

## Delaware Workers' Compensation

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Paul V. Tatlow

**The Board grants the employer's motion to dismiss the claimant's petition for additional compensation, finding that the medical treatment was beyond the portion of the cervical spine injured in the work accident.**

*Deborah Kreuwieser v. Sandra Kite,*  
(IAB Hearing No. 1466189 – Decided Feb. 3, 2020)

This case shows the advantage to the employer in defining as precisely and narrowly as possible the nature of a compensable work injury.

On April 17, 2016, the claimant was leading a horse out of a stall at Delaware Park during the course of her employment when the horse reared after becoming frightened by a chair in its path. The claimant sought medical treatment with Dr. Bose. Treatment included multiple diagnostic tests identifying problems at various levels of the cervical spine, including a fracture at the C2 level and other findings at the C3-C7 levels. Dr. Bose's records for treatment of the claimant in early November 2017 indicated that they discussed possible surgery to include various options involving the C3 through C7 levels.

The parties entered into an agreement for compensation on November 29, 2017, which specifically stated: "The only injuries sustained were a right shoulder biceps tendon rupture with a SLAP tear; left thumb fracture; left leg contusion; and cervical fracture of Employee's C2 vertebra." That agreement

was approved by the Board on January 19, 2018. On April 11, 2018, the parties entered into a supplemental agreement to pay for additional medical expenses, but this agreement also recited the precise description of the injury given in the first agreement.

In July 2019, the claimant filed a petition to determine additional compensation, which sought payment for medical expenses related to cervical spine surgery she had undergone with Dr. Bose on March 5, 2019, involving the C5-C6 and C6-C7 levels. The employer filed a motion to dismiss that petition. The claimant argued that she was clearly entitled under the Act to have the Board review the previous agreements on the basis that her medical condition had changed. She further argued that the recent surgery with Dr. Bose was necessary, reasonable and causally related to her work injury.

The Board rejected that argument and granted the employer's motion to dismiss. The key fact, as pointed out by the Board, was this was not a situation where the claimant's condition had changed or a new injury had developed through a progression caused by the initial work injury. To the contrary, the need for surgery had existed and been discussed before the execution of the agreements by the parties. Those agreements make it clear that the accepted work injury to the cervical spine was limited to the C2 level. The claimant had the opportunity to include other cervical levels as being compensable when the agreements were executed, but she had not done so. Accordingly, the claimant was bound by the description of the injury on the agreements, and the petition to determine additional compensation was dismissed. ▶

This newsletter is prepared by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects when called upon.

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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# Florida Workers' Compensation

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Linda Wagner Farrell

## **Last-minute motions to admit surveillance or to continue the final hearing denied as claimant was prejudiced by the surprise, the prejudice was incurable and another continuance would have prevented efficiency.**

*2K South Beach Hotel, LLC and Continental Indemnity Co. v. Marlene Mustelier, DCA#: 19-0713, Decision date: Jan. 15, 2020*

Three weeks before the final hearing, an authorized treating physician testified via deposition that the claimant utilized a cane (not prescribed) at her last office visit. The employer obtained surveillance of the claimant in the week before the final hearing, which showed that the claimant did not use a cane and she was seen using her right arm and hand in an unrestricted manner. The employer deposed the claimant the day before the final hearing, where she testified she had never used a cane.

On the morning of the final hearing, the employer moved to either admit the surveillance or to continue the hearing, to amend the pretrial stipulation to add a misrepresentation defense, and to "clarify" their witness and exhibit lists to include the surveillance evidence. The

employer also e-filed the surveillance report and then gave the report to the claimant the morning of the final hearing. At the final hearing, the employer proffered the surveillance evidence and elicited testimony from the claimant that a friend had applied nail polish to her right hand, even though she claimed she has pain when her right hand is touched.

The judge denied the employer's motions, finding prejudice to the claimant and no good cause for the employer's delay, and awarded the claimant the requested benefits. After granting the employer's motion for rehearing, in part, the judge amended the order, adding a discussion of "bad faith" to the analysis of good cause and clarifying that he found the late addition of a misrepresentation defense violated the claimant's due process rights.

