MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 22 | NO. 5 | MAY 2018

What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

A self-insured employer is not entitled to subrogation against claimant's third party settlement for those benefits claimant received during time he was receiving his full salary under the Heart and Lung Act.

Commonwealth of Pennsylvania v. WCAB (Piree); 995 C.D. 2017; filed Apr. 4, 2018; Judge Cohn Jubelirer

The claimant worked as an agent for the Office of Attorney General, the employer, and sustained injuries in a work-related motor vehicle accident. The employer accepted the claimant's injuries by Notice of Compensation Payable. The claimant also received his full salary pursuant to the Heart and Lung Act. After the claimant's Heart and Lung benefits ended, he began receiving workers' compensation benefits. Eventually, the claimant took a disability retirement from his position.

Later, the claimant settled a third party case and entered into a Third Party Settlement Agreement with the employer. The claimant and the employer filed Petitions to Review Compensation Benefits, seeking a determination on whether the employer was entitled to reimbursement of the net lien amount under §319 of the Workers' Compensation Act. The claimant requested that the payments made under to the Heart and Lung Act be excluded from the Third Party Settlement Agreement. The employer responded that the amounts in the Third Party Settlement Agreement were all amounts payable under the Act.

The Workers' Compensation Judge concluded that the claimant did not prove that the amounts identified as the lien in the Third Party Settlement Agreement were anything other than compensation payable under the Workers' Compensation Act. The judge found in favor of the employer, and the claimant appealed to the Appeal Board. The Board reversed, holding that, because the employer was self insured and the claimant was entitled to Heart and Lung benefits concurrently with workers' compensation benefits from the date of injury until his retirement, the employer was not entitled to subrogation of the lien for workers' compensation. The Board did conclude, however, that the employer was entitled to subrogation from the date the claimant's Heart and Lung benefits ended into the future.

In its appeal to the Commonwealth Court, the employer maintained that it was entitled to subrogation to the extent of the compensation payable under the Act, not withstanding the claimant's concurrent receipt of Heart and Lung benefits. The employers' third party administrator paid the claimant's weekly workers' compensation benefits from the employer's workers' compensation fund, directly to the employer's payroll fund. According to the employer, workers' compensation benefits were still payable, even though not directly to the claimant while he received Heart and Lung benefits. Therefore, they were entitled to subrogate against the third party settlement by the amount its workers' compensation fund reimbursed its payroll fund.

The Commonwealth Court rejected this argument and affirmed the Appeal Board. Guided by legal precedent, the court held that a self-insured employer cannot subrogate that portion of the benefits paid to a claimant pursuant to the Heart and Lung Act. The court remanded the case for a determination regarding the employer's entitlement to subrogation for benefits paid solely while the claimant was entitled to benefits under the Workers' Compensation Act. **II**

A routine office examination by a chiropractor does not constitute "a significant and separately identifiable service" for which a chiropractor may be paid under § 127.105 (e) of the Medical Cost Containment Regulations.

Sedgwick Claims Management Services, Inc. v. Bureau of Workers' Compensation, Fee Review Hearing Office (Piszel and Bucks County Pain Center); 1033 C.D. 2017; filed Apr. 11, 2018; Senior Judge Colins

After the claimant sustained a work injury with his employer, the parties entered into a Compromise and Release Agreement (C&R). However, under the terms of the C&R, the employer remained responsible for payment of reasonable and necessary medical expenses for the work injury. The claimant received chiropractic treatment for shoulder and neck pain approximately three times per week, and this provider sent bills that included charges of $78 per office visit and other treatments given at those visits. The insurance carrier denied payment for the office visit charges, but paid for the other treatments. The provider filed fee review applications, challenging the denials of payment for 39 office visit charges. The Bureau of Workers' Compensation denied the provider's claim for the office visit charges. The provider then filed a request for a hearing with a Fee Review Hearing Officer.

The Hearing Officer vacated the Bureau's administrative determinations and ordered payment for all the office visit charges. The insurance company appealed to the Commonwealth Court, arguing that § 127.105 (e) of the Medical Cost Containment Regulations prohibits payment of office visit charges for routine physical examinations and evaluations on the same day as other treatments when there is no new medical condition.

According to § 127.105 (e) of the Medical Cost Containment Regulations, payment shall be made for an office visit provided on the same day as another procedure, only when the office visit represents a "significant and separately identifiable service performed in addition to the other procedure." The Commonwealth Court noted that the phrase "significant and separately identifiable service" was undefined and that this was a case of first impression. Citing federal Medicare case law and decisions, the court noted that an examination on the same date as a catheter placement or minor surgical procedure does not constitute a "significant and separately identifiable service" unless it is above and beyond the usual evaluation performed in conjunction with that procedure or is unrelated to the procedure that was performed on the same day.

