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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

A diagnosis of malingering can be a sufficient change in condition as a matter of law to support a modification of benefits based on the results of a labor market survey.

Gregory Simmons v. WCAB (Powertrack International); 2168 C.D. 2013; filed 7/24/14; Judge Leadbetter

Following a 2001 work-related closed head injury resulting in post-concussive syndrome, the claimant underwent numerous independent medical examinations, and the employer filed termination petitions on two occasions. In the decisions dismissing those petitions, the credited medical experts generally opined that the claimant's condition was consistent with a post-concussion syndrome—with no signs of symptom magnification or malingering—and that the claimant was not capable of returning to work. Later, the employer filed a petition to modify the claimant's benefits based on the results of a Labor Market Survey. In connection with that petition, the employer offered a medical report from a new IME physician, who administered new tests to the claimant and concluded that the claimant was malingering and was able to return to work. The claimant testified that he was unable to perform the jobs in the employer's Labor Market Survey due to lack of concentration, light headedness, dizziness and an inability to sit or stand for long periods of time.

The Workers' Compensation Judge found that the claimant was sufficiently recovered from his injury and able to return to the work force. The Judge granted the modification petition and, in doing so, found the claimant to be mostly incredible. The claimant appealed, and the Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the employer failed to demonstrate that his condition had changed since the last termination proceeding. According to the claimant, the only change recognized by the IME physician was symptom magnification and/or malingering, which the claimant argued did not constitute a change in condition as a matter of law. The court rejected this argument, concluding that a diagnosis of malingering can be a sufficient change in condition as a matter of law to support a modification of benefits if it leads the medical expert to conclude that the claimant's disability or ability to work has changed. II

A claimant who quits his job just before suffering an injury may be within the course and scope of employment. The employer is not judicially estopped from arguing that the claimant was not an employee at the time of the work injury, even when employment was admitted in the employer's answer to a civil action complaint.

Paul Marazas v. WCAB (Vitas Healthcare Corporation); 337 C.D. 2014; filed 8/11/14; Judge Simpson

The claimant worked as a driver-technician for the employer. After a weekend on call, the claimant reported to work to receive his daily itinerary. After reviewing a list of the assigned stops, which would take him until midnight to complete, the claimant went to the employer's office and advised his manager that he was tired after his on-call weekend and asked for some stops to be removed. The

manager refused, and the claimant said he was quitting and turned in his keys and phone. The manager informed the claimant that he needed to remove his personal belongings from his company truck and escorted the claimant to the truck, pursuant to the employer's policy. After removing items from the truck, the claimant tripped over a pallet jack and fell, sustaining injuries. Days later, the claimant called the manager to report his injury and requested a referral to a panel physician. The claimant was informed that such physicians were limited to active employees.

Initially, the claimant filed a civil suit seeking damages for his injury. The employer, however, pled that the claimant was in the course and scope of his employment at the time of the injury. Consequently, the claimant withdrew his complaint and filed a claim petition, which was granted. The Appeal Board vacated and remanded the Workers' Compensation Judge's order, directing the Judge to assess whether the claimant was within the scope of employment at the time of injury. At a hearing on the remand, the Judge admitted into evidence the complaint the claimant filed and the employer's answer and new matter. In the answer, the employer admitted that the claimant was an employee. Ultimately, the Judge found that, although the clamant quit his employment prior to the injury, he was within the scope of his employment when he fell. The Judge concluded that the claimant fell on the employer's premises and that he was furthering the employer's interests at the time of injury because he was directed to go and perform a requested task. The Board again reversed the Judge on appeal.

The Commonwealth Court, however, reversed the Board. In doing so, the court held that, even though the claimant quit, he remained on the premises and was furthering the employer's interests by removing his belongings from the employer's truck while under his manager's supervision. Thus, the claimant was under the employer's control at the time of the injury. Moreover, the court noted that §301 (c) (1) of the Act does not preclude a claimant from seeking benefits for such an injury after the employment relationship has ceased, provided it can be established the injury occurred in the course of employment. The court also rejected the claimant's argument that the employer was judicially estopped from arguing that the claimant was not in the scope of employment at the time of the injury because the employer had already admitted in its answer to the claimant's civil action complaint that the claimant was an employee at the time of the injury. According to the court, judicial estoppel did not apply since the claimant voluntarily withdrew the complaint. **II**

Although the claimant began each work day by reporting to the employer's facility to receive assignments and pick up equipment, he was a traveling employee and the injuries sustained in a motor vehicle accident while driving to work were compensable.