On appeal, the First District Court of Appeal held that the claimant was prejudiced by the surprise, the prejudice was incurable and another continuance would have prevented efficiency. The court also held that the judge did not abuse his discretion in denying the employer's motion to amend the pretrial stipulation, as the motion was not a mere "clarification" of the witness list and the lateness of the motion to add a misrepresentation defense was not excusable. The court went on to hold that there was no error on the judge's part in denying testimonies from surveillance witnesses. ▶

## News

**Michele Punturi** (Philadelphia, PA) is speaking at the 2020 CLM Annual Conference in Dallas, Texas in March. In "Changing the Employee Safety and Wellness Mindset to Reduce Workers' Compensation Costs and Avoid Liability," Michele will join 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 CLM Annual Conference is the premier annual event for professionals in the claims and litigation management industries. For more information, visit <https://www.theclm.org/Event/ShowEventDescription/11972>.

On March 18, 2020, **Kacey Wiedt** (Harrisburg, PA) will be a featured speaker at the Spring Risk

Management Workshop seminar hosted by the County Commissioners Association of Pennsylvania. Kacey will be joined by Dr. S. Ross Noble to present "Don't Let Injured Workers 'Lay You Up,'" a discussion about independent medical exams and how they can help with return to work for injured employees. For more information, visit <https://www.eiseverywhere.com/ereg/index.php?eventid=519615&>.

The Pennsylvania Insurance Fraud Prevention Authority, together with the Delaware Valley and Greater Pittsburgh Chapters of the International Association of Special Investigation Units, will jointly host the 2020 Pennsylvania Insurance Fraud Conference on April 2<sup>nd</sup> and 3<sup>rd</sup>. **Anthony Natale III** and **Ashley Eldridge** (Philadelphia, PA) will present the topic "Prosecuting

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# New Jersey Workers' Compensation

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Dario J. Badalamenti

**The Appellate Division affirms the denial of a motion to change the venue of a workers' compensation coverage dispute to New York as New Jersey's workers' compensation law embodies a strong public policy preference to litigate workers' compensation coverage disputes in this jurisdiction.**

*The Travelers v. HES Trans, Inc.*, 2019 N.J. Super. Unpub. LEXIS 2621 (App. Div., decided Dec. 23, 2019)

In this dispute over workers' compensation coverage, the Appellate Division affirmed the denial of a motion to effectively change the venue to New York State. The Appellate Division found that New Jersey's workers' compensation law embodies a strong public policy preference to litigate disputes over workers' compensation coverage in this jurisdiction.

The underlying dispute was the employment status of truck drivers. The plaintiff, Travelers Property Casualty Company of America, provided workers' compensation coverage for HES Trans, Inc., a trucking company. Travelers asserted that HES's drivers were employees of HES and that, under New Jersey's mandatory workers' compensation coverage laws, Travelers was required to issue coverage for the drivers. Meanwhile, HES contended that the drivers were independent contractors, not employees; therefore, it was not required to pay for their workers' compensation insurance. Accordingly, HES failed to name most of its drivers as employees in its policy application to Travelers. As such, Travelers claimed that HES substantially underpaid its workers' compensation premiums and filed the present case in the Law Division seeking payment of the unpaid premiums from HES.

HES, in turn, named as third-party defendants the companies from whom it contractually procured its drivers. According to HES, these third-party defendants were supposed to ensure the drivers had all required insurance,

including workers' compensation coverage. The third-party defendants moved to dismiss HES's third-party complaint for lack of jurisdiction, arguing the forum selection clause in their contracts with HES required that their dispute be resolved in New York, not in New Jersey.

The lower court denied the dismissal motion of the third-party defendants, ruling that strong public policies underlying New Jersey's workers' compensation scheme weighed against allowing parallel litigation in New York. This appeal ensued.

In affirming the Superior Court's ruling, the Appellate Division found that the key issue before it was whether the forum selection clause required the case to be litigated in New York, or whether such action would be contrary to New Jersey public policy. As the Appellate Division concluded:

The New Jersey workers' compensation statute, N.J.S.A. 34:15-1 et seq., requires an employer to insure all of its workers' compensation liabilities and invalidates any insurance policies that fail to do so. A failure to provide workers' compensation protections under the statutory scheme, or a deliberate misrepresentation of employees as independent contractors to avoid providing coverage, can subject an employer to criminal liability. N.J.S.A. 34:15-79(a). The trial court properly concluded these facets of our State's workers' compensation laws embody a strong public policy preference to litigate disputes over workers' compensation coverage and premiums in this jurisdiction.