Therefore, the Commonwealth Court concluded that an examination involving no new medical condition, change in medical condition, or other circumstances that require an examination and assessment above and beyond the usual examination and evaluation for treatment performed on the same date does not constitute "a significant and separately identifiable service" for which a chiropractor may be paid under § 127.105 (e) of the Medical Cost Containment Regulations. ||

News from Marshall Dennehey

Tony Natale (Philadelphia, PA) will participate in the firm's upcoming *Insurance Fraud 360* seminar, which will be held on June 13, 2018. Tony will present "Workers' Compensation Fraud–Don't Forget the Data." For more infromation or to register, visit our Events Page.

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based university in the litigation of a remanded claim petition. The claimant worked for the university in various capacities and allegedly sustained an injury in the form of a strain to his spine due to lifting paint cans. The claimant had a long history of prior non-work-related lumbar spine anomalies. Tony established upon cross examination of the claimant's medical expert that, despite the work injury, records of treatment did not show any increased diagnoses over and the above the pre-existing lumbar problems. This contradicted the expert's testimony as to the nature of injury arising out of the work injury. The Workers' Compensation Judge found the injury limited to a strain only, which had fully recovered. The claimant appealed the matter, and the Workers' Compensation Appeal Board found that the judge's decision lacked a clear reasoning for concluding that the claimant's lumbar spine anomalies—including disc herniations and annular tears—were not work related. The matter was remanded to the judge for further findings on this issue. The judge held oral argument, concentrating on the lumbar spine MRI findings. She then issued an updated decision, finding that the preponderance of the medical expert records revealed that all abnormalities in the claimant's spine as seen on pre- and post-injury MRIs were pre-existing conditions and not work related. The full recovery was upheld.

Tony Natale (Philadelphia, PA) successfully represented the interests of a transportation authority when the Workers' Compensation Appeal Board overturned a Workers' Compensation Judge's decision granting benefits to an injured employee after a discharge for cause. The claimant sustained a work-related injury as a result of falling down a flight of stairs. The claimant alleged a head injury, post concussion syndrome, orthopedic injuries to the neck and various other injuries. The claimant treated, returned to work and was discharged for cause for alleged violations of company policy. The employer had the claimant examined by a neurologist, who pronounced the claimant fully recovered from the work injury. The employer also introduced fact witness testimony to support the discharge for cause. The Workers' Compensation Judge agreed that, although the claimant sustained injuries in the fall, he was fully recovered from those injuries approximately one year later, as of the time of the employer's medical evaluation. The judge also found the employer's fact witness testimony to be credible as to discharge. Nonetheless, the judge awarded benefits to the claimant through the date of the employer's medical exam. On appeal, Tony argued that the judge applied the wrong burden of proof as to the award of disability benefits. Tony further argued that the substantial evidence of record supported that disability benefits should end as of the date of discharge from employment. Ultimately, the Appeal Board modified the judge's decision and found that disability benefits should have been suspended as of the date of discharge. ||

Delaware Workers' Compensation

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

Paul V. Tatlow

On the employer's petition appealing a Utilization Review Determination, the Board reversed the UR decision and held that the claimant's treatment was not necessary and reasonable.

Krystle Morton v. Delhaize America, LLC, (IAB No. 1459979 – Decided Apr. 18, 2018)

This case involved the employer's appeal from a Utilization Review decision, which had determined that the treatment for pain management—including prescription medications, office visits, chiropractic care and acupuncture—was Guideline compliant. The 32-year-old claimant sustained a work injury on June 11, 2016, when she was lifting a fryer during the course of her employment. She experienced pain in her upper and lower back that caused her to stop working. A hearing was held on the petition on April 2, 2018, where the evidence consisted of testimony from Dr. Kates, the employer's medical expert, testimony from Dr. Balu, the claimant's expert and whose treatment was at issue, and testimony from the claimant.

The Board noted that, since the employer was the party challenging the Utilization Review Determination, it had the burden of proof. The issue in the Utilization Review Determination was whether the challenged treatment was within the applicable Health Care Practice Guidelines. However, the issue before the Board was whether the challenged treatment was necessary and reasonable for the accepted work injury.

