylvania Uninsured Employer's Guaranty Fund v. WCAB (Bonner & Fitzgerald); 300 C.D. 2013; filed 2/12/14; by Judge McCullough

The claimant, who worked as a laborer, fell from a roof and landed on a cement slab. He suffered a seizure and was placed in a drug induced coma for one week. The claimant was diagnosed with a skull fracture, seizures and left eye injury. The claimant filed a claim petition against the employer, and then a claim petition against the Fund, since the employer was uninsured.

In testifying in connection with the claim petition, the claimant said he did not think he could go back to work since he continued to experience headaches, difficulty with balance and pain in his left eye. He also presented testimony from a medical expert, who said that the claimant sustained a moderate traumatic brain injury and that he was unable to work as a laborer as of the last time he saw the claimant. On cross examination, the expert said that he thought the claimant's condition would continue to improve and that, when he last saw the claimant, he thought he would be able to return to work in six weeks, pending test results.

The Judge granted the claim petition, and the Fund appealed. The Board affirmed the Judge's decision, concluding that the claimant's medical expert's testimony provided substantial evidence to support the Judge's finding that the claimant's disability extended beyond November 25, 2009 (the last time the expert saw the claimant).

The Commonwealth Court agreed and affirmed the decision of the Board. The court pointed out that a claimant's medical expert is not required to be an eyewitness to the claimant's disability throughout the pendency of a claim petition. They further found the claimant's expert's testimony to be "speculation," as the expert anticipated the claimant would be able to go back to work. The court held that in light of this speculative testimony and the claimant's testimony that total disability from his work injuries continued, the Judge properly denied the employer's request for a suspension of benefits as of the last date the claimant's expert saw him. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

A Judge of Compensation's extreme interpretation of the Premises Rule withstands Appellate Division review.

Burdette v. Harrah's Atlantic City, Docket No. A-4797-12T1, 2014 N.J. Super. Unpub. LEXIS 114 (App. Div., decided 1/17/14)

The petitioner was employed as a blackjack dealer with the respondent casino. On September 19, 2012, after completing her shift, the petitioner obtained her vehicle from the respondent's parking garage, drove along the respondent's internal driveway, passed through the respondent's security gate and proceeded to make a lawful left turn onto MGM Mirage Boulevard, a three-lane public highway. As the petitioner's vehicle entered MGM Mirage Boulevard, it was struck by another vehicle, which collided directly with the petitioner's driver's-side door. At the moment of impact, the petitioner's vehicle was located on MGM Mirage Boulevard, but was still partly over the defendant's driveway apron.

The petitioner filed a claim with the Division of Workers' Compensation for injuries sustained as a result of her motor vehicle accident. The respondent denied the petitioner's claim and filed a simultaneous motion to dismiss, asserting that the petitioner was not in the course of her employment at the time of her accident. At the conclusion of the trial, and having indicated that he reviewed a videotape recording of the accident, read the police report prepared following the incident and made multiple trips to the scene of the accident, the Judge of Compensation held that:

> The petitioner's vehicle after the collision [exited] the parking lot, but not completely. There is approximately one foot in length of petitioner's car still in the area of the parking lot controlled by Harrah's. [T]he petitioner's car was still, no matter how little or how much, still in the respondent's parking lot and by applying the [*Livingstone v. Abraham & Straus, Inc.*, 111 N.J. 89 (1988)] case, that equals that petitioner was still in her course of employment with Harrah's in accordance with N.J.S.A. 34:15-7.

The respondent appealed the Judge of Compensation's ruling, asserting that he misapplied the so-called Premises Rule – *i.e.*, N.J.S.A. 34:15-36, which provides in relevant part that: "Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer."

The respondent contended that the Judge's decision was erroneous as it was based on the disposition of the vehicle at the time of the incident, rather than the location where the vehicles impacted and where the petitioner's injuries were sustained. According to the respondent, as the point of impact and physical injuries occurred on MGM Mirage Boulevard and not within the physical limits of the respondent's premises, there could be no finding of compensability.

In affirming the Judge's ruling, the Appellate Division relied on *Kristiansen v. Morgan*, 153 N.J. 298 (1998), in which the New Jersey Supreme Court acknowledged that the Premises Rule limits recovery to injuries that occur on the employer's premises by confining the term "in the course of employment" to the physical limits of the employer's premises. However, the court is *Kristiansen* also reasoned that the legislature used the phrase "excluding areas not under the control of the employer" in its definition of employment to include within the definition areas controlled by the employer but not necessarily within the physical limits of the employer's premises. As the Appellate Division in the instant case reasoned:

> The circumstances of the present case plainly reveal that Burdette never fully left her own employer's premises. Although her vehicle was in the midst of navigating a left turn onto a public thoroughfare, the exact spot where Burdette suffered injuries was neither remote from, or unconnected to, her work premises. The inextricable connection between Harrah's premises and the collision would render a parting of the accidental injuries from compensability an unjust result. II

Side Bar

It seems apparent here that the Appellate Division's decision was based purely on altruistic concerns. Interestingly, the Appellate Division described the respondent's approach of focusing only on the colliding vehicles' point of impact and the front seat location of the petitioner in her vehicle as "ultra-rigid." However, one can easily characterize the Appellate Division's own holding as ultra-rigid. As the Judge of Compensation noted, only roughly one foot of the rear-end of the petitioner's vehicle extended over Harrah's property at the time of the incident. All four wheels of the vehicle were firmly planted on MGM Mirage Boulevard, as demonstrated by surveillance video. To conclude that the petitioner's accident occurred on the respondent's premises based on these findings is to extend the Premises Rule to its breaking point. However, the Appellate Division here made its purpose very clear in the introductory sentence to its holding: "Because the Act is humanitarian social legislation, it is to be liberally construed in favor of coverage, for the protection of employees."

