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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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

Francis X. Wickersham

A claimant's duties as a caretaker for a woman suffering from mild dementia come within the domestic service exception to the Workers' Compensation Act; therefore, claimant's injuries are not compensable.

Pamela Joan Van Leer v. WCAB (Hudson); 1127 C.D. 2018; filed Feb. 27, 2019; Judge Covey

The claimant suffered injuries while taking care of her employer, a woman suffering from mild dementia. The injuries included a broken nose, damaged teeth, facial lacerations, aggravation of pre-existing arthritis, a concussion and possible scarring. After the claimant filed a claim petition, the employer filed its answer, alleging that the claimant was precluded from benefits under the domestic service exception of the Act.

A workers' compensation judge denied the claim petition, concluding that the claimant was engaged entirely in domestic services. The claimant appealed to the Workers' Compensation Appeal Board, which affirmed the judge's decision.

On appeal to the Commonwealth Court, the claimant argued that her duties as a caretaker did not fall within the domestic service exception under § 321 of the Act. She maintained that the services she provided were akin to those of a nurse's aide. The court, however, rejected the position taken by the claimant and affirmed the dismissal of the claim petition. According to the court, the claimant's duties consisted entirely of service to the members of the household, which consisted solely of the woman with dementia (the employer). Additionally, the claimant denied providing any other type of services, such as medical care. The claimant's main responsibility was to make sure that the woman got ready for bed and stayed in bed throughout the evening. Therefore, the court concluded that the domestic service exception to the Act applied and the claim petition was properly dismissed. II

News from Marshall Dennehey

Kacey Wiedt (Harrisburg, PA), assistant director of the firm's Workers' Compensation Department, is speaking at the *Tough Problems in Workers' Compensation* seminar hosted by the Pennsylvania Bar Institute on April 18, 2019. The program is designed to explore some of the toughest issues in a lively point/counterpoint style. In addition to focusing on specific problems, the faculty will provide a review of recent decisions from the Commonwealth and Supreme Courts and how they affect workers' compensation practitioners and their clients. For more information, click here.

Anthony Natale and **Ashley Talley** (Philadelphia, PA) are presenting "The Interplay Between Traumatic Brain Injuries and Fraud in Workers' Compensation" at the upcoming Pennsylvania Insurance Fraud Conference, being held in Hershey, PA between April 23-24. In the workers' compensation field, one of the biggest red flags for fraud is the nature of injury, and, more recently, injuries involving concussion, post-concussion or similar traumatic head injuries. Attendees will gain insight into how to identify, manage and fight claims for traumatic head injuries that are diagnosed based upon subjective complaints alone. Fore more information, click here.

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Delaware Workers' Compensation

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

Paul V. Tatlow

Superior Court affirms the Board's decision that the employer is only required to reimburse the claimant for mileage, not tolls and parking expenses incurred for attending medical appointments in treatment for the work injury.

Rebecca Failing v. State of Delaware, (C.A. No. K18A-07-002 WLW – Decided Feb. 25, 2019)

This case has been successfully handled to date by my colleague, Benjamin Durstein. After sustaining a work injury to her right knee on October 4, 2016, the claimant sought medical treatment from specialists in Philadelphia. In so doing, she incurred travel expenses that included mileage, tolls and parking fees. The employer reimbursed the claimant for the mileage expense only, totaling $761.20. Claimant's counsel filed a motion with the Board seeking reimbursement for the fees associated with tolls and parking. The Board found that pursuant to Section 2322 (g) of the Act, the claimant could only be reimbursed for mileage related to travel for medical treatment. The claimant filed an appeal to the Superior Court.

The crux of the claimant's argument on appeal was that the Board failed to act on implicit authority granted in the Act because of its mistaken belief that they could not grant reimbursement for tolls and parking incurred in the claimant's commutes to Philadelphia. The employer argued in support of the Board's decision that the claimant was essentially asking the court to find ambiguity in Section 2322 (g) where none existed, thereby creating a new liability on employers that is not based in the Act or any case law.

