MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 20 | NO. 2 | FEBRUARY 2016

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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

Francis X. Wickersham

While an expert must recognize the occupational causal presumption given to firefighters under § 301(a), this does not preclude an expert from attributing lung disease to non-occupational factors, such as preexisting bronchitis and smoking.

Thomas J. Sweigert v. WCAB (City of Williamsport); 493 C.D. 2015; filed December 23, 2015; Judge Covey

In his claim petition, the claimant alleged that he developed Chronic Obstructive Pulmonary Disease (COPD) as a result of 22 years of work as a firefighter for the employer. During that time, he was exposed to smoke, fumes, heat and gases. The claimant also alleged that the COPD caused him to stop working as of August 9, 2011. The Workers' Compensation Judge denied his petition, concluding that the claimant did not benefit from the presumption that his lung condition was a work-related occupational disease under § 301 of the Act. The judge also concluded that the claimant did not meet his burden of proving a work injury because his medical evidence was equivocal. The Workers' Compensation Appeal Board affirmed the judge's decision.

In his appeal to the Commonwealth Court, the claimant argued that the employer's medical expert was incompetent because he refused to acknowledge the occupational causal presumption given to firefighters under the Act. By law, expert testimony that adamantly rejects any causal relationship between exposure to the hazards of firefighting and lung disease is incompetent. In reviewing the testimony given by the expert, though, the court concluded that he did not say that a causal relationship did not exist between exposure to the hazards of firefighting and lung disease. Rather, he opined that if an individual has other significant causal factors, he would not attribute firefighting as the number one cause. ||

Under § 319, an employer is entitled to subrogation against a claimant's recovery of uninsured motorist's benefits from the policy of a co-employee.

Karen Davis v. WCAB (PA Social Services Union and Netherlands Insurance Company); 216 C.D. 2015; filed December 30, 2015; Senior Judge Friedman

While in the course of her employment, the claimant was involved in a motor vehicle accident as a passenger in the vehicle owned by a co-worker. The driver of the vehicle that struck the co-employee's vehicle was unknown. The claimant sustained injuries to her neck and low back and was paid a total of $56,213 in wage loss benefits and $33,572.22 in medical benefits.

Later, the claimant filed an uninsured motorist's claim with the co-worker's motor vehicle insurance carrier. The workers' compensation carrier then asserted a lien. The claimant settled the uninsured motorist claim, and, thereafter, the employer filed a petition to recover its lien from the proceeds from the uninsured motorist settlement.

The Workers' Compensation Judge concluded that the workers' compensation insurance company was entitled to subrogate against the claimant's settlement. Noting that the co-employee purchased the motor vehicle insurance, the judge concluded that, because insurance had been purchased by someone other than the claimant, the employer was entitled to subrogation under § 319 of the Act. The Appeal Board affirmed, and the claimant appealed.

The Commonwealth Court also affirmed. In doing so, they rejected the claimant's argument that subrogation was improper because a co-worker paid for the uninsured/underinsured motorist's coverage. According to the claimant, the employer should have the right to subrogation only where it has paid for the uninsured/underinsured motorist's coverage. The Commonwealth Court held, however, that the employer has the right to subrogation not only when the employer has paid for the policy, but also when a third party, such as a customer or co-worker, has paid for the policy. ||

Although the MCARE Act precludes subrogation against medical malpractice proceeds incurred before trial, an employer is entitled to subrogation against future medical expenses and wage loss.

Maryann Protz v. WCAB (Derry Area School District); 402 C.D. 2015; filed January 6, 2016; President Judge Pellegrini

The claimant sustained a work-related injury to her right knee that led to a total knee replacement. That procedure, unfortunately, resulted in a transected popliteal artery. The claimant filed medical malpractice actions against the surgeon and the hospital where the operation was performed. In connection with the medical malpractice case, the claimant submitted a medical report from her expert stating that the claimant underwent a total knee replacement due to her work-related injury and that, due to the negligent manner in which it was performed, she suffered a laceration of the popliteal artery, which required a popliteal artery repair. The medical malpractice action eventually settled, and the employer filed a petition to recover their workers' compensation lien under § 319 of the Act. The claimant took the position that the employer was not entitled to any recovery under the Medicare Care Availability and Reduction of Error (MCARE) Act.

The Workers' Compensation Judge granted the employer's petition. According to the judge, the employer established that the claimant's third-party settlement was for the malpractice injury sustained during surgery performed to treat the work injury and the complications that sprang from that injury. The judge precluded the employer and its workers' compensation insurer from obtaining subrogation against the medical malpractice proceeds with regard to payments for past medical expenses and past lost earnings under § 508 of the MCARE Act. However, the judge also found that § 508 did not preclude the employer from seeking subrogation with respect to future payments. The claimant appealed to the Appeal Board, and they affirmed.