This decision highlights the statutory scheme for mandatory and comprehensive workers' compensation insurance for New Jersey employers whereby, and with limited exception, every employer must make sufficient provision for the complete payment of any obligation it may incur to an injured employee. Although the Appellate Division was not asked to address the distinction between employees and independent contractors, which was the subject of Travelers' underlying complaint, New Jersey's statutory workers' compensation scheme does exclude independent contractors from this mandatory coverage requirement. ▶

# Pennsylvania Workers' Compensation

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Francis X. Wickersham

## **A mechanism does not exist under the Act to provide reimbursement to an employer for erroneously awarded litigation costs.**

*Crocker v. WCAB (Georgia Pacific LLC); 401 C.D. 2019; filed Jan. 30, 2020; Judge McCullough*

The judge granted a claim petition and ordered the employer to reimburse the claimant's litigation costs. Later, the employer appealed and, after supersedeas was denied, paid the costs. Ultimately, the judge's decision was reversed on appeal. The employer then filed a review petition, arguing that because the judge erroneously awarded litigation costs, it was entitled to reimbursement of those costs from the claimant on the basis that it was ultimately determined the claimant was not entitled to workers' compensation benefits. The judge granted the petition and ordered the claimant to reimburse the employer. The Workers' Compensation Appeal Board affirmed on appeal.

The claimant appealed to the Commonwealth Court, which noted that in *Barrett v. WCAB (Sunoco, Inc.)*, 987 A.2d 1280 (Pa. Cmwlth.), *appeal denied*, 13 A.3d 480 (Pa. 2010), they held that an employer may obtain reimbursement for litigation costs awarded in error under § 440 of the Act. However, the court concluded that *Barrett* should be overruled in light of the Supreme Court's later decision in *County of Allegheny v. WCAB (Parker)*, 177 A.3d 864 (Pa. 2018) (*Parker II*), wherein the court held that an employer cannot obtain reimbursement for attorney's fees that were awarded in error under § 440. The Commonwealth Court reversed the decisions of the judge and the Board, holding that under *Parker II*, the doctrine of unjust enrichment was an inapplicable and "extra-statutory mechanism" that cannot be read into the Act. Since there is nothing in the Act to allow for reimbursement to an employer for erroneously awarded attorney's fees, there is nothing under the Act to allow for reimbursement to an employer for erroneously awarded litigation costs. ▶

## **In a reinstatement petition, the claimant must show disability from the date of refusal of a modified-duty job through the date the record closes in the proceedings.**

*Tyson Shared Services, Inc. v. WCAB (Perez); 1048 C.D. 2019; filed Feb. 3, 2020; Judge Covey*

The claimant sustained a work-related injury to his right shoulder, and after returning to work, he underwent right shoulder surgery. The claimant then filed a claim petition. During the course of litigating that petition, the claimant's surgeon released him to return to work with restrictions. The employer then sent the claimant a letter, requesting a return to work on March 2, 2015, in a modified-duty capacity. The claimant did not return to work. The employer subsequently issued a medical only notice of compensation payable, describing the claimant's injury as a right shoulder rotator cuff tear.

The judge dismissed the claim petition and suspended the claimant's benefits as of March 2, 2015, based on his failure to return to work. In March of 2017, the claimant filed a reinstatement petition, alleging that his injury worsened after a third surgery was performed in August 2016. In its answer, the employer admitted to a reinstatement of temporary total disability benefits for a limited period of time. The judge concluded the claimant was unable to work while recovering from the August 2016 surgery, but, based on an October 25, 2016, note from his surgeon releasing him to return to modified-duty work, the judge suspended benefits as of that date. The judge further found credible the testimony from the defendant's expert, who reviewed the 2015 modified-duty job offer and testimony concerning the duties of that position and gave the opinion that the claimant was physically capable of performing the duties of that job as of October 25, 2016. The defendant's expert also performed an IME of the claimant in August of 2017.

The claimant appealed to the Appeal Board, arguing that the judge erred because the defendant's medical expert did not examine the claimant until August 2017, yet testified the claimant was able to perform the duties of a job offered in 2015 as of October 25, 2016, the date the claimant's surgeon released him to modified-duty work. The Board affirmed but modified the suspension date to the date of the IME.



On appeal to the Commonwealth Court, the employer argued that the judge properly suspended benefits as of October 25, 2016. The Commonwealth Court agreed and reversed the Board. According to the court, the factual issue in the case was whether the claimant's loss of wages was caused and continued to be caused by his work-

related injury. Given that the claimant was found to have wrongly refused the 2015 job offer, it was the claimant's burden to show, through the pendency of the reinstatement proceeding, a change in his condition such that he could no longer perform the job that was offered to him. ▶

## News (cont.)

Workers' Compensation Fraud." Participants will be introduced to the steps of identifying and prosecuting workers' compensation fraud. The presentation will start with a video of a fraudulent injury and begin an interactive journey through the criminal and civil prosecution methods for workers' compensation fraud. For more information, go to <https://www.helpstopfraud.org/Fighting-Insurance-Fraud/Insurance-Fraud-Conference>.

