MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 20 | NO. 5 | MAY 2016

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

Penalties are not payable when underlying claims between claimant and employer were settled by Compromise and Release Agreement without an admission of liability, with no finding that the injury was work-related and no provision for payment of medical expenses.

Peter Schatzberg, D.C. and Philadelphia Pain Management v. WCAB (Bemis Co., Inc.); 1914 C.D. 2015; filed March 30, 2016; by Senior Judge Friedman

The claimant filed a claim petition, alleging he sustained a work injury with the employer on November 13, 2009. Later, a settlement was reached by a Compromise and Release Agreement (C&R). The C&R described the claimant's alleged injury and stated it was a resolution of all wage loss and medical benefits on a full and final basis.

After the C&R was approved, the provider filed a penalty petition, alleging the employer violated the Act by resolving the case by C&R without giving the provider notice and an opportunity to intervene. The provider maintained that the employer violated the Act by failing to pay for the claimant's medical bills in the C&R. The Workers' Compensation Judge dismissed the penalty petition, concluding the provider failed to establish that the employer was required to pay the bills since the C&R did not obligate the employer to pay them. The provider appealed to the Workers' Compensation Appeal Board, which affirmed.

The Commonwealth Court affirmed the dismissal of the penalty petition as well. It pointed out that the C&R stated it was not an admission of liability by the employer, and it did not require the employer to pay past or future medical expenses. Because the employer never admitted liability and because there was no finding or adjudication that the injury was work related, the employer was not obligated to pay the claimant's medical bills. **II**

Even though the employer admitted that a modified-duty job was more physically demanding than a video of the job observed by the employer's medical expert, a suspension of benefits was still proper since the job was within the restrictions of the employer's medical expert.

Edward Dixon v. WCAB (Medrad, Inc.); 1700 C.D. 2014; filed March 30, 2016; by Judge Covey

In December 2002, the claimant sustained a work-related injury to his neck. On July 29, 2011, the employer filed a Notification of Suspension or Modification, stating that as of July 25, 2011, the claimant's benefits were suspended based on a return to work at pre-injury wages. The employer then filed a suspension petition, alleging that it had offered the claimant a job within his physical capacities and that the claimant returned to work as of July 25, 2011, but stopped working on August 3, 2011. After that, the claimant filed a challenge petition. Additionally, the claimant filed penalty petitions, alleging the employer violated the Act.

The Workers' Compensation Judge granted the employer's suspension petition and denied the claimant's challenge petition, finding that the offered position was available to the claimant and that he did not exercise good faith in his attempt to return to work. The claimant appealed to the Appeal Board, which affirmed the judge's decision. The Board further modified the judge's decision to reflect that the claimant's challenge petition was granted.

On appeal to the Commonwealth Court, the claimant argued that his benefits were wrongly suspended because the proffered job exceeded his restrictions. The employer's medical expert, who performed

an IME of the claimant, testified that he thought the claimant was capable of working and provided physical capacities. He also reviewed a DVD of the offered job, which he felt the claimant was capable of performing. However, an employer witness testified that the job was actually more physically demanding than the job portrayed on the DVD.

The Commonwealth Court pointed out that the employer witness clarified that the claimant would not be asked to do anything outside his weight limitations, and the employer's medical expert said that the claimant could perform duties that were not depicted on the DVD but were within his physical capacities. Additionally, in reviewing the evidence of the claimant's follow-through on the job offer, the Commonwealth Court held that the judge's finding that the claimant did not make a good faith effort on his attempt to return to work was supported by the evidence. That evidence indicated that the week the claimant worked, he was performing sedentary duties—reading manuals and watching videos—and had not yet been required to perform his light-duty job. Still, on multiple occasions, the claimant left complaining of neck pain, despite the fact that the work he was doing that week was well within the restrictions of his own physician. Thus, the Commonwealth Court affirmed the decision of the Workers' Compensation Judge and the Appeal Board, suspending the claimant's benefits. II

New Jersey Workers' Compensation

By Elizabeth A. Dietz, Esquire (973.618.4192 or eadietz@mdwcg.com)

Elizabeth A. Dietz

When a psychotherapist becomes an advocate for a petitioner, instead of assisting the petitioner in gaining insight into the source of their problem and setting goals for recovery, the petitioner will be weaned off of the psychotherapy treatment.