The court noted Section 2322 (g) states that in obtaining medical treatment, as well as medical supplies for a compensable injury, "an employee shall be entitled to mileage reimbursement in an amount equal to the State specified mileage allowance rate in effect at the time of travel . . ." The court concluded that it was not persuaded by the claimant's argument because this Section is clear and unambiguous concerning mileage being the only authorized and compensable reimbursement available. The court explained that Section 2322 (g) is unambiguous and cannot be reasonably interpreted in any other manner than its plain meaning. In other words, there are no reasonable doubts regarding the meaning of the term "mileage." The claimant had cited other sections of the Act that provided reimbursement for "travel expenses," but the court stated it was irrelevant since they would reasonably assume that the Legislature was and is aware of its choice of statutory language and, thus, fully intended Section 2322 (g) to reflect only mileage as compensable. The court stated that the law demands that the court must assume that the Legislature amended Section 2322 (g) with the intent to use the specific term "mileage," despite the knowledge that other sections of the Act, including Section 2353, use the broader term "travel expenses." Therefore, the court held that since Section 2322 (g) is plainly unambiguous, the Board had correctly interpreted and applied the law to its decision, and since that decision was free from legal error, it was affirmed. II

Florida Workers' Compensation

By Linda Wagner Farrell, Esquire (904.358.4224 or lwfarrell@mdwcg.com)

Linda W. Farrell

The 2019 Legislative session is underway and is expected to conclude on May 3, 2019. There are several bills that could impact workers' compensation in Florida. Here are some highlights of the proposed legislation. Note that the House and Senate bills share some similar goals.

House Bill 1399:

- Expands the definition of "specificity" in section 440.02(40), Fla. Stat. to include: "for each requested benefits, the specific amount of each requested benefits, the calculation used for computing the specific amount of each requested benefit."
- Adds language to section 440.13(3), Fla. Stat. regarding "provider eligibility" to include: "However, a carrier's authorization of a physician that includes the provision of palliative care also authorizes the provision of such care by health care providers affiliated with the authorized physician."
- Amends section 440.13(3)(c)2. Fla. Stat. regarding diagnostic testing or palliative care to state that same would be "deemed authorized" and is to "be reported to the carrier."
- Removes the requirement to "respond" per section 440.13(3)(d) Fla. Stat. Amends to require the carrier to "authorize or deny . . . or inform the health care provider of material deficiencies that prevent authorization or denial" within three business days.

- Proposes changes to the process of the Three Member Panel, which is responsible for medical fee schedules and also to reimbursements for physicians and in-patient hospital care.
- Removes the 104-week limitation on temporary total and temporary partial disability benefits, uses the term "overall" when referring to maximum medical improvement, and limits all temporary benefits to 260 weeks.
- Requires attorneys to include a disclosure statement signed by the claimant regarding attorney fees.
- Affords a judge of compensation claims "independent discretion" as to whether a good faith effort was made to resolve a dispute.
- Amends section 440.345, Fla. Stat. requiring that carriers specify "the total number of attorney hours spent on services related to the defense of petitions, and the total amount of attorney fees paid for services unrelated to the defense of petitions" when reporting attorney fees.

Senate Bill 1636:

- Amends section 440.02(40) regarding "specificity" and would require "for each requested benefit, the specific amount of each requested benefit, the calculation used for computing the specific amount of each requested benefit." This would also require "details demonstrating that such benefits have specifically been denied by the adjuster responsible . . . " The petition for benefits would have to include "specific allegations and statements of fact supporting the specific denial by the adjuster handling payment of benefits."
- Requires the exact method used to calculate the average weekly wage by the claimant and the date of maximum medical improvement relative to impairment benefits when filing a petition for benefits.
- Lengthens the time period for when attorney fees attach to a petition from 30 days to 45 days.
- Caps the amount of employer/carrier-paid attorney fees to 20/15/10/5 percent.
- Requires that retainer contracts be filed with the judge for approval.
- Codifies the *Westphal* case so that temporary benefits are for 260 weeks rather than 104 weeks.
- Heightens the requirement of a good faith effort and gives the judge more power to determine if a good faith effort was made. **II**

