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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Refusal to pay work-related medical treatment on basis that a different entity was the actual provider of billed medical services makes the employer subject to penalties for violating the Act.

Derry Township Supervisors and Selective Insurance Company of America v. WCAB (Reed), No. 751 C.D. 2016; Filed Jan. 30, 2017; Senior Judge Pellegrini

The claimant was receiving physical therapy treatment for a work injury, and bills for this treatment were being submitted to the workers' compensation carrier by an entity known as pt Group. However, the actual services were performed by an entity known as The Physical Therapy Institute (PTI). According to an apparent exception to Section 306(3)(iii) of the Act—billing based on the Medicare Fee Schedule—if a provider was in existence on or before January 1, 1995, when the cost containment provisions were enacted, the provider was grandfathered and could avoid billing in accordance with the Medicare Fee Schedule.

The pt Group was not in existence in 1995. It owned the facility where the claimant received his physical therapy treatment and leased it and physical therapists to PTI for the purpose of treating workers' compensation clients. PTI was in existence in 1995 and was the entity that submitted the bills to the workers' compensation carrier. The carrier denied the bills because it believed pt Group performed the claimant's physical therapy, not PTI. The claimant filed a penalty petition, requesting payment of penalties and unreasonable contest attorney's fees.

The Workers' Compensation Judge granted the claimant's penalty and review petitions. In doing so, the judge noted that the employer never disputed that the claimant received the treatment outlined on the bills or that the bills remained unpaid and outstanding. Because the employer never received any indication from any federal or state authority that the billing arrangement was impermissible in any way, the judge found that the employer did not have a reasonable basis to contest the matter and ordered the employer to pay counsel fees in the amount of $83,400.

The employer appealed to the Workers' Compensation Appeal Board. It argued that services were provided by pt Group employees and billed by PTI at higher rates as an improper means to avoid the cost containment provisions of the Act. The Board affirmed the Workers' Compensation Judge's decision and dismissed the appeal.

At the Workers' Compensation Judge level, various witnesses testified as to the contractual arrangement between pt Group and PTI. Essentially, it was a joint venture. The claimant signed a disclosure statement, which provided that workers' compensation clients would be treated by therapists of PTI. The attorney who drafted the arrangement also testified, pointing out that the Centers for Medicare and Medicaid Services (CMS) had approved 26 locations submitted by PTI involving this leasing arrangement and that the Bureau of Workers' Compensation had been aware of the arrangement since 2007. An investigator for the employer's insurance carrier testified that in reviewing the bills, it was unclear which entity was providing the service, but his belief was that PTI was not the actual health care provider. Other witnesses from the carrier testified that, based on a review of the bills and the medical records, the provider that billed the treatment was not the provider that rendered the treatment. However, there was no indication on the face of the bills that they should not be paid.

On appeal to the Commonwealth Court, the court considered the issue of whether the Workers' Compensation Judge correctly found that the joint venture between PTI and pt Group was lawful, thereby enabling PTI to bill for the services rendered. The employer argued that, because pt Group was the actual provider, the services should be billed at the Medicare Part B fee reduction rate and that the insurance carrier did not violate the Act by not paying the bills. The Commonwealth Court disagreed and dismissed the employer's appeal. According to the court,

the Workers' Compensation Judge did not abuse his discretion in imposing a 50% penalty, nor did he err in awarding unreasonable contest counsel fees, given the employer's failure to provide any evidence establishing the alleged illegality of the joint venture. II

The claimant was properly denied benefits on the basis that he was an independent contractor, not an employee, and the WCJ was not required to hold that the claimant was an employee because of a late answer to a claim petition.

Justin Hawbaker v. WCAB (Kriner's Quality Roofing Services and Uninsured Employers Guaranty Fund); No. 224 C.D. 2016; Filed Feb. 13, 2017; By President Judge Leavitt

The claimant suffered injuries when he fell off of a roof while working. He filed a claim petition and, later, another claim petition that identified the Uninsured Employers Guaranty Fund as a defendant. The claimant testified that he worked for Kriner's, a company that specializes in residential roofing jobs. Admittedly, he said his work took some skill. He testified that the company instructed him where to perform jobs; what needed to be done on those jobs; when he was to take lunch; and when he was allowed to leave. He used his personal tools and was provided with some materials by the company.

The claimant began working for the company in 2011. In January 2012, he signed an Independent Contractor Agreement. Due to substance abuse problems, he stopped showing up for work in December 2012. In March 2013, the claimant contacted the company about returning to work and was told to obtain liability insurance and provide proof of insurance before starting any jobs. An addendum to the Independent Contractor Agreement was made indicating that the claimant would be paid by assigned task. The Independent Contractor Agreement of January 2012 was never terminated. The claimant provided a business name and address on his application for liability insurance, which later lapsed. He did not notify the company when his liability insurance lapsed.