In her appeal to the Commonwealth Court, the claimant argued that § 508 of the MCARE Act is silent as to subrogation of future medical expenses and wage loss in medical malpractice actions and, therefore, must be construed as a prohibition of subrogation. The court disagreed and dismissed the claimant's appeal, holding that, while § 508(c) of the MCARE Act disallowed subrogation with respect to benefits paid up until the time of trial, it did nothing to alter the pre-existing law with regard to future benefits. The court noted that, prior to the passage of the MCARE Act, employers and workers' compensation carriers were entitled to subrogation with respect to both past and future benefits. ||

New Jersey Workers' Compensation

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

Dario J. Badalamenti

A petitioner is not entitled to temporary disability benefits when he fails to establish that he has any promise or prospect of employment which he must forego due to his work injury.

Katzenstein v. Dollar General, Docket No. A-1141-13T3, 2016 N.J. Super. Unpub. LEXIS 120 (App. Div., decided January 22, 2016)

On August 22, 2012, the petitioner suffered a compensable right knee injury while working as a store manager for the respondent. The treating doctor returned the petitioner to work "light duty" on September 19th, restricting the number of hours per week he was permitted to work. On September 28th, the petitioner's employment was terminated for violating company policy because he left his store without supervision to make a bank deposit. Treatment with the treating physician continued.

On October 17, 2012, while the petitioner was neither employed nor receiving unemployment benefits, and his application for unemployment benefits having been denied, the treating physician instructed the petitioner out of work and recommended him for an arthroscopic knee surgery. Although the respondent authorized the surgery, it declined to pay temporary disability benefits based on *Cunningham v. Atlantic States Cast Iron Pipe Co.*, 386 N.J. Super. 423 (App. Div. 2006). The *Cunningham* court held that an employee is only entitled to temporary disability benefits if he can demonstrate that he had a "promise or prospect of employment" that he was required to forego because of his disability. Here, the respondent argued, there was no such showing.

The petitioner then filed a motion seeking temporary disability benefits, and although he testified that he had made an effort to find a job after he was terminated, the Judge of Compensation found that:

> the accuracy and veracity of [petitioner's] testimony . . . [was] dubious due to his lack of credibility. Not only had [petitioner] misstated the reason he was denied unemployment benefits, but during his testimony he sometimes evaded questions, and often inserted information in his answers that was not responsive to the question asked.

At the conclusion of the petitioner's testimony and oral argument, and finding the petitioner "somewhat lacking in candor," the Judge of Compensation also found the record was devoid of evidence that the petitioner had any promise or prospect of employment that he had to forego due to his disability; therefore, under *Cunningham*, he was not entitled to temporary disability benefits.

The petitioner appealed to the Appellate Division, which affirmed the Judge of Compensation's ruling. In finding that *Cunningham* had been properly applied, the Appellate Division reasoned:

> The Judge of Compensation assessed whether Katzenstein, after being terminated, had a promise or prospect of employment that he had to forego due to his disability. In determining that Katzenstein was not credible, the Judge of Compensation found he was neither offered employment after he was terminated nor declined employment due to his work-related disability. Thus, the Judge of Compensation's conclusion that Katzenstein was not entitled to temporary disability benefits is fitting. ||

Side Bar

The Judge of Compensation's ruling was strongly influenced by his assessment of the petitioner's credibility. Although he testified that he had made an effort to find employment following his termination, the Judge found that the petitioner lacked credibility due to inconsistencies in his statements and a general lack of "accuracy and veracity" during his testimony. The Appellate Division will give deference to the factual findings of a Judge of Compensation who has the opportunity to assess the witnesses's credibility from hearing and observing their testimony. *See*, *Lindquist v. Jersey City Fire Dep't.*, 175 N.J. 244 (2003). "We cannot second guess a judge," the Appellate Division reasoned here, "when sufficient credible evidence in the record supports his or her credibility findings."

Delaware Workers' Compensation

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

Paul V. Tatlow

Delaware Superior Court holds that the Board properly allowed the employer to utilize photographs taken from the claimant's public Facebook page as impeachment evidence without giving prior notice to the claimant.

Mary Ann MacFadyen v. Total Care Physicians, (C.A. No. N15A-05-001 ALR - Decided December 15, 2015)

The claimant had sustained a compensable injury during the course of her employment and was receiving compensation. She filed two petitions, with the first one alleging that she had developed complex regional pain syndrome of the left upper extremity and a recurrence of total disability. The Board found in favor of the claimant on both of those allegations. The second petition alleged the claimant had sustained a 24% permanency to the left upper extremity. On that petition, the Board relied on the testimony of the defense medical expert and concluded that the claimant only had a 4% permanency.

In her appeal, the claimant contended that the Board erred in only awarding 4% permanency and had improperly allowed the employer to utilize photographs taken from her public Facebook profile as impeachment evidence without giving prior notice to claimant's counsel.

The Delaware Superior Court concluded that there was substantial evidence for the Board to find that the claimant's permanency to the left upper extremity was 4%, as rated by the employer's medical expert, and that the Board was entitled to reject as it did the higher permanency rating of 24% given by the claimant's medical expert.