Bannon v. Ridgefield Board of Education, CP#s: 2008-30924; 2009-33181

The petitioner sustained injuries to her left knee in both 2007 and 2008 while working as a special education teacher for the respondent. As a result of surgery to her knee, the petitioner suffered chronic left knee pain, anxiety and depression. In November 2010, it was ordered by the Judge of Compensation that Dr. Seltzer be authorized as the petitioner's treating psychiatrist. The respondent filed a motion to terminate the medical treatment being provided by Dr. Seltzer in July 2013, which was opposed by the petitioner.

In support of its argument, the respondent elicited the expert opinion of Dr. Hammer, a board certified psychiatrist. Dr. Hammer testified that the petitioner was receiving psychotherapy, which is not meant to be a long-term type of therapy. Dr. Hammer also testified that, upon review of Dr. Seltzer's records, it appeared as though Dr. Seltzer was focusing more on the workers' compensation system, as well as on issues regarding the petitioner's husband and daughter, as opposed to the petitioner's treatment goals, causing sessions to become less goal directed and more palliative and supportive in nature. As a result, Dr. Hammer concluded that the petitioner had reached maximum medical improvement with regards to psychotherapy.

In support of her argument, the petitioner elicited the expert opinion of Dr. Seltzer, who testified that the petitioner had shown improvement in her sessions and that there should not be a definitive expectation of time as to when her treatment should conclude.

The Judge of Compensation concluded that there was nothing in the record to support the necessity for the petitioner to continue to attend psychotherapy sessions in order to be able to implement the techniques and strategies that had already been provided to her for dealing with her condition. He further concluded that the treatment was becoming more palliative than goal directed and ordered that the petitioner be weaned off of the psychotherapy treatment over a period of 14 months. The Judge of Compensation's decision is interesting in that it is in contradiction to what has been the current trend of allowing ongoing palliative treatment. II

Side Bar

Psychotherapy, a.k.a. talk therapy, has the purpose of enabling patients to gain insight into the nature of their problems and set goals for their recovery from whatever mental disorder they may be suffering. Supportive therapy, on the other hand, focuses more on everyday life and is not goal oriented. Treatment was ultimately discontinued for the petitioner due to the fact that the nature of her therapy changed from psychotherapy to supportive therapy.

Delaware Workers' Compensation

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

Paul V. Tatlow

The Delaware Superior Court holds that, based on the exclusivity provision of the Act, a claimant is barred from recovering underinsured motorists benefits from the self-insured employer for the same injuries for which she had already received workers' compensation benefits.

Carletta Simpson v. State of Delaware and Government Employees Insurance Co., (C.A. No. N15C-02-138 WCC - Decided January 28, 2016)

This claimant was injured in a work-related motor vehicle accident on September 16, 2010, sustaining injuries to her cervical spine and lower back, for which she received workers' compensation benefits from her employer. The claimant also received the $15,000 policy limits from the carrier for the third-party tortfeasor. The litigation at issue took place in the Superior Court on the claimant's suit seeking UIM benefits from her employer and her personal insurance carrier for the injuries sustained in the work-related auto accident. The employer moved for summary judgment on the basis that the claimant had accepted workers' compensation benefits to the exclusion of other remedies.

The issue as framed by the court was whether the claimant could pursue the UIM claim against her self-insured employer for essentially the same injuries for which she had already received workers' compensation benefits. The court noted that other cases had dealt with a similar issue and allowed claimants to collect both workers' compensation and UIM benefits in cases where the claimant had purchased their own UIM policy. However, the court stated that this case presented an issue of first impression since it was one in which the workers' compensation insurer and the UM/UIM insurer were the same entity, namely, the State of Delaware. The court concluded that Section 2304, the exclusivity provision of the Act, barred the claimant from recovering the UIM benefits.