The defendant explained that the Independent Contractor Agreement does not preclude an independent contractor from working for other contractors. A 1099 Form was issued to each subcontractor at the end of the year. The subcontractors were roofers who knew how to perform the tasks they were given.

The Workers' Compensation Judge dismissed the claim petition, concluding that the claimant was customarily engaged as an independent roofing contractor. The Appeal Board affirmed, noting that in October 2010, the legislature passed the Construction Workplace Misclassification Act, which set forth the guidelines for classification of independent contractors in construction. According to the Board, the Workers' Compensation Judge correctly applied the terms of the Misclassification Act in concluding that the claimant was an independent contractor. Additionally, the Board rejected the claimant's argument that, because the answer to the claim petition was untimely, the judge was required to hold that the claimant was an employee.

The Commonwealth Court affirmed the decisions of the Workers' Compensation Judge and the Appeal Board. In doing so, they pointed out that the January 2012 Independent Contractor Agreement never terminated. Additionally, the company did not direct the manner in which the claimant did work, a critical feature of the master servant relationship. The claimant performed the same or similar services for two other roofing companies. His Facebook page stated he was an "independent roofing contractor," and the claimant's insurance application identified his business and himself as the owner. Finally, the court rejected the claimant's argument that the untimely answer to the claim petition required the judge to conclude that he was an employee. According to the court, the claimant still has the burden of proving all elements to support an award of compensation. Conclusions of law are not deemed admitted by a late answer to a claim petition, and the existence of an employer/employee relationship is a question of law based on the facts presented in each case. II

In a disease as injury case under Section 301(c)(1) of the Act, the last date of exposure is the date of injury, and if death occurs within 300 weeks of the date of last exposure, a fatal claim petition is properly granted.

Kimberly Clark Corporation v. WCAB (Bromley), No. 656 C.D. 2016; Filed May 4, 2017; Judge Covey

The employer operated a paper manufacturing plant where the decedent worked as a plant electrician from 1973 to 2005. During that time, he was exposed to various chemicals. In the summer of 2005, the decedent was diagnosed with metastatic bladder cancer, resulting in his death on June 23, 2006.

On August 4, 2008, the claimant filed claim petitions: one seeking lost wages from August 11, 2005, through June 23, 2006; one fatal claim petition alleging death from an occupational disease under Section 301(c)(2) of the Act; and one seeking widow's benefits under Section 301(c)(1) of the Act. In all of the petitions, it was alleged that the decedent's date of injury/last date of employment was August 11, 2005.

Initially, the Workers' Compensation judge granted the fatal claim petition and ordered payment of benefits to the claimant as of June 23, 2006. The employer appealed to the Appeal Board, and they remanded to the judge since he did not state whether conclusions were made pursuant to Section 301(c)(1) or Section 301(c)(2) of the Act. On remand, the judge re-affirmed his original decision and added that the claimant met the burden of proof required under Section 301(c)(1) of the Act. The employer appealed to the Appeal Board, which affirmed.

In its appeal to the Commonwealth Court, the employer argued that the claimant failed to meet her burden of proving that the decedent's death was caused by exposure to chemicals in the work place within 300 weeks preceding his death. According to the court, while there was evidence that would negate any significant exposure since 1995, there was, nevertheless, an acknowledged and continued presence of a number of compounds at the facility that continued to expose the decedent to carcinogens up until the time he retired. In the court's analysis, in order for the claim to be compensable under Section 301(c)(1) of the Act, the claimant had to prove that the decedent's last exposure to a hazard occurred on or after September 22, 2000. In the court's view, testimony given by co-worker lay witnesses was sufficient to establish exposure and there was evidence that the exposure was a substantial contributing cause of the decedent's bladder cancer. II

Delaware Workers' Compensation

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Paul V. Tatlow

The Superior Court holds that the Board applied the incorrect legal standard and, therefore, reversed and remanded the Board's decision which found that the claimant's injury sustained while playing on an employer's softball team was within the course and scope of his employment.

Morris James LLP v. William Weller, (C.A. No. N16A-05-006 FWW – Decided Mar. 16, 2017)

The claimant was a bankruptcy paralegal for the employer, a law firm in Wilmington for which the claimant had begun working in October 2002. Shortly after beginning work there, the claimant participated on the employer's softball team and at one point was its manager. Since the 1970s, a group of employees had formed a team that competed against other local law practitioners in the Wilmington Lawyers' Softball League. The employer supported the team by paying for team jerseys, equipment and meals after each game. The employer also supported the team by signing liability agreements so that the players could practice on local softball fields.

