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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

An employer is obligated under § 306 (f.1)(1)(i) of the Act to reimburse the claimant for massage therapy sessions performed by a licensed therapist under the direction of the claimant's treating provider.

Leslie Schriver v. WCAB (Commonwealth of Pennsylvania, Department of Transportation); 289 C.D. 2017; filed Dec. 28, 2017; Judge Covey

Following a 1978 work injury, the claimant was referred by her chiropractor to a licensed massage therapist in 2015 for therapy to the low back and hips. The claimant received massage therapy treatments every three weeks beginning in January 2015, for which she paid $60 per hour out of pocket. The massage therapy receipts were submitted to the employer's counsel for reimbursement. However, the employer did not pay the claimant. Consequently, the claimant filed a penalty petition and a review petition seeking reimbursement of the expenses. The Workers' Compensation Judge granted the petitions, ordering the employer to reimburse the claimant and awarding the claimant penalties, costs and attorney's fees.

The employer appealed to the Workers' Compensation Appeal Board. The Board reversed, reasoning that although the massage therapist was licensed, as required under the Massage Therapy Law of 2008, this did not automatically mean the employer was required to cover massage therapy under the Act. According to the Board, an employer is only liable for medical treatment designed to diagnose impairment, illness, disease and disability, and massage therapy is merely intended to "enhance health and well being," and, therefore, not compensable.

The Commonwealth Court reversed the Board. The court noted that § 306 (f.1)(1)(i) does not expressly limit health care providers to medical treatment to the exclusion of methodologies intended to enhance an injured worker's health and well being. Based on legal precedent and the Act's definition of a health care provider, regardless of whether or not massage therapists are licensed, if they are supervised or have an employment or agency relationship with a licensed health care provider, the employer is liable for expenses related to the services rendered. The court concluded that the evidence supported the Workers' Compensation Judge's finding that the claimant's massage therapy was provided under the direction of her chiropractor in connection with her overall work-injury treatment plan and, therefore, the employer was obligated under the Act to reimburse the claimant for the sessions. II

A claimant who had been separated and living apart from the decedent but not divorced is not entitled to dependency benefits under § 307(7) of the Act as he could not establish he was actually dependent upon and received a substantial portion of support from the decedent.

Gerard Grimm, on behalf of Catherine A. Grimm, Deceased v. WCAB (Federal Express Corporation); 1982 C.D. 2016; filed Jan. 4, 2018; Judge Simpson

The claimant and the decedent were married in November of 1988 and had three children. They separated in August or September of 2010. On February 2, 2012, the decedent suffered a fatal heart attack while in the course of her employment as a truck driver/delivery person. The claimant filed a fatal claim petition on behalf of himself as the widower/husband and the couple's children as dependents. The employer acknowledged the decedent's work-related death and the children's entitlement to benefits, but disputed the claimant's entitlement to dependency benefits because the claimant was separated and living apart from the decedent at the time of death, although they were not divorced.

At the Workers' Compensation Judge level, the claimant submitted evidence to show dependency, including joint tax returns that he filed with the decedent and information concerning health insurance benefits the decedent provided to the claimant and their children. The claimant testified that after their separation, the decedent continued to provide her family,

including the claimant, with health insurance through the employer. The decedent paid for health insurance coverage through payroll deductions.

The Workers' Compensation Judge dismissed the petition, finding the claimant was not living with the decedent and was not dependent on her or receiving a substantial portion of support from her at the time of death. According to the judge, the only support the decedent provided to the claimant was health care benefits. The record showed the claimant provided the majority of support for the decedent's and children's household by continuing to pay for utilities, the children's expenses and half of the real estate taxes. The claimant appealed to the Appeal Board, which affirmed.

On appeal to the Commonwealth Court, the claimant argued that the Workers' Compensation Judge erred in denying his petition because there was evidence establishing that, although he was separated from the decedent at the time of death, they could still be considered "living together" under § 307(7) of the Act. According to the claimant, although the decedent filed for divorce and the claimant moved to a townhouse thereafter, the divorce was never finalized, the claimant continued using a joint account for his personal use and the couple continued to file joint tax returns. Additionally, the couple jointly owned the marital residence, and the decedent provided health insurance coverage for the children and the claimant.