Dane Holler v. WCAB (Tri-Wire Engineering Solutions, Inc.); 2209 C.D. 2013; filed 8/22/14; Judge Brobson

The claimant sought benefits for injuries he sustained in a motor vehicle accident that occurred while he was driving to his employer's facility. The claimant worked as a cable technician and began each workday by reporting to the employer's facility, where he received his assignments and picked up equipment. The claimant then spent the rest of his workday traveling to various customer locations. The employer permitted the claimant to take his company vehicle home each night and use it to report to work in the mornings, but they did not allow passengers, other drivers or use of the vehicle for personal reasons.

On the morning of the accident, the claimant was driving the company vehicle to the employer's facility to begin his workday when he was injured in a single vehicle accident. The claimant filed a claim petition, and the employer, relying on the "coming and going rule," argued that the claimant was not in the course and scope of employment. The Workers' Compensation Judge dismissed the claim petition, and the Appeal Board affirmed. The claimant appealed to the Commonwealth Court and argued that he was entitled to benefits because he had no fixed place of employment.

The Commonwealth Court agreed with the claimant and reversed the decisions below. Citing an unreported opinion in which it was determined that a cable technician was a traveling employee, the court held that the claimant had no fixed place of work and was entitled to a presumption that he was working for the employer during the drive from his house to the employer's facility. **II**

Side Bar

The court pointed out that the facts of the unreported case it cited were factually indistinguishable. In that opinion, as in this one, the court held that the fact that the claimant initially stopped at the employer's office at the beginning of the workday was not dispositive of the issue of whether the claimant was a traveling employee.

Delaware Workers' Compensation

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Paul V. Tatlow

The employer's payment of medical bills for treatment to a body part that is not part of the accepted work injury does not create an implied agreement of compensability where the evidence establishes that the payments were made by mistake but not under a feeling of compulsion.

Heather Taylor v. General Motors, Corp., IAB No. 1200319

This case came before the Board on the claimant's petition to determine additional compensation due, which sought compensability for a low back condition that was allegedly related to the acknowledged work injuries in 2001 and 2005. The accepted work injuries included the claimant's bilateral upper extremities, shoulders and cervical spine. The claimant alleged the medical evidence would establish that the low back condition was causally related to the accepted work injuries. Alternatively, the claimant asserted that the employer had made medical payments for treatment to the low back condition under a feeling of compulsion, resulting in an implied agreement of compensability. The evidence did establish that between 2005 and 2008, the employer had paid approximately $11,000 in medical bills to a provider who had treated the claimant's low back condition.

The claimant presented medical evidence from the provider who had been paid for treatment to the low back indicating that the physician's opinion was that the low back condition was causally related to the accepted work injuries. This provider also testified that his bills had been paid with no indication that the low back was not an accepted work injury. The employer presented medical evidence from a physician who had performed a DME and a records review. This expert testified that the low back condition was not work-related since there was no documented history of low back problems resulting from the work activities and also based on the indication that the claimant had a fibromyalgia condition, which could explain the low back symptoms. The Board accepted the employer's evidence on this issue and determined that the low back condition was not causally related to the accepted work injuries.

On the medical payment issue, the claimant testified that she had treated for her back and believed that it was part of the accepted injuries. The employer presented the claim adjuster who had handled the case during a portion of the time when the disputed medical payments were made, and she testified that those payments were made by mistake but not under a feeling of compulsion. This witness further testified that the claim notes reflected the accepted injuries, which did not include the low back, and the employer's evidence also showed that numerous agreements had been issued on this case but that none of them referenced the low back or lumbar spine.

The applicable law, as set forth in *Tenaglia-Evans v. St. Francis Hospital*, 913A.2d 570 (Del. 2006), stands for the proposition that an implied agreement to pay compensation may be found where the employer has paid medical expenses or compensation out of a "feeling of compulsion." The simple payment of expenses is not enough though. There must be a finding of "compulsion" on the part of the employer to pay those expenses. The Board applied this legal standard to this case and held that the medical payments made for the low back condition were done in error but not under a feeling of compulsion, and as such, they did not create an implied agreement or obligation under the Act. The Board accepted as credible the testimony of the claim adjuster presented by the employer on this issue. Claimant's counsel had objected to some of that testimony on hearsay grounds, contending that this witness had not made all of the payments. However, the evidence did establish that the witness made several of the payments at issue and clearly had firsthand knowledge to provide the testimony that the Board accepted. Accordingly, the claimant's petition seeking to establish the low back condition as compensable was dismissed. II

Side Bar

This case involved total medical payments made to date of over $154,000. In such cases, it is not uncommon that some medical bills may be paid for conditions that are not part of the accepted work injury. Even if such medicals are not paid, under the payment without prejudice provision of the Act, the employer still needs to be mindful that a defense can be raised that the medical bills were paid in error but not under a "feeling of compulsion." The successful assertion of such a defense can prevent the employer from being liable for what could otherwise be a serious medical condition that will greatly increase the exposure on the case. This particular case is being handled by this writer and is currently before the Superior Court on an appeal filed by the claimant.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division upholds exclusion of the petitioner's medical expert's testimony as an inadmissible "net opinion."

