

Florida Workers' Compensation

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Linda W. Farrell

First District Court of Appeal affirms judge's denial of the claimant's selection of one-time change physician but reverses and remands the judge's finding of misconduct with instructions to re-consider the claim for

temporary partial disability benefits.

Krysiak v. City of Kissimmee, et al., Case No. 1D18-5241 (1st DCA 2020)

One-Time Change

The claimant timely named his selection for a one-time change provider and expressly objected to the employer's option, indicating that he planned to seek treatment with his selection under the self-help provision. The claimant then attended two appointments with the employer's selection. The claimant testified he had no choice but to attend appointments with the employer's untimely selection of a one-time change in provider because he lacked the money to pay for treatment with an unauthorized provider under the self-help provisions of the statute.

The court found that the claimant waived his right to choose his provider since his actions—attending two appointments with the employer's selection—contradicted his prior objections and express intentions to seek treatment under the self-help provision. The District Court of Appeal affirmed the judge of compensation claims' decision and rejected the claimant's argument that, having once objected,

he can never acquiesce to the employer's selection. The court held the claimant should have, but did not, inform the employer that his treatment with its selection was "under protest" in order to preserve his right to selecting his own provider, otherwise it is waived.

Misconduct

The employer argued the claimant committed misconduct by violating its policy on substance abuse when he purchased alcohol while on duty, for which the claimant was written up. The claimant repeatedly missed work and was a no-call/no-show for several days in a row. The employer sent the claimant for testing when he finally returned to work. Upon his return from testing, the supervisor told the Human Resources representative, the claimant "does not look ready to work." He was terminated after a second violation and a positive drug and alcohol test.

Misconduct is an affirmative defense, and the employer has the burden of proving sufficient behavior to disqualify an employee from receiving benefits. The court distinguished the issues of whether the employer had cause or the right to terminate the claimant's employment versus whether the employer proved the claimant's termination was based on acts of misconduct defined in the workers' compensation statute F.S. § 440.02(18). However, the employer did not produce any evidence regarding test results or admissible evidence interpreting those results. Therefore, the First District Court of Appeal found there was no competent, substantial evidence to support the judge's denial of temporary partial disability benefits due to misconduct without evidentiary support of the claimant's intoxication. ▶

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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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New Jersey Workers' Compensation

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Gregory C. Bartley

New Jersey Supreme Court affirms Appellate Division decision requiring an employer to reasonably accommodate an employee's use of medical marijuana prescribed pursuant to New Jersey's Compassionate Use Medical Marijuana Act.

Wild v. Carriage Funeral Holdings, 2020 N.J. LEXIS 299 (Supreme Court, decided Mar. 10, 2020)

In this case of first impression, the New Jersey Supreme Court affirmed the Appellate Division's ruling that, under the New Jersey Law Against Discrimination (NJLAD), an employer is required to accommodate its employee's use of medical marijuana as part of his cancer treatment, as allowed under the state's Compassionate Use Medical Marijuana Act (CUMMA).

Mr. Wild was hired as a licensed funeral director with the defendant in 2013. In 2015, he was diagnosed with cancer. As part of his treatment, his physician prescribed marijuana as permitted under CUMMA. After a minor work-related motor vehicle accident in 2016, Wild was taken to an emergency room, where he informed the hospital physician that he was using medical marijuana pursuant to a prescription. According to the police report, Wild was not at fault for the accident. The defendant learned of Wild's drug use from the emergency room records and ordered him to take a drug test. When Wild tested positive for marijuana, he was terminated.

Wild filed suit against the defendant, claiming that they failed to reasonably accommodate his disability—namely, his cancer—and that he was unlawfully discharged in violation of NJLAD because he used medical marijuana as permitted by CUMMA in order to treat his cancer. In dismissing his suit, the trial court

relied on a provision in the law stating that CUMMA did not require employers to reasonably accommodate licensed use of medical marijuana in the workplace.

The Appellate Division reversed, holding that although CUMMA did not require employers to accommodate an employee's use of medical marijuana in the workplace, it did not affect an employer's requirement under NJLAD to reasonably accommodate an employee's disability, which, as the Appellate Division held, included an employee's use of medical marijuana during off-duty hours. The New Jersey Supreme Court granted certification and agreed to hear the defendant's appeal.

In affirming the Appellate Division's ruling, the Supreme Court largely reiterated the Appellate Division's reasoning:

[J]ust because the Compassionate Use Act does not require . . . an employer to accommodate the medical use of marijuana in any workplace, does not mean that the LAD may not impose such an obligation, particularly when the declination of an accommodation to such a user relates only to medical marijuana use during off-duty hours. [Here, Wild] alleged only that he sought an accommodation that would allow his continued use of medical marijuana off-site or during off-work hours.

This decision highlights the legal ambiguities surrounding workplace drug testing, CUMMA and NJLAD. As a result of this Supreme Court ruling, an employer can no longer rely on the fact that marijuana use remains illegal under the federal Controlled Substances Act as protection against repercussions from firing employees who fail routine drug tests. Rather, employers will need to prepare a strategy to protect themselves from possible liability under the NJLAD in the context of the legal medical marijuana use of its employees. ▶

Delaware Workers' Compensation

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Paul V. Tatlow

The Supreme Court reverses the lower court's decision, holding that the Board erred in dismissing the claimant's permanency petition at the outset based on evidence that had been presented at a prior hearing on the claimant's petition alleging a recurrence of total disability.