The Commonwealth Court rejected the claimant's argument, holding that the Workers' Compensation Judge was correct in finding that the claimant and the decedent were living separate lives at the time of the decedent's death and that the marital relationship existed in name only. The court further rejected the claimant's argument that he nevertheless received a substantial portion of support from the decedent through the health care benefits she provided through her employer, which in the year preceding the decedent's death amounted to 25% of the family's overall monthly expenses. The court concluded that this was considered by the Workers' Compensation Judge, who correctly found that the benefits alone failed to establish that the decedent substantially contributed to the claimant's support. The court also dismissed the claimant's argument that joint tax returns from 2009 and 2010 showing negative income were further evidence of the substantial support he received from the decedent. The court pointed out that the claimant's 2011 tax return showed that the year prior to the decedent's death his income recovered following earlier business losses and that he earned significantly more than the decedent. **II**

A claimant is not eligible to seek a reinstatement of disability compensation benefits when it has previously been adjudicated that the work injury did not cause a loss of earning power.

Wilner Dorvilus v. WCAB (Cardone Industries); 397 C.D. 2017; filed Jan. 5, 2018; President Judge Leavitt

In his claim petition, the claimant alleged a work injury that occurred on November 12, 2009, while he was packing machine parts onto a cart. The Workers' Compensation Judge granted the claim petition for a low back strain and sprain and ordered payment of wage loss benefits as of September 18, 2009, ongoing. The employer appealed to the Appeal Board. Although the Board affirmed that the claimant sustained a work injury, they reversed the judge's award of disability benefits. The claimant appealed that decision to the Commonwealth Court, which affirmed the Board in a 2014 decision.

On May 5, 2015, the claimant filed a reinstatement petition, alleging that his work injury had worsened and caused a loss of earning power as of June 26, 2013. The employer moved to dismiss the petition as barred by collateral estoppel and res judicata, which was denied by the Workers' Compensation Judge. The employer then moved to dismiss the petition as time barred under § 413(a) of the Act, which requires a reinstatement petition to be filed within three years after the date of the most recent payment of compensation. The judge dismissed the petition, and the Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that his reinstatement petition was timely since his last payment of compensation was made on July 21, 2013, and his petition was filed on May 8, 2015. The employer paid the claimant benefits from May 23, 2011—the date of the Workers' Compensation Judge's award—through July 31, 2013—the date the Appeal Board reversed the award of disability compensation. According to the employer, it had been adjudicated that the claimant was not entitled to any wage loss compensation and, therefore, the payment of benefits to which the claimant was not entitled was irrelevant to the three-year deadline imposed by § 413(a) of the Act for filing a reinstatement petition.

The Commonwealth Court dismissed the claimant's appeal, pointing out that in this case, the claimant fully litigated his claim for disability compensation and lost. Thus, there were no benefits capable of reinstatement. Although the claimant proved a work injury, he did not prove that it caused disability. Therefore, he could not now seek a reinstatement after the three-year statute of limitations had run based upon his collection of compensation payments that were ultimately reversed on appeal. **II**

A Workers' Compensation Judge lacks jurisdiction to hear a claimant's appeal of a utilization review determination where the required medical records were not provided to the utilization review organization.

Timothy M. Allison v. WCAB (Fisher Auto Parts, Inc.); 704 C.D. 2017; filed Jan. 12, 2018; President Judge Leavitt

Following multiple injuries sustained by the claimant in a work-related motor vehicle accident, the employer filed a request for Utilization Review of medical treatment being provided to the claimant by a treating physician. The request was assigned to a Utilization Review Organization (URO), which requested the physician's medical records. The records were never provided. Nevertheless, the URO assigned the matter to a reviewing physician, who, despite not having the records, performed a substantive review of the care. The reviewing provider concluded that the treatment was not reasonable and necessary, citing medical literature to support his opinion. The claimant filed a petition challenging the determination.

The employer moved to dismiss the petition, arguing the Workers' Compensation Judge lacked jurisdiction because the physician had not provided medical records to the URO. The employer's motion was denied since the reviewing provider prepared a substantive report. The Workers' Compensation Judge granted the claimant's petition, holding that the medical treatments were reasonable and necessary. The employer appeal to the Appeal Board, which reversed.

The Commonwealth Court affirmed the Board, agreeing that the Workers' Compensation Judge lacked jurisdiction to review the reasonableness and necessity of the medical treatment at issue since the medical records were not provided to the URO. Although the reviewing provider had performed a substantive Utilization Review, the court held that the URO's assignment of the Utilization Review to a reviewing physician was improper because the substantive review could not be performed without the records. The court further rejected an argument raised by the claimant that the Board, by denying his right to a hearing, violated his due process rights since he had an identifiable property interest in the treatment he received from his physician. According to the court, this claim was unfounded because there was no identifiable property right to any medical treatment that, by law, has been determined not to be reasonable and necessary. **II**

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board committed legal error in awarding compensation for injuries the claimant sustained in an auto accident that occurred when he was commuting home from work because the employment contract did not pay for time spent commuting.