Prior to the June 10, 2015, game, the claimant was asked to buy beverages for the game that evening, and he left work early in order to do so. During the game, the claimant was running around the bases when he ruptured his Achilles tendon. He had surgery to repair the Achilles tendon and was out of work from June 11, 2015, to December 8, 2015, recovering from the surgery. The workers' compensation carrier for the employer denied the claim on the basis that it did not occur within the course and scope of employment.

The claimant filed a petition, and a hearing took place before the Board on December 16, 2015. The testimony at the hearing indicated that employee participation on the softball team enhanced moral and camaraderie within the firm. The executive director for the employer also testified that he himself enjoyed playing softball and he believed that by enhancing the morale of the employees it also inevitably enhances their productivity at work.

The Board determined that the claimant's injury occurred within the course and scope of his employment and applied a four-factor standard from Larson's Workers' Compensation Law Treatise in reaching that determination. The Board specifically determined that the employer probably obtained benefit through increased productivity of its employees who participate as players, and that the employer's willingness to accept liability for on-field incidents by signing the hold harmless agreements showed a modicum of control sufficient to bring the games within the course and scope of the employment. Finally, the Board noted that, while the games themselves took place off of the work premises and after work hours, the claimant in this incident had been allowed to leave work early to purchase beverages for the game.

On appeal, the employer argued that the Board's decision should be reversed since they had applied the incorrect legal standard. The claimant, on the other hand, while conceding that the Board used the wrong standard, contended that this was a harmless error.

The Delaware Superior Court provided a detailed and thorough analysis of the applicable law. The case of *Nocks v. Townsend's, Inc*. sets forth the standard for an employee injured during a softball game sponsored by the employer. That standard, from Larson's Treatise, for a company-sponsored event requires the court to consider: (1) the time and place factor; (2) the degree of employer initiative; (3) the financial support and equipment furnished by the employer; and (4) the employer's benefit from having a company team. On the other hand, the case of *State v. Dalton* sets forth the standard for a softball game that is **not** sponsored by the employer but, rather, by another organization. In that situation, the standard, also from Larson's Treatise, requires the court to consider whether: (1) the injury occurs on the premises during a lunch or recreation period as a regular incident of employment; (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of the employee, brings the activity within the orbit of the employment; or (3) the employer derives substantially direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

As to the three-part standard for determining the compensability of a non-employer-sponsored recreational activity, the Delaware Supreme Court thereafter affirmed this Court's decision has noted that the factors are set forth in the disjunctive, and, therefore, only one of the factors must be satisfied in order to support a finding that the injury is compensable. In this case, the Board had determined that the employer did not sponsor the softball games since they were instead sponsored by the Wilmington Lawyers' Softball League. Therefore, the court determined that the Board had erred by applying the factors set forth in *Nocks*, which applied to employer-sponsored recreational events. The court remanded the case back to the Board to apply the factors set forth in *Dalton* for recreational events that are not sponsored by the employer. II

News from Marshall Dennehey

Kacey Wiedt and **Shannon Fellin** (Harrisburg, PA) are presenting a live webinar, "Best Practices to Avoid Common Workers' Compensation Mistakes," on June 29, 2017. One of the most difficult challenges facing employers today is the management of sky-rocketing workers' compensation costs. While avoidance of litigation is always the goal, it is not always possible. When litigation ensues, steps can be taken to avoid common workers' compensation litigation mistakes to help contain and mitigate costs. This webinar will benefit those involved in the claims handling process by identifying these common mistakes, as well as the solutions to remedy them. You will also benefit from learning best practices in risk management to avoid mistakes in the first place. When the employer, insurance claims adjuster and defense attorney align toward the goal of reducing workers' compensation litigation costs, a company is well-positioned for future growth and success. For more information or to register, **click here**.

Kacey Wiedt (Harrisburg, PA) is presenting at SEAK's 36th Annual National Workers' Compensation and Occupational Medicine Conference, which will take place from July 18-July 20, 2017. In "How Employers, Insurers and Self-Insurers Can Save Money," Kacey will explain how to judge the compensability of workers' compensation claims and determine which ones to accept or defend. He will discuss how to partner with defense counsel to create accountability and reduce overall costs on litigated workers' compensation claims. Kacey will also offer practical suggestions for deciding how and when to settle claims and resolve difficult legacy claims. For more information and to register, **click here**.

Tony Natale (Philadelphia, PA) successfully prosecuted a suspension petition on behalf of a mushroom packing facility. The claimant sustained serious injuries to her low back and shoulder, which required surgery. Tony convinced the Workers' Compensation Judge that the claimant refused available employment within her post-injury physical limitations that would have paid her equal to, or in excess of, her pre-injury average weekly wage. While the claimant presented a "treating expert" as part of her case, Tony presented the claimant's treating surgeon to meet his burden of proof. The judge concluded that the surgeon was more credible and persuasive as to the claimant's work capabilities. **II**