Delaware Workers' Compensation

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Paul V. Tatlow

Board applies the Displaced Worker Doctrine and denies the employer's termination petition where the medical evidence shows claimant can do part-time light-duty work but still has a reasonable expectation of continued employment with the employer and they cannot accommodate the claimant's restrictions.

Donna Brittingham v. Delaware Supermarkets, (IAB No. 1376088 – Decided 11/6/13)

This case involved application of the Displaced Worker Doctrine with an unfavorable result for the employer. The claimant had sustained a compensable low back injury on October 9, 2011, following which she underwent lumbar spine surgery and received total disability benefits. Later, the employer filed a review petition, seeking to terminate the claimant's total disability benefits and put her on partial disability status. Based on the medical evidence presented by both parties, the Board concluded that the claimant was capable of part-time light-duty work as of August 28, 2013, based in part on reliance on a functional capacity evaluation that the claimant had undergone. The evidence also included a labor market survey prepared by a vocational consultant on behalf of the employer showing jobs in the local economy, which was submitted into evidence by stipulation of the parties. The claimant, however, contended that she was a displaced worker pursuant to the *Hoey* doctrine and was entitled to ongoing total disability since the employer could not accommodate her modified work restrictions.

The Board determined that the claimant did, in fact, have a reasonable expectation of continued employment with the employer as she had never been informed that she was being terminated. Further, the evidence showed that the claimant continued to receive employee benefits, including health insurance, and that she had been employed with the employer for many years. The claimant was also a union employee, which required a particular procedure to be followed in order to terminate such a claimant's employment, and that procedure had not even been initiated in this case. Based on this evidence, the Board concluded that, while the claimant was clearly capable of performing modified work, she nevertheless remained entitled to total disability benefits since she had a reasonable expectation of continued employment with the employer and they were not able to accommodate her modified work restrictions. ||

Side Bar

The *Hoey* doctrine, as enunciated by the Delaware Supreme Court many years ago, stands for the proposition that a claimant can be totally disabled legally if he or she has a reasonable expectation of continued employment with the employer and the employer cannot accommodate modified work restrictions. This case illustrates the fact that such a claimant cannot be expected to seek new employment elsewhere. The important upshot of this rule for employers is that labor market survey evidence is of no value when the claimant has a continued expectation of employment with the time-of-injury employer. In that instance, the employer will need to provide modified work to the claimant or else be liable for the claimant's continuing receipt of total disability benefits. If the employer, in fact, contends that the claimant has been terminated from his or her employment, an employer fact witness should testify as to the reasons why that has occurred, and this evidence should include documentation that the claimant's employment was formally terminated with the employer.

News from Marshall Dennehey

Tony Natale (Philadelphia, PA) successfully defended a large electric service company in a case involving a horrific motor vehicle accident. The claimant alleged injuries ranging from disc herniations riddled through the neck and back, significant tears in both shoulder tendons, bilateral carpal tunnel syndrome and epicondyle nerve damage, and a fractured ankle with total ankle replacement. The carrier involved in this matter contemplated accepting the injuries and prepared for a high-exposure claim. Interestingly, the claimant decided to get a ruling in the workers' compensation case before taking the case to trial in the MVA third-party case. The carrier asked that Tony do his best to limit exposure. Tony was able to effectively cross examine all of the claimant's medical witnesses, and the Workers' Compensation Judge found all neck, back and shoulder injuries to be fully recovered, while also finding that the bilateral wrist conditions were not work related.

The Insurance Society of Philadelphia will hold its annual Philly I-Day on April 9, 2104. **Niki Ingram** (Philadelphia, PA) will participate as a panelist for a breakout session titled "Diversity & Inclusion in the Insurance Industry – A Critical Success Factor." Niki joins a diverse and experienced panel for a lively discussion on the state of diversity and inclusion in the insurance industry. Drawing on personal anecdotes and real-life experiences, the panel will reflect on current issues in diversity and how moving forward toward diversity and inclusion will put the insurance industry on a path to better communication, improved employee satisfaction, increased customer satisfaction, greater productivity, and ultimately greater growth and profitability. For more information and to register, please visit www.phillyiday.com.

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- "Supreme Court of Pennsylvania Carves Out Exception to Exclusive Remedy Provision of Pennsylvania Workers' Compensation Act for Late Manifesting Occupational Disease Claims," *ABA TIPS Committee News*, Winter 2014 by Francis X. Wickersham.