

## Delaware Workers' Compensation

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Paul V. Tatlow

**In a bad faith claim arising out of a workers' compensation claim, the Superior Court held that the carrier was not entitled to summary judgment since genuine issues of material fact remained regarding whether the carrier acted in bad faith and whether it acted recklessly.**

*Jason C. Powell, Esquire, as Personal Representative of the Estate of Mark Krieger v. Amguard Insurance Co., (C.A. No. K17C-11-003 - JJC - Decided Sep. 19, 2019)*

In the underlying workers' compensation case, the claimant suffered a work injury on May 22, 2017. On June 5, 2017, Amguard, the workers' compensation carrier for the employer, became aware of the claim and issued a notice to the claimant that it could not accept or deny the claim because of a "lack of medical documentation." By July 7, 2017, the carrier had received medical documentation showing that the claimant had suffered nine separate bone fractures in his foot and ankle in the work incident. The carrier still did not accept the claim based on information from the employer that the claimant may have been at the jobsite at the time of the injury in order to steal the company's copper. The insurer also received information that the claimant had a possible drug use problem. It was not until August 8, 2017, that the carrier informed the

claimant's attorney that it was still denying the claim based on the alleged theft and a new allegation that the claimant had impermissibly used a forklift that was involved in the incident. Counsel for the claimant undertook an investigation on his own by interviewing co-workers. He then relayed this information to Amguard, following which they concluded that the alleged theft and impermissible use of a forklift by the claimant were false allegations. Finally, by late September 2017, an agreement was reached to accept the claim as compensable. A check paying the claimant for lost wage benefits was issued on October 2, 2017. The claimant had been without income for the four previous months. Amguard continued to pay benefits to the claimant until he died from unrelated causes in 2018.

The estate for the claimant brought a bad faith action against Amguard. The applicable legal principle as stated by the court was that, since an insurance policy is a contract between an insurer and insured, it includes an implied covenant of good faith and fair dealing that extends to third-party beneficiaries, such as the employees of the employer. An insurer or carrier acts in bad faith and breaches the implied covenant of good faith when it refuses to honor its obligations and lacks reasonable justification for its refusal. As to the damages that are recoverable, the court stated that compensatory damages are generally limited to those that are direct or consequential. Further, the special nature of an insurance relationship creates an exception that permits punitive damages. However, mere bad faith delay or denial or an unreasonable and unjustified stance do not alone

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What's Hot in Workers' Comp is published by our firm, which is a defense litigation law firm with 500 attorneys residing in 20 offices in the Commonwealth of Pennsylvania and the states of New Jersey, Delaware, Ohio, Florida and New York. Our firm was founded in 1962 and is headquartered in Philadelphia, Pennsylvania.

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justify punitive damages. Rather, to recover punitive damages, the denial of coverage must also be willful or malicious or the bad faith actions of the carrier must be taken with reckless indifference or malice toward the plight of the insured. Stated another way, the court said that the state of mind necessary by the carrier to support punitive damages is the disregard of an insured's rights with an "I don't care attitude."

In denying the motion for summary judgment filed by Amguard, the court concluded that, where the litigant's state of mind is an element of a claim, summary judgment is not appropriate because of the highly factual nature of this issue. This claim will require a jury to consider the circumstances in order to determine the carrier's state of mind at the relevant times. In assessing the evidence, the court pointed out that the carrier knew no later than July 12, 2017, that the claimant had suffered a crush injury to his foot and had multiple broken bones. Despite that, the

carrier took no action to investigate the alleged "red flags" for two full months. On the issue of reasonable justification, the court noted that the evidence of record provides an inference that the carrier's delay in investigating and paying lost wage benefits occurred without justification. The estate claimed that, in delaying the payment of compensation benefits, the carrier acted recklessly. The court commented that a four-month delay in paying benefits in the face of an injury involving nine bone fractures does support an inference of recklessness. Further, the failure to investigate the "red flag" issues for two months could support a juror's inference that the carrier did not care about the plight of the claimant.

The ultimate outcome of this case is yet to be decided. In the meantime, employers and carriers should heed the comments from the court, that unreasonable delays in investigating and paying compensation benefits on claims can result in bad faith causes of action. ▶

## Florida Workers' Compensation

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Linda Wagner Farrell

**Since the claimant established an occupational causation of his heart disease, the burden is on the employer to present evidence that the heart disease had wholly non-occupational causes.**

*Eugene McDonald v. City of Jacksonville, DCA#: 19-0573, Decision date Dec. 20, 2019*

Pursuant to the presumption of occupational causation created by section 112.18 of the Florida Statutes, the claimant, a law enforcement officer, appealed an order of the judge denying compensability of his coronary artery disease. The judge held that the claimant failed to establish a work-related cause of the purported "trigger" of his heart attack, rather than keeping the burden on the employer to overcome the presumption of compensability of the coronary artery disease.