State of Delaware v. Mark Desantis, (C.A. No. N17A-02-007 ALR – Decided Oct. 17, 2017)

This case was appealed to the Delaware Superior Court by the employer, who was represented by my colleagues Jessica Julian and Ben Durstein. We were successful in having the Board's decision in favor of the claimant reversed and remanded. This case involved the issue of when the "going and coming" rule should be applied in determining compensability.

The claimant was employed as a construction manager for DelDot, and his job duties required the inspection, execution and administration of the construction activities in its paving and rehabilitation program. The claimant had an office in Bear, Delaware, and he worked core hours that were either from 8:00 a.m. to 4:00 p.m. or from 7:00 a.m. to 3:00 p.m. His job duties also required that he visit various roadway construction sites to conduct inspections. It was common for him to do so by working overtime and visiting those construction sites after his core hours because many of these projects took place at night. Importantly, the claimant was not compensated for any time spent commuting to or from his home, whether during his core hours or when working overtime. On October 16, 2014, the claimant visited a construction site late in the evening. On his way home in the early morning hours of October 17, 2014, he was involved in a motor vehicle accident and sustained extensive injuries.

Claimant's counsel filed a DCD petition, seeking compensation for the injuries sustained in the motor vehicle accident while the claimant was commuting to his home from the jobsite. The Board found that while the employer did not compensate the claimant for commuting time, this claim was nevertheless compensable since the claimant was employed with a semi-fixed place of business, which is an exception to the "going and coming" rule.

On appeal, the Superior Court made reference to the "going and coming" rule, which provides that injuries resulting from accidents during an employee's regular travel to and from work are not compensable. There are, of course, a number of exceptions to that rule. The court then focused on the 2013 Delaware Supreme Court decision in *Spellman v. Christiana Care Health Services*, 74 A.3d 619 (Del.2013), in which the court set forth a framework for when the "going and coming" rule should be applied. Under the *Spellman* framework, the Board is directed to first focus on the employment contract to determine if its terms contemplate that the claimant's travel time is compensable. If the terms of the employment contract are clear on that issue, the Board's inquiry must end. It is only when the employment contract is not clear on whether travel time to and from work is paid for that the Board can then consider secondary default presumptions and rules of construction, such as the "going and coming" rule and its exceptions.

As applied to this case, the Superior Court reasoned that the Board was first required to consider whether the employment contract addressed the question of whether commuting home from the construction site was compensable. The Board had done so, and the evidence showed that the terms of the employment contract provided that the claimant was not paid for travel time or mileage between his home and work. The court stated that this should have ended the Board's inquiry.

The Superior Court reasoned that since the claimant's employment contract specified that he would not be paid for travel from work to home or vice versa, the *Spellman* analysis required a ruling that the injury incurred while driving home from work did not arise out of the course of employment. Therefore, the Board committed legal error by then applying the "going and coming" rule. The Board's decision was reversed, and the case was remanded to the Board for further proceedings, which will most likely result in a dismissal of the claimant's petition. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

Appellate Division relies on *Cunningham* in affirming a Judge of Compensation's denial of petitioner's claim to temporary disability benefits because the petitioner was unable to demonstrate actual lost wages.

Kocanowski v. Township of Bridgewater, Docket No. A-3306-15T2, 2017 N.J. Super. Unpub. LEXIS 171 (App. Div., decided Dec. 11, 2017)

While responding to a fire on March 16, 2015, the petitioner, a volunteer firefighter with the respondent, slipped and fell on ice, breaking her right leg and foot. The petitioner later underwent surgery of the right leg and foot followed by a lengthy course of recuperative care. At the time of the accident, the petitioner was not employed. Although she had previously been employed as a certified home health aide, she stopped working in October of 2013 to care for her ill father and allowed her certification to lapse.

The petitioner filed a claim with the Division of Workers' Compensation for an injury to the right leg in addition to a motion seeking temporary

disability benefits. The respondent filed an opposition to the motion, claiming that because the petitioner was not employed at the time of the accident, she was not entitled to temporary disability payments.