News from Marshall Dennehey (*cont.*)

Niki Ingram (Philadelphia, PA) will be speaking at the upcoming CLM Workers' Compensation Conference in Chicago, being held from May 21 to May 23, 2019. In "Maximizing the Productivity of an Aging Workforce," Niki joins a panel of insurance industry professionals for an engaging discussion about the impact of an aging workforce as many baby boomers reach retirement age yet elect to continue working. This demographic shift is forcing companies to change the way they think about their workforce strategies, including their workers compensation and disability programs. The panel will examine some of the changes workers go through as they age, how these factors affect their performance and productivity, and ways to mitigate any declines and accentuate opportunities for improved productivity. For more information, click here.

Jeffrey G. Rapattoni (Mt. Laurel, NJ), co-chair of the Fraud/Special Investigation Practice Group at Marshall Dennehey, will moderate a panel discussion on the "Multi-Generational Workforce: How they React to WC: Traits, Culture, Fraud, Psycho/Social Roadblocks." You can join his session on Thursday May 9th at 9:00 am – 10:00 am. For additional information or to register, click here.

Michele Punturi (Philadelphia, PA) successfully defended a worldwide youth adult development organization in litigation surrounding a fall at work. The claimant allegedly fell walking into an object that he claimed included a metal connector. He struck his head, resulting in his glasses falling off his head and temporary total disability. The claimant was diagnosed with orthopedic, neurological and neuro-ophthalmologic injuries, including the neck, eyes, skull contusion, concussion and post-concussive syndrome. The employer captured the incident on video. Due to the questionable mechanism of injury, Michele convinced the workers' compensation judge to travel to the employer's location to view the actual video of the incident and observe the surroundings, including the gym where the claimant continued to work out. The parties submitted multiple expert opinions on the nature of the claimant's condition and disability status. The employer presented multiple fact witnesses corroborating the video and lack of disability. Based upon the video of the incident and the fact witness for the employer, the judge found only a head contusion and full recovery. The judge further found no liability for the claimant's extensive litigation costs.

On behalf of a Berks County mushroom distribution corporation, **Tony Natale** (Philadelphia, PA) successfully prosecuted a termination petition and defended against a review petition to add injuries. The claimant originally sustained an injury to his lower back while lifting mushroom cases. Ultimately, the claimant was relegated to working a light-duty job, four hours per day, due to the injury. The work restrictions were in part based on an Functional Capacity Evaluation the claimant undertook at the advice of his treating physician. The employer secured an independent medical examination from a nationally renowned orthopedic surgeon. The claimant's credibility was in doubt based on this exam. The employer filed a termination petition, alleging full recovery from the work injury. The claimant

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News from Marshall Dennehey (*cont.*)

responded by filing a review petition to add additional injuries to his work-related condition, including an S-I joint dysfunction. The parties proceeded to litigation. During cross examination of the claimant's medical expert, Tony secured various admissions, including the fact that the expert did not review the claimant's testimony and that he relied on an Functional Capacity Evaluation that described the claimant as magnifying his symptoms. The claimant's expert also admitted that he felt the claimant was 49 percent not credible—a fact the workers' compensation judge found extremely important. The termination petition was granted, finding the claimant fully recovered, and the review petition was dismissed.

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based law firm in litigation surrounding an allegation of work injury with resultant post-concussion syndrome. The claimant tripped and fell at work, alleging that he struck his head during the fall. He donned sunglasses at the hearing and depositions, claiming his injury led to photophobia and post-concussion syndrome. During discovery, it was determined that the claimant suffered and treated for headache symptoms and memory loss prior to the alleged work injury. Surveillance revealed that the claimant did not use sunglasses when carrying out everyday activities. The claimant's medical expert admitted on cross-examination that he was unaware of the claimant's pre-existing medical condition and was not aware of the surveillance evidence when arriving at his opinions and conclusions. The workers' compensation judge found the claimant and the medical expert NOT to be credible, leading to the successful defense of the claim. **II**