The First District Court of Appeal held that, because the claimant satisfied the pre-requisites of section 112.18—establishing occupational causation of his heart disease—the burden was on the employer to put forth evidence that the heart disease had wholly non-occupational causes. The case was remanded to the judge to determine whether the employer has overcome this statutory presumption. ▶

**The court found no record to support the finding that the claimant had admitted to misconduct, nor did they agree that the business records exception applied.**

*Dorothy E. Hauser v. Goodwill Industries of SW Florida, Inc. and United Heartland, DCA#: 19-1054, Decision date Dec. 20, 2019*

The injured employee appealed the judge's denial of her claim for temporary partial disability benefits for the time period following her termination of employment with the employer. The judge found that the employer justifiably terminated the claimant's employment for misconduct as defined by statute and that, as a consequence, the claimant is ineligible for temporary partial disability benefits under section 440.15(4)(e) of the Florida Statutes. On appeal, the claimant did not deny that the conduct attributed to her, if proven, constitutes misconduct under the statutory definition of section 440.02(18) of the Florida Statutes. Instead, she argued that the judge erred when he admitted the employer's exit interview form as evidence of this conduct.

The employer's district director testified that she typed the description in the form based on information she received in a telephone conversation with the complaining customer. She did not testify as to the substance of her conversation with the customer. She admitted that she did not keep the customer's initial voicemail message, had lost the customer's contact information, and did not even remember his name. She also

did not recall speaking with a co-employee or undertaking any further investigation. The claimant denied making the comments attributed to her in the form and objected to its admission as hearsay. It is to be noted that the employer did not present testimony from any witness with personal knowledge of the incident described in this form. The judge overruled the claimant's hearsay objection and admitted the

form as evidence of her misconduct.

The First District Court of Appeal found that the judge abused his discretion in this case. The court found no support for the judge's finding that the claimant had admitted to the conduct, nor did they agree that the business records exception applied. Accordingly, the district court reversed and remanded for a new hearing. ▶

## New Jersey Workers' Compensation

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Dario J. Badalamenti

### **Appellate Division affirms order requiring an employer to reimburse its employee for purchase of medical marijuana despite the objection that complying would be in violation of the federal Controlled Substances Act.**

*Hager v. M&K Construction*, Docket No. A-0102-18T3 (App. Div., decided Jan. 13, 2020)

In this case of first impression, the New Jersey Appellate Division affirmed the judge's order requiring an employer to reimburse its injured employee for his use of medical marijuana. The petitioner's primary care physician recommended that he discontinue use of narcotic medication due to its decreasing effectiveness and increasing adverse side effects. As an alternative, he was prescribed medical marijuana to manage his chronic pain under New Jersey's Compassionate Use Medical Marijuana Act (CUMMA), N.J.S.A. 24:61-1 et seq. He filed a claim with the Division of Workers' Compensation, which the employer denied.

The judge found the petitioner's use of medical marijuana to be reasonable and necessary under the statute and entered an order, which, in relevant part, required the employer to reimburse the petitioner for his continued use of medical marijuana for chronic pain. The employer appealed on the grounds that, although the use of medical marijuana is permitted by CUMMA, ordering the employer to authorize and subsidize the acquisition of medical marijuana would require the employer to engage in conduct made criminal by the federal Controlled Substances Act (CSA), 21 U.S.C.S. §§801-904, which makes it a federal crime to "knowingly or intentionally possess with intent to manufacture, distribute or dispense" marijuana. The employer reasoned, if it were to comply with the judge's ruling, it would be engaging in conduct that meets all the elements of a federal crime. In light of this "positive conflict" between CUMMA and CSA, according to the employer, federal law preempts the state

law, and the judge's ruling must be reversed based on established preemption principles.

In affirming the judge, the Appellate Division found that the employer's reimbursement of a registered CUMMA patient's use of medical marijuana does not require that it "possess, manufacture or distribute" marijuana. The division further concluded that the employer could not be found to have aided and abetted the petitioner if it simply reimbursed him for medical marijuana as ordered by the judge. Further, the Appellate Division found specious the employer's argument that compliance with the judge's order exposes it to the threat of federal prosecution. ▶

### Side Bar

As with other workers' compensation decisions involving the prescribed use of medical marijuana, the nation's opioid crisis seems to have weighed heavily in the court's decision making. As the Appellate Division in this case stated:

Both [M&K's and Hager's physicians] addressed the different side effects of medical marijuana and opioids. The physicians agreed that the treatment of pain with opioids carried a risk of death, and that opioids were significantly more addictive than marijuana. Both [Hager & his physician] testified as to the beneficial effects medical marijuana can achieve for chronic pain and specifically for [Hager's own pain levels]. Its use has also allowed [Hager] to cease using opioids. That achievement, by itself, in light of the opioid crisis in existence today, should suffice as a rationale for the reimbursement of medical marijuana.