In regard to the use of the Facebook photographs, claimant's counsel argued that they were improperly admitted into evidence because employer's counsel had failed to give notice of the intent to use them in compliance with Board Rule 9, which provides that notice needs to be given to the opposing party of the intent to use any movie, video, or still picture and to either produce a copy of the same or information as to where it may be viewed. The court found that, contrary to the claimant's assertion, the Board had not actually admitted the Facebook photographs into evidence. Instead, the Board had determined that the photographs would be used only for impeachment purposes, would not be admitted into evidence, and would be given lesser weight than if they were introduced as substantive evidence.

The Superior Court reasoned that the Board was well within its authority to allow the employer to use the Facebook photos as impeachment evidence given the fact that the claimant had testified she cannot hold her grandchildren with her injured arm, and yet the photographs showed the claimant, in fact, holding her grandchildren with the injured arm. The court stated that, in these circumstances, to allow use of the photos as impeachment evidence was not unreasonable or capricious. To the contrary, the court concluded that the Board was well within its authority to allow use of the Facebook photos as impeachment evidence and that doing so did not produce any injustice. Therefore, the Board's decision on both of the issues appealed was affirmed. ||

Side Bar

With the rampant use of social media, employers should be diligent in investigating this area to determine the validity of a claimant's allegations. As noted in this case, the court found no error in the Board's allowing the Facebook photos to be used as impeachment evidence without actually admitting them as substantive evidence. As a general matter, it is probably preferable for the employer's counsel to disclose the intent to use this type of evidence in accordance with Board Rule 9 and in compliance with the 30-day rule in order to avoid the risk that they will be held inadmissible. This is particularly true where any type of social media evidence will be used as substantive evidence on behalf of the employer, as opposed to merely for impeachment purposes. Otherwise, failure to disclose the intent to use the social media evidence could result in the Board precluding its use as they generally frown on trial by ambush.

News from Marshall Dennehey

We are pleased to welcome **John P. Zeigler** to our Workers' Compensation Department. John joins us as a shareholder and is working in our Harrisburg office. With 20 years of experience, he defends employers, self-insureds and third-party administrators in all aspects of Pennsylvania workers' compensation claims. John is a founding member of the Central Pennsylvania Claims Association and remains on its Board of Directors today.

John Zeigler (Harrisburg, PA) will be speaking at the RIMS 2016 Annual Conference & Exhibition on April 11, 2016. In "The War on Employee Misclassification: Risks and Costs to Employers and Insurers," John will review state and federal actions and trends on the misclassification of employees and the impact on employer and insurer costs and risk. When workers are labeled independent contractors, employers avoid taxes as well as workers' compensation and unemployment insurance coverage. Conversely, misclassified workers who file suit for injuries sustained on worksites create tremendous liability risk for both employers and insurers. Joining John as a presenter is Stephanie Watts, a resolution manager at Gallagher Bassett. For more information, click here.

Judd Woytek (Allentown, PA) successfully defeated a claim petition in which the claimant alleged that she slipped and fell on the snow-covered parking lot of her employer's premises and sustained a concussion, post-concussion syndrome and cervical pain. The judge denied and dismissed the petition by accepting Judd's argument that the claimant failed to sustain her burden of proving that she actually slipped and fell on the employer's premises. The claimant lived only a few blocks from her employer's place of business, and Judd submitted medical records contemporaneous with the claimant's fall which all indicated that the claimant had absolutely no recollection of the fall itself or where it occurred. During her testimony, however, the claimant was adamant that she had fallen between rows of cars on the employer's parking lot. Despite the fact that both the claimant's treating doctor and our IME doctor found that she had sustained a concussion, Judd was able to convince the judge to deny the claim petition based upon the "coming and going" rule. The judge concluded that the claimant was unable to prove that she slipped and fell on her employer's parking lot or premises and that she was "commuting" to work when she slipped and fell. The judge also denied the claimant's penalty petition and found that the issuance of the notice of denial seven days late did not warrant a penalty.

Tony Natale (Philadelphia, PA) successfully litigated a number of appeals before the Workers' Compensation Appeal Board. The first case was on behalf of a local Fortune 500 financial institution. The claimant slipped and fell while performing her job duties on the employer's property and alleged she was plagued by repetitive traumatic stress. Tony litigated the original claim petition and was successful in having it dismissed before the judge. At the appeal level, the claimant argued that the burden of proof applied by the judge to the repetitive stress claim was improper. In a very complex oral argument and brief, Tony convinced the Appeal Board that the standard of proof applied by the judge did not constitute an error of law. The claimant's appeal was dismissed in its entirety.

In a second appeal before the Workers' Compensation Appeal Board, **Tony** represented a local credit union on the issue of whether alleged workplace abnormalities (which included allegations of harassment and racial bias) rose to the degree of a mental injury under the Pennsylvania Workers' Compensation Act. After arguing the case, the Board upheld the original dismissal of the claimant's petition, holding that the evidence of record did not meet the standard of a workplace injury within the meaning of the Act. ||