Leshawn Washington v. Delaware Transit Corp., (No. 333, 2019 – Decided Mar. 2, 2020)

This case involved an appeal by the claimant from the Superior Court's decision that had affirmed the Board's decision granting a motion by the employer to dismiss the claimant's permanency petition. The claimant was employed as a bus driver and on August 4, 2016, sustained a work injury to his left shoulder while driving. The claim was accepted as compensable, and the claimant underwent surgery on his left shoulder. He was paid compensation for a closed period of temporary total disability. After returning to work, he had problems with his shoulder, and his treating physician put him on no-work status.

The claimant filed a DACD petition, alleging a recurrence of total disability. He presented testimony from Dr. Rinow as the treating chiropractor. Dr. Rinow testified that the claimant had an increase in his symptoms that necessitated him being put on no-work status. The employer presented testimony from Dr. Tadduni, who had evaluated the claimant on two occasions and who concluded that the claimant could return to work and was fully recovered from the work injury. The Board issued a decision denying the claimant's DACD petition and explicitly accepting the testimony of Dr. Tadduni. The Board concluded that the claimant was no longer totally disabled after December 5, 2016.

In the litigation on the permanency petition, the claimant took the deposition testimony of Dr. Bandera, who testified

that the claimant had a 16% permanency. The employer took the deposition testimony of Dr. Gelman, who testified that the claimant had a much lower permanency of only 3%. At the hearing on the permanency petition, the employer made a motion at the outset for dismissal of the petition on the basis that the Board had already concluded in the prior decision to deny the recurrence of temporary total disability, that the claimant's shoulder had returned to normal and he was fully recovered. The Board granted that motion and dismissed the permanency petition without considering any of the medical testimony the parties had taken on the permanency issue.

The claimant initially appealed to the Superior Court, which affirmed the Board's decision. The claimant then appealed to the Supreme Court, which held that the Superior Court had erred in affirming the Board's decision by relying solely on expert testimony presented in connection with the recurrence of temporary total disability petition. The Supreme Court concluded that the claimant should have had the opportunity to present his evidence at the permanency hearing.

The legal reasoning as to why the Supreme Court found error by the Board in dismissing the petition was that, whether a work injury causes temporary total disability or permanent partial disability are two totally distinct questions. The issue before the Board on the total temporary disability recurrence petition was whether the claimant had suffered a recurrence of total disability and the expert testimony focused on whether the claimant was able to return to work. The reference in the testimony of Dr. Tadduni's finding that the claimant fully recovered was still related to whether there had been a recurrence of total disability and whether the claimant could return to work. In contrast, the nature of the inquiry at the permanency hearing was whether and to what degree the claimant had suffered permanent impairment. Therefore, the Supreme Court ordered that the case be remanded so that the claimant would have an opportunity to present medical evidence on the issue of permanent impairment. ▶

Pennsylvania Workers' Compensation

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A. Judd Woytek

COVID-19 EDI Reporting

The Workers' Compensation Insurance Organizations (WCIO) has approved the addition of a new Cause Code of 83 for Pandemic and a new Nature Code of 83 for COVID-19. Pennsylvania's system has been updated to accept these codes for reporting COVID-19 claims. The codes are anticipated to

be used for the reporting for any COVID-19 claim effective December 2019 or later. The International Association of Industrial Accidents, Boards and Commissions (IAIABC) recommends that EDI reporting and collection systems be modified to recognize these new codes by April 1, 2020. However, until you are able to update your system to use these codes, we ask that you use Type of Loss field DN0290 as Occupational Disease, and list COVID-19 in the Accident/Injury Description Narrative DN0038 so we can easily identify these claims. ▶

News

Rachel Ramsay-Lowe, a shareholder in our Roseland, New Jersey office, has been elected to be a member of the Executive Committee for the Workers' Compensation Section of the New Jersey State Bar Association. She will serve a three-year term after being sworn in at the May meeting.

Kelly M. Scifres (Jacksonville, FL) will present a webinar on the "Five Hour-Law & Ethics CEU for Adjusters" on June 4, 2020, from Noon-5 p.m. Enrollment is free. Please email KMScifres@mdwgc.com

to sign up. Space is limited to the first 100 entrants.

Michele Punturi (Philadelphia, PA) will be speaking at the 2020 CLM Workers' Compensation and Retail, Restaurant & Hospitality Conference, which will be held in Chicago from June 15-17, 2020. 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

Ashley Eldridge (Philadelphia, PA) and **Audrey Copeland** (King of Prussia, PA) obtained a defense verdict on appeal of a claim petition to the Commonwealth Court. In this case, Ashley successfully defended a bifurcated claim petition by proving that the claimant was an independent contractor. Opposing counsel appealed, and the Workers' Compensation Appeal Board reversed and remanded the decision for evidence on the medical component of the claim. However, contrary to the defendant's argument, on remand, the judge granted the claim petition, finding she was "constrained" to reaffirm the Board on the independent contractor issue. The defendant once again appealed, and the Board re-affirmed the claim petition. Audrey and Ashley took the case up on appeal, and the Commonwealth Court agreed that the record did not demonstrate a "high level of control" such that an employment relationship has been established. The court

agreed with the defendant's position and reversed the order affirming the claim petition.

Michele R. Punturi (Philadelphia, PA) successfully prosecuted a termination petition for a well-known national delivery company involving a crush injury to the thumb and multiple surgeries. Michele secured an independent medical examination by a board-certified orthopedic surgeon, who has an added board certification in upper extremities. The defense medical expert conducted a comprehensive physical examination and reviewed all medical records and diagnostic study films. Based upon the defense medical expert's opinions, the judge found the expert to be competent, credible, and persuasive and granted the termination petition. No appeal was filed, thus providing the employer and its carrier an avenue for significant Supersedeas Fund recovery for all medical and indemnity paid on or after the date the termination petition was filed. ▶