It is important to recognize that the state of the law with regard to an employer's obligation to reimburse its employee for his use of medical marijuana continues to be in flux both in New Jersey and nationally, and it will remain so until the issue is addressed by a higher court.

# Pennsylvania Workers' Compensation

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Francis X. Wickersham

**A joinder petition is not untimely under § 315 of the Act, even if it is filed more than three years from the date of injury.**

*Sota Construction Services, Inc. v. WCAB (Czarnecki, Zawilla d/b/a Gorilla Construction, and Uninsured Employers Guaranty Fund); 87 C.D. 2009; filed Dec. 20, 2019; Judge Covey*

The claimant alleged that he sustained multiple work-related injuries on October 26, 2009. On August 27, 2012, he filed a claim petition against the employer, a subcontractor, that did not have workers' compensation insurance. Therefore, the claimant filed a claim petition against the Uninsured Employers Guaranty Fund (UEGF). Following testimony given by the employer on June 20, 2013, the UEGF filed a joinder petition against the general contractor, asserting they were the statutory employer.

The statutory employer made a motion to strike the joinder petition, which was granted by the judge on the basis that it was not filed within three years of the claimant's alleged October 26, 2009 injury, in accordance with § 315 of the Act. The judge struck the joinder petition in an interlocutory order and, ultimately, dismissed it again as untimely filed in a decision granting the claim petition. The UEGF appealed to the Workers' Compensation Appeal Board, which reversed the dismissal of the joinder petition, finding that it was timely filed. The Board also remanded the case to the judge, who thereafter granted the joinder petition. The Board affirmed on appeal.

On appeal to the Commonwealth Court, the general contractor/statutory employer argued that § 315 of the Act is a statute of repose that completely extinguished the claimant's rights under the Act when the joinder petition was filed more than three years from the date of the alleged injury. The court disagreed, noting that the claim petition was filed within three years of the date of the alleged injury and that the joinder petition was filed in compliance with § 131.36 (d) and (h) of the Bureau's regulations. ▶

**The terms of a professional football player's contract are paramount in determining whether he is a seasonal employee and**

**whether the player's average weekly wage should be calculated under § 309 (e) of the Act.**

*Pittsburgh Steelers Sports, Inc. v. WCAB (Trucks); 1257 C.D. 2018; filed Jan. 3, 2020; Judge Brobson*

The claimant alleged that he sustained a work-related injury to his left shoulder during a football game in the course and scope of his employment with the employer. The claimant's contract spanned two football seasons and included obligations for the claimant to fulfill, both on and off season. The contract also prohibited the claimant from playing football, or engaging in any football-related activities, outside of his employment. Under the terms of the contract, the claimant was paid a yearly salary, which was disbursed in weekly or biweekly installments over the course of a regular season.

The employer agreed to accept the claim. The only issue before the workers' compensation judge was calculation of the claimant's average weekly wage. Following the judge's decision granting the claim petition, the employer and the claimant both appealed to the Appeal Board. After a remand, a decision was issued granting the claim petition and awarding benefits based on a calculation of the claimant's average weekly wage pursuant to §309 (c) of the Act. The employer appealed to the Board, arguing that the claimant was a seasonal employee and, therefore, § 309 (e) should have been used to calculate his average weekly wage. The Board affirmed the judge, and the employer appealed to the Commonwealth Court.

The Commonwealth Court rejected the employer's argument that all professional football players are seasonal employees and dismissed the appeal. According to the court, the proper analysis required is whether a specific claimant is a seasonal employee. Considering all the facts and, most importantly, the claimant's contract, the court determined that the claimant was not a seasonal employee. The court noted that the performance of the claimant's activities was not limited to the regular football season. It also noted that the limitation on the claimant's ability to play football outside of his employment was an indication that his employment was not seasonal. Finally, the court pointed out that, although the claimant only received compensation during the regular season, the contract clearly said the claimant would be paid a yearly salary in exchange for performance of all contractual obligations, including media appearances, which were not limited to the regular season. ▶

## News

**Niki Ingram** and **Tony Natale** (Philadelphia, PA) are presenting the webinar “Workers’ Compensation—Job Modifications, Fighting Fraudulent Claims, Understanding the WC Hearing Process,” to help employers understand how to handle some of the most challenging aspects of workers’ compensation. The webinar is presented by the Pennsylvania Chamber of Business and Industry. Topics will include:

- Common mistakes employers make when applying for workers’ compensation benefits.
- Implications of the EEOC and the ADA.
- Red flags that could indicate workers’ compensation fraud and best practices for handling fraudulent claims.
- Strategies for dealing with the workers’ compensation hearing process.