We are proud to sponsor the annual Florida Bar Workers' Compensation Forum on April 16<sup>th</sup> and 17<sup>th</sup> presented by the Workers' Compensation Section of The Florida Bar and the Association of Workers' Compensation Claims Professionals. On April 16,

**Heather Carbone** (Jacksonville, FL) will participate in the program "Average Weekly Wage and Indemnity Benefits (Other than PTD)." For more information, go to <https://www.wccp.org/>.

On May 20<sup>th</sup>, **Michele Punturi** (Philadelphia, PA) is speaking at the 2020 CLM Workers' Compensation and Retail, Restaurant & Hospitality Conference in Chicago. 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. For more information, visit <https://www.theclm.org/Event/ShowEventDescription/12673>. ▶

## Outcomes

**Gregory Bartley** (Roseland, NJ) successfully handled a case inherited from staff counsel after the litigation and motion practice. Our client was under an order from the court to provide medical and temporary benefits to the petitioner, without prejudice. Staff counsel for the carrier was handling this matter at the time the order was entered. The case was then transferred to us, due to a conflict. Greg tried to settle the case under section 20 of the New Jersey Workers' Compensation Act, finally making an offer in excess of \$16 million in various benefits, annuities and a lump sum payment. This offer was rejected, and we proceeded to trial. At trial, we were able to show that there was an uninsured subcontractor hired by the general contractor who was the actual employer. Under New Jersey Law, the general contractor was deemed responsible for workers' compensation benefits to this petitioner, and our client was dismissed.

**Angela DeMary, Kiara Hartwell and Bob Fitzgerald** (Mount Laurel, NJ) obtained a defense verdict for a prominent health care system. The petitioner filed a motion for additional medical and temporary disability benefits, essentially alleging she was permanently and

totally disabled from prior compensable shoulder and leg injuries. After a three-day trial and extensive briefing, the judge dismissed the motion, determining that, despite the compensable injuries, the petitioner had plateaued medically and was not entitled to any further benefits.

**Michele Punturi** (Philadelphia, PA) successfully defended a claim petition on behalf of a renowned local hospital. The claimant, an ultrasound technician, alleged right hand tendonitis, ulnar neuropathy, and right thumb trigger finger due to the repetitive nature of her job duties and resultant cumulative trauma. Michele presented fact witnesses from the employer, who were able to demonstrate a discrepancy with the date of injury, lack of notice that any complaints were related to her job duties, text messages revealing activity and complaints occurring at places outside of work, all of which significantly challenged the claimant's credibility on any alleged date of injury, causation and notice. The defense also presented multiple dates of surveillance, which showed no observable difficulty in using the alleged injured body part. The judge ultimately found the claimant not credible with respect to sustaining any alleged work injury. The claim petition was

## Outcomes (cont.)

denied and dismissed, and the defense was not liable for the significant litigation costs presented by the claimant. This case clearly demonstrates the significance of challenging the mechanism of injury with factual and medical evidence, securing any and all medical records, and establishing through surveillance activities contrary to any alleged disability and/or injury when in litigation before a judge.

**Tony Natale** (Philadelphia, PA) successfully defended a Philadelphia-based university in litigation surrounding the efficacy of the utilization review system in the Commonwealth of Pennsylvania. The case is one of first impression at the lower court level and may be destined to be the subject of appellate review action. The claimant treated with a well-known provider (pain specialist) and was prescribed narcotic medication, which was made the subject of a utilization review request and found to be unreasonable. The claimant appealed that determination.

After very lengthy litigation, the judge found the medication unreasonable. As a result, the provider referred to claimant to his partner (another pain specialist), who prescribed the same narcotics. Since the utilization review provisions follow the provider, as opposed to the treatment, the employer was required to file a new utilization review request on the same narcotic treatment that the judge and the previous URO found unreasonable. This time the narcotics were found to be reasonable. Tony filed an appeal to this new determination (in the form of a petition to review), arguing that the new UR determination collaterally attacked the previous judge's decision pertaining to the narcotic medication at issue. The Philadelphia Judge Supervisor presided over the case and concluded as a matter of law that the new UR determination was an unlawful collateral attack on the previous judge's decision. All narcotic treatment was deemed unreasonable. ▶