Russo v. Scott Schaffer, DMD, Docket No. A-2948-12T4, A-2949-12T41, (App. Div., decided 8/8/14)

The petitioner was employed as a dental hygienist by the respondent from August 1991 to March 2005. She filed a claim with the Division of Workers' Compensation alleging that she began having problems with her right wrist two or three years after she began working for the respondent. The petitioner testified that the nature of her work required her to use her hands with pinch force on instruments to remove plaque and calculus and required constant flexion, extension and abduction of the wrists with prolonged periods of static posture.

The petitioner's expert in orthopedics testified that he had no specific knowledge of the work that the petitioner performed as a dental hygienist, had not read any literature regarding the work, and had not viewed a surveillance video of the petitioner shopping, carrying packages, lifting large plants with her hands and gardening without much difficulty. The Judge found that the petitioner's expert's testimony was a "net opinion" based on very little knowledge of the petitioner's occupation or alleged injuries. Pursuant to N.J.R.E. 703, the so-called "net opinion" rule, an expert's opinion must be based on "facts, data, or another expert's opinion, either perceived or made known to the expert, at or before trial." Specifically, N.J.R.E. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Accordingly, the Judge concluded that she could give no weight to the petitioner's expert's opinion and that it was inadmissible.

In affirming the Judge's conclusion that the testimony of this expert could not be relied upon, the Appellate Division provided the following reasoning:

> [T]he only witness [Petitioner] presented to prove that her orthopedic injuries were work related was [her expert]. As we have noted, the judge found he had very little knowledge of the Petitioner's occupation or alleged injuries, rendering his testimony a net opinion. The judge cited specific aspects of [this expert's] testimony could not be relied upon to determine what orthopedic injuries were work related was supported by the record and is, therefore, entitled to our deference. II

Side Bar

The "net opinion" rule has been succinctly defined as "a prohibition against speculative testimony." Experts must identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable. As the Judge of Compensation in the instant case explained, "[T]he reasons and mechanics of a medical witness' assertion are more important than the assertion. [The petitioner's expert's] lack of knowledge, and his lack of explanation as to how and in what matter the employment caused the disability, leave an irreparable void in the proofs."

News from Marshall Dennehey

The Philadelphia Association of Defense Counsel's 2014-2015 luncheon CLE program series begins on Tuesday, September 16, 2014. The program, "What You Need to Know About Workers' Compensation to Keep You Out of Trouble in Your Liability Case," will be co-presented by **Niki Ingram** (Philadelphia).

Niki Ingram, **Tony Natale** (Philadelphia) and **Jim Pocius** (Scranton) will participate in the October 1, 2014, Pennsylvania Chamber of Business and Industry's Workers' Compensation Summit in Harrisburg, PA. The purpose of the Summit is to provide a basic understanding of workers' compensation and remove confusion from the "gray areas" of the law, explain the relationship between Medicare and workers' compensation, cover new and hot topics, and provide solutions to companies' biggest mistakes. Niki and Tony will present "Social Media and Workers' Compensation, and Handling Unusual WC Situations." James will present "Workers' Compensation and Medicare Update, and The Top 10 Mistakes Companies Make in Complying." For more information or to register, visit http://www.pachamber.org/events/details.php?id=1426#d2.

Tony Natale (Philadelphia) successfully defended a large mushroom distribution company in Reading, Pennsylvania, in a claim petition. The claimant slipped and fell at work and landed on her knee. Within a month she had meniscal repair surgery and, a few months later, total knee replacement surgery. Between surgeries, the claimant was discharged from employment for violation of the company absenteeism policy. Despite original testimony to the contrary, Tony was able to force the claimant to admit that she violated the company policy at issue by failing to produce medical records certifying the cause of her various absences. Tony cross-examined the claimant's medical expert and, as a result, the WCJ found the claimant's surgery not to be work related. The WCJ also found the claimant to be fully recovered from any and all injuries sustained during the slip and fall. II