The issue, as phrased by the Board, was whether the treatment with Dr. Balu—specifically his prescription medications, office visits, chiropractic care and acupuncture from July 5, 2017, and ongoing—was necessary and reasonable treatment for the work injury. The Board concluded that the treatment in question was not necessary and reasonable for the following reasons. First, the Board found that Dr. Balu's testimony was not persuasive. Dr. Balu testified that, because of a hole in the page on that study, he had misread the claimant's MRI results in concluding that the claimant had a rotator cuff tear. Thus, the Board reasoned that Dr. Balu's treatment was at least, in part, based on an erroneous diagnosis of a rotator cuff tear. Further, Dr. Balu had admitted that when he saw the claimant in May 2017, his examination results were similar to those he had reached at a January 2017 exam. Despite this, the claimant had reported worsening of her symptoms during those intervening months. When Dr. Balu saw the claimant in May 2017, her physical exam was similar to the one he had done in January 2017, and yet he re-filled her prescription for Oxycodone. The Board further took Dr. Balu to task by stating that they found it incredible that he was unaware of the reason the claimant had four appointments with him in the month of October 2017. According to Dr. Balu, he continued to prescribe Vicoprofen even though the claimant had tested negative for this medication three times since he began prescribing it for her. He agreed it was reasonable to stop prescribing Vicoprofen because the claimant was only taking it as needed. In strong language, the Board stated that they found Dr. Balu's pattern of unsubstantiated treatment to be unreasonable. Examples of this included the fact that, while the claimant had missed months of treatment, she had no new objective signs of symptoms worsening and had failed several drug tests for prescribed medications. Nevertheless, Dr. Balu had continued to supply the claimant with additional prescription narcotic pain medications and treated symptoms that were not substantiated by any objective findings.

In ruling as it did, the Board was also persuaded by the significant gaps in the claimant's treatment as being indicative of her lack of need for treatment. The claimant admitted in her testimony, and Dr. Balu had confirmed, that she had not treated at all between January 2017 and May 2017 because she was in Florida visiting family during that time. The Board found that the claimant's testimony regarding the significant gaps in her treatment did not support a finding that her treatment was necessary and clearly detracted from her credibility as to her ongoing symptoms.

The Board also accepted as credible the testimony of Dr. Kates, the employer's medical expert. Dr. Kates had diagnosed the claimant as having a lumbosacral sprain and left shoulder pain. However, at his defense medical exam of the claimant in February 2018, he had noted objective signs of symptom magnification, including a slow gait speed that did not match her symptoms, a total lack of cervical spine range of motion, an inability to raise her shoulders without scapular substitution, and reported circular loss of sensation, which is normally longitudinal. The Board concluded that Dr. Kates' testimony that the claimant's symptoms were magnified, as her subjective complaints were not corroborated by objective findings, was clearly supported by the evidence. The claimant had also acknowledged that she had been released to return to modified work as early as December 2016, but one month later in January 2017, when she had her initial visit with Dr. Balu, she told him she did not believe she could ever return to work and was considering filing for "early retirement."

The Board concluded that the employer had met its burden of proof. Its petition was granted, and the Utilization Review decision was reversed. ||

New Jersey Workers' Compensation

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Dario J. Badalamenti

Appellate Division utilizes the "control test" and "relative nature of the work test" in finding that petitioner was an employee of respondent within the meaning of NJ Workers' Compensation Act.

Hopkins v. Capone Transportation, LLC, Docket No. A-5180-14T2, 2018 N.J. Super. Unpub. LEXIS 871 (App. Div., decided Apr. 16, 2018)

In June of 2011, Leonard Capone, Jr. formed Capone Transportation, LLC, a single-member LLC. He later formed another entity, Capone Scrap Iron & Metal, also a single-member LLC. Leonard was the principal and sole member of both. In February of 2012, on Capone Scrap Metal's behalf, Leonard entered into a contract with Lehigh Hanson to demolish a number of structures on one Lehigh Hanson's properties. The contract provided that Capone Scrap Metal would retain any scrap metal from the demolition for sale to a third party and that it was to be covered by workers' compensation insurance.

After executing the contract, Leonard assigned Capone Scrap Metal's rights in the contract to Capone Transportation because the scrap metal company did not have workers' compensation insurance, but Capone Transportation did have coverage through New Jersey Manufacturers Insurance Company (NJM). Capone Transportation then hired Darryl Hopkins and two other workers to do the demolition.