The court reasoned that the basic purpose of the UM/UIM coverage was to ensure that individuals have the ability to be compensated for their injuries beyond what may be available from a negligent tortfeasor's policy. The court noted that for individuals who have access to workers' compensation benefits, those benefits are in essence providing the same benefits they would receive under a UIM policy. The court concluded that the phrase "exclusion of all rights and remedies" in Section 2304 of the Act prohibited the claimant from having access to the employer's UM/UIM policy in this situation. Accordingly, the employer's motion for summary judgment was granted. II

Side Bar

In its conclusion, the *Simpson* court stated that they believed this issue required clarification from the legislature. Specifically, the court commented that it appeared possible that the exclusivity provision of the Act could operate to unfairly deprive an employee of much needed benefits. They gave as an example the situation where a claimant who had pain and suffering and wages beyond the maximum allowed under the Workers' Compensation Act could not recover them through that forum, but these benefits might be available under a personal insurance policy. The court suggested that, to the extent there was a possible inconsistency in coverage, there should at least be a clear legislative mandate to reflect what was intended. This writer has learned that the legislature is in fact addressing this issue and will most likely be issuing the clarification that has been requested by the court.

News from Marshall Dennehey

Tony Natale (Philadelphia, PA) will be speaking at our *Insurance Fraud 360* seminar, which will be held on June 2, 2016, from 11:30 a.m. – 4:30 p.m. at the CHUBB Conference Center in Lafayette Hill, Pennsylvania.

Tony and **Ariel Brownstein** (Cherry Hill, NJ) will share the podium in their presentation *Current Fraud Trends in Workers' Compensation and PIP*. Led by James H. Cole, Chair of Marshall Dennehey's Fraud/Special Investigation and Property Litigation Practice Groups, the seminar will feature firm attorneys and other insurance fraud professionals discussing emerging trends in fraud; the spike in fraudulent water damage claims; fraud trends in workers' compensation and PIP; bad faith perspectives on first party issues; and contemporary SIU management issues. Thomas Donahue, CIFI, FCLS, and Executive Director of the Pennsylvania Insurance Fraud Prevention Authority, will open the program as a special guest speaker.

Registration is open through May 31 and may be completed online or contact Terre Montemuro at tamontemuro@mdwcg.com.

Michele Punturi (Philadelphia, PA) received a favorable decision modifying a claimant's benefits and subsequently terminating his benefits and defeating his penalty petition and modification petition to expand the nature of injury. The case involved a high-exposure and a significant amount of evidence, including the claimant's testimony, the deposition testimony of the IME expert, the claimant's medical

expert and fact witness testimony of the employer. It is significant to note in this decision that the judge recognized the extreme importance of supplying to the IME expert all of the medical records and diagnostic study films, as well as past medical history, past medical records and diagnostic studies for comparison. The claimant's medical expert was not furnished with all medical records and diagnostic studies, nor did he have the applicable area of expertise. Also, the fact witness testimony of the employer was very detailed, being extremely knowledgeable of the work availability and job tasks. His testimony supported Michele's argument that the job offer made to, and rejected by, the claimant was within his restrictions.

John Swartz (Harrisburg, PA) obtained a defense verdict in a claim petition filed against a national eye lens manufacturer. The claimant alleged a stress fracture due to overuse of the left foot while working for the employer. The claimant did stand 10-12 hours per day in her employment. The judge found that, despite the claimant doing extensive walking and standing during her shift, the stress fracture, and the subsequent need for surgery, was not related to any work condition, but was pre-existing. The judge relied on the evidence and testimony of the defendant's medical expert over that of the claimant's expert. Under cross-examination, the claimant's expert's medical testimony was discredited since the physician's opinion was not supported by the objective diagnostic evidence or by the opinion of other treating physicians. In addition, the claimant did not report this as a work-related injury until after her short-term disability benefits expired. Claimant's counsel then appealed to the Workers' Compensation Appeal Board. John was successful in defending before the Board, and the judge's decision was affirmed dismissing the claim petition in its entirety.

Ashley Talley (Philadelphia, PA) won a defense verdict in a matter where the claimant was injured after a slip and fall at work. Although liability was initially acknowledged for a low back injury, the claimant sought to expand the injury to include a right shoulder condition, which required extensive surgical intervention. Medical depositions were presented on behalf of both parties, and in a decision mirroring the Ashley's legal and factual arguments, the judge granted a termination of benefits, finding the claimant to have effected a full recovery from the work injury while denying additional liability for the alleged right shoulder condition. ||