At trial, the petitioner testified that since her March 2015 accident, she was unable to resume her duties as a volunteer firefighter, nor did she believe that she was capable of returning to work as a certified home health aide. Although finding that the petitioner was entitled to both medical treatment and permanent disability for her injuries under the Workers' Compensation Act, the Judge of Compensation denied her application for temporary disability benefits, stating, "The case law in New Jersey is clear, petitioner must be receiving wages to merit receiving temporary disability replacement for those wages."

The petitioner filed this appeal. In affirming the Judge of Compensation's denial, the Appellate Division relied on *Cunningham v. Atlantic States Cast Iron Pipe Co*., 386 N.J. Super. 423 (App. Div., 2006), where the court found that actual lost wages are a prerequisite to a temporary disability award. The Appellate Division found that the judge's ruling was in accord with *Cunningham* and reasoned that, "[a]lthough a volunteer firefighter is entitled to temporary benefits[,] there first must be an entitlement by the volunteer to payment of temporary benefits. That payment depends on proof of lost wages."

Since the petitioner had provided no proof of lost wages, the Appellate Division concluded that she was not entitled to temporary disability benefits. ||

Side Bar

In addition to *Cunningham*, the Appellate Division did include as part of its analysis a discussion of a number of other New Jersey cases that support the proposition that proof of lost income is a prerequisite for an award of temporary disability benefits. Those cases include *Electronic Associates, Inc. v. Heisinger*, 111 N.J. Super. 15 (App. Div. 1970); *Tamecki v. Johns-Manville Products Corp*., 125 N.J. Super. 355 (App. Div. 1973); *Outland v. Monmouth-Ocean Education Service Commission*, 154 N.J. 531 (1988); and *Capano v. Bound Brook Relief Fire Co.*, 356 N.J. Super. 87 (App. Div. 2002).

Marshall Dennehey Expands Workers' Compensation Department Into the Sunshine State

We are happy to announce that our firm has expanded its Workers' Compensation Department into the state of Florida with the additions of Heather Byrer Carbone, shareholder; Linda Wagner Farrell, shareholder; and associate Kelly M. Scifres. The attorneys will lead Marshall Dennehey's statewide practice from the firm's Jacksonville office. All three previously practiced workers' compensation defense law at Boyd & Jenerette, P.A. in Jacksonville.

Our Workers' Compensation Department has represented employers, insurance carriers and third party administrators in Pennsylvania, New Jersey and Delaware for more than 30 years. The group addition in Jacksonville represents our first workers' compensation offering in the state of Florida.

"We are thrilled to expand our practice into the state of Florida with the additions of Heather, Linda and Kelly," said Niki T. Ingram, Director of the Workers' Compensation Department. "We had been waiting for the right time and opportunity. Heather and Linda are well known in the workers' compensation arena and bring a robust practice to the firm. We look forward to serving clients across the state, and anticipate further expansion in the future."

Heather Byrer Carbone will serve as practice group leader of the department in Florida. She has 17 years of experience in both workers' compensation defense and employment law. She is Board Certified by The Florida Bar in Workers' Compensation. Ms. Carbone is highly accomplished in workers' compensation law, dealing with the analysis and litigation of problems or controversies arising out of the Florida Workers' Compensation Law. She is active in the E. Robert Williams Inn of Court, Friends of 440 Scholarship Organization and Jacksonville Bar Association. She is AV rated by Martindale-Hubbell and has been selected a Florida Super Lawyers Rising Star and named a "Top Rated Lawyer in Labor & Employment" by American Lawyer Media. She is a graduate of Florida State University and Indiana University School of Law.

Linda Wagner Farrell has over 15 years of experience representing insurance carriers, third party administrators and self-insured employers in all aspects of workers' compensation defense. She enjoys the highest peer rating by Martindale-Hubbell and was previously named "Woman Lawyer of the Year" by The Jacksonville Women Lawyers Association. Among her professional activities, she is active in the Workers' Compensation Claims Professionals group and is a Barrister in the E. Robert Williams Inn of Court. Ms. Farrell is a graduate of the University of North Florida and the Florida Coastal School of Law.

Kelly M. Scifres has five years of workers' compensation experience defending insured and uninsured employers, having worked closely with Ms. Farrell and Ms. Carbone throughout that time. Ms. Scifres also defends businesses audited by the state of Florida for workers' compensation coverage compliance and matters related to stop-work orders and penalty assessments. She has prior experience in the areas of asbestos litigation, general liability defense, and subrogation of workers' compensation liens in third party claims. Ms. Scifres is a graduate of the University of Central Florida and Florida Coastal School of Law. ||