On April 9, 2012, Hopkins fell 60 feet from a silo on Lehigh Hanson's property, sustaining injuries that rendered him a quadriplegic. He filed a claim with the Division of Workers' Compensation seeking benefits from NJM, which denied the claim, contending the petitioner was an employee of Capone Scrap Metal, not Capone Transportation, at the time of the accident.

At the conclusion of trial on the issue of whether the petitioner was Capone Transportation's employee at the time of the accident, the Judge of Compensation determined that:

> All of the testimony and records surrounding this issue point to the fact that petitioner was hired by Capone Transportation. He was paid by Capone Transportation, used equipment provided by Capone Transportation. Applying the traditional tests, namely, the control test and the relative nature of the work test, I find that petitioner was an employee of Capone Transportation.

The Judge of Compensation found the petitioner to be entitled to workers' compensation benefits for the injuries sustained as a result of his accident. This appeal ensued.

In affirming the Judge of Compensation's holding, the Appellate Division relied on *Pollack v. Pino's Formal Wear & Tailoring*, 253 N.J. Super. 397 (App. Div. 1992), where the court set forth two tests to determine if a party is an "employee" within the meaning of the New Jersey workers' compensation statute—i.e., the "control test" and the "relative nature of the work test." The control test considers whether the employer has the right to direct the manner in which the work shall be done, as well as the results to be accomplished. The relative nature of the work test is essentially an economic and functional one, where the determinative criteria is the extent of economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.

Applying the control test, the Appellate Division found that it was not refuted that Capone Transportation could control the petitioner's work. According to the petitioner, the foreman told him what needed to be done at the job site. As for the relative nature of the work test, the Appellate Division found that the work the petitioner performed at Lehigh Hanson's site was an integral part of Capone Transportation's demolition business. Although the petitioner was not questioned as to the extent to which he relied upon the wages he earned from Capone Transportation, the fact that he was available for work when hired by Capone Transportation was indicative of his need for, and likely reliance on, the income he received from that entity.

Accordingly, the Appellate Division found sufficient support in the record for the Judge of Compensation's determination that the petitioner was an employee of Capone Transportation within the meaning of the New Jersey Workers' Compensation Act and, therefore, entitled to workers' compensation benefits for the injuries he sustained as a result of his work-related accident. II

Side Bar

The Appellate Division did address NJM's assertion that the petitioner was an employee of Capone Scrap Metal at the time of this accident in light of the fact that Lehigh Hanson had contracted with Capone Scrap Metal, not Capone Transportation, for the provision of demolition services. The Appellate Division acknowledged that, although Leonard Capone had initially intended that Capone Scrap Metal perform the demolition services Lehigh Hanson sought, before any services were actually rendered, Leonard assigned the contract to his other business, Capone Transportation, because it had workers' compensation coverage in place. The Appellate Division did not specifically address the issue of whether Leonard actually had the right to assign the contract to another entity without Lehigh Hanson's consent. However, the Appellate Division did not in its opinion that Lehigh Hanson never objected to the assignment, nor did they take any action against Capone Scrap Metal for the assignment.

Florida Workers' Compensation

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Linda W. Farrell

Another ray of hope for the Major Contributing Cause defense.

Ryals v. Escambia County Board of Commissioners and Florida League of Cities, 1D17-2395 (Fla. Dist. Ct. App. 2018)

On April 30, 2014, the claimant sustained injuries to his neck and low back in an explosion. The employer accepted compensability and authorized care. It was undisputed that the claimant had pre-existing degenerative disc disease, which was asymptomatic at the time of the accident. In 2016, the employer asserted that the claimant's low back condition had returned to his pre-existing baseline and denied continuing care. Although there were differing opinions between the doctors, neither party requested an EMA, leaving the Judge of Compensation Claims to weigh the evidence. The employer asserted a major contributing cause defense, and the claimant did not raise the 120-day provision. Judge of Compensation Claims Winn found that, because the claimant had not voiced any complaints of low back pain over a period of 11 months, the low back injury had resolved. Judge Winn denied compensability of the low back along with the request for pain management. On appeal, the First District Court of Appeal confirmed. II

New Judges of Compensation Claims appointed by Governor.

Two new judges have been appointed by Governor Scott: Jacquelyn Newman will replace retiring JCC Lazzara for Tallahassee, and Timothy Stanton will leave Tampa as a state mediator to become the JCC in Gainesville.

Six judges have been re-appointed by Governor Scott:

- Judge Almeyda of Miami
- Judge Dietz of Sebastian
- Judge Forte of Miami
- Judge Pitts of Orlando
- Judge Sojourner of Orlando
- Chief Judge Langham