**Niki Ingram** and **Michele Punturi** (Philadelphia, PA) are speaking at the 2020 CLM Annual Conference in Dallas, Texas in March.

Niki joins a panel of industry professionals to present “Confronting Unconscious Biases in Litigation.” Speaking from their years of experience, the panelists will share their real-life experiences where unconscious biases negatively impacted the settlement of analyses and valuations of cases. They will also discuss why it is essential that

adjusters and defense counsel are aware of these biases so that cases can be appropriately and accurately assessed.

In “Changing the Employee Safety and Wellness Mindset to Reduce Workers’ Compensation Costs and Avoid Liability,” Michele joins other industry professionals to discuss how changing the claims management mindset surrounding employee safety and wellness can drive down workers’ compensation costs and avoid liability exposure. The session will provide valuable insight about maintaining a safe and healthy environment, preventing workers’ compensation claims and avoiding liability.

The CLM Annual Conference is the premier annual event for professionals in the claims and litigation management industries.

**Michele Punturi** (Philadelphia, PA) is speaking at the 2020 CLM Workers’ Compensation and Retail, Restaurant & Hospitality Conference in Chicago in May.

In “Survivor — Workers’ Compensation Edition,” Michele joins an industry panel to discuss how employers can survive and thrive in the workers’ compensation claims management arena. Attendees will gain real-world insight from two national companies who are mitigating exposure and bolstering defenses with strategic risk management and claims management tactics. The panelists will also discuss best-in-class strategies for realistic claims management that can allow for favorable resolution and even immunity from litigation. ▶

## Outcomes

**Ashley Eldridge** (Philadelphia, PA) successfully defended a claim petition where the claimant was working as a landscaper for the insured when he suffered injuries from a fall at work. A claim petition was filed for significant injuries to the lumbar spine, cervical spine, thoracic spine, left knee and right ankle, which required surgery, according to expert testimony from a neurosurgeon and podiatrist. Ashley presented an orthopedic surgeon and neurologist in rebuttal, both of whom the judge found to be more credible and persuasive than the claimant’s experts. The judge accepted the defense experts’ opinions and limited disability to three months of time.

**Ashley** also successfully litigated a termination petition by establishing that the claimant was no longer entitled to workers’ compensation benefits. The carrier accepted a right knee injury and paid total disability

benefits to the claimant. After the claimant had undergone extensive treatment, Ashley was able to persuade the judge that, pursuant to the findings of our medical expert, the claimant was no longer disabled and could return to work full duty. The judge found our expert to be credible and granted a termination of benefits.

**Ashley** prevailed on a suspension petition against a claimant who suffered a work-related gunshot injury. The claimant was shot in the hand while making a delivery for the insured. He underwent multiple surgeries but cited ongoing neurological deficits as the reason he was unable to return to work. Ashley successfully proved not only a release to work, but his refusal of a job within those restrictions. The judge found in favor of the insured and granted the suspension petition.

**Tony Natale** (Philadelphia, PA) successfully defended a Philadelphia-based university in a claim petition that alleged a disabling medial meniscus tear of the knee, with surgery, due to the claimant's repetitive job duties as a university shuttle driver. The claimant alleged that the bumpy ride and the non-ergonomic position of his driver's seat in relation to the gas and brake pedals caused his injury and need for surgery. Upon cross examination of the claimant's medical expert, it was conceded that the meniscal tear likely was pre-existing. Evidence was also presented concerning the university's allegation that the claimant illegally doctored the shuttle bus log, which put his credibility in doubt. The judge found that the claimant's meniscal tear, surgery and disability were not work related.

**Michele Punturi** (Philadelphia, PA) successfully defended an appeal affirming the judge's prior decision and order that had denied the claimant's claim petition. The claimant, who had a long-standing history of back problems, failed to advise the employer of a work injury, or of even having physical difficulties, both of which contributed to the rejection of the claimant's testimony as not credible. The judge emphasized that the employer's

fact witnesses corroborated each other and supported the claimant's own admission that he had never reported a work injury. The defense expert also supported that any findings on the MRIs were not post-traumatic and not related to any work injury or an aggravation of a pre-existing condition.

**Michele** also successfully prosecuted a termination petition for an international automobile manufacturer. An aggressive and detailed cross examination of the claimant's medical expert, who had opined that the claimant was not fully recovered, established that he could not offer any explanation for his opinion. The defense questioned the expert's understanding of the mechanism of injury, the nature and extent of medical treatment, and the lack of causation to the work injury. The judge did not find the claimant's alleged ongoing symptoms/restrictions and the need for treatment as related to the accepted work injury to be credible. The judge further found the defense was not liable for the claimant's litigation costs given his findings of full recovery. The termination petition was granted. ▶