MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Delaware Workers' Compensation

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In a psychiatric injury claim, the Board denies the claimant's DCD petition by finding that she failed to meet her burden of proof since there was no objective evidence that her work environment as a nurse was actually stressful or that it was the cause of her anxiety and depression.

Yolanda Jones v. Westside Family Healthcare, (IAB Hearing No. 1483556 – decided Jun. 4, 2020)

The claimant filed a Petition to Determine Compensation Due, alleging a work injury in the nature of depression and anxiety caused by a stressful work environment with a manifestation date of April 5, 2017. The employer denied any relationship between the claimant's alleged psychological injury and the workplace activities.

The claimant had been a nurse with the employer since September 24, 2001. She was 55 years old as of April 5, 2017, and had been working as a triage nurse for the previous five years. Her job duties involved telephone triage for patients who called with problems, and she would handle from 25 to 50 calls per day. The claimant was required to handle the calls in a timely manner and provide correct advice for emergency calls, or else a patient could die. The subject matter of the urgent calls included babies with high bilirubin and patients who were taking blood thinners. The evidence showed the claimant received a Performance Improvement Plan dated April 5, 2017, which she reviewed with her superiors. The plan included comments that a staff member had complained about how the claimant spoke to her, and the claimant responded that what she was being asked to do by the co-worker was not possible and took time away from her triage calls. The claimant testified that after the plan was reviewed with her, it increased her depression due to the threat of termination of her job, and she became very upset. She stated that she became more depressed, ate and slept poorly, and also lost weight. Her primary care physician increased her anti-depressant medications, and she ended up missing 12 weeks of work after April 5, 2017.

Dr. Dettwyler, who is a licensed clinical psychologist, testified as the claimant's expert. His diagnosis was an adjustment disorder with depression and anxiety, secondary to work stress. In his opinion, the claimant was experiencing her stress from her situation at work, and he did not believe she had a personality disorder.

The employer presented testimony from a human resources officer and a co-worker of the claimant. This testimony revealed that the workload for a triage nurse with the employer was manageable and the job was not unusually stressful. The evidence also revealed that the claimant had a long history of inter-personal and

behavior issues with co-workers, as documented in her performance reviews over the years. The employer's evidence also indicated that the claimant was not in danger of being fired after the April 2017 improvement plan. Rather, the employer was taking steps to improve the claimant's work performance rather than to fire her. Dr. Langan, a clinical neuropsychologist who testified as the employer's expert, indicated that the psychological testing he performed on the claimant produced normal results and showed no clinically significant levels of anxiety or depression. He opined the claimant did not sustain a psychological injury due to her work experiences. Dr. Langan concluded that the claimant had a history of depression and a history of documented discourteous behavior towards staff members dating back to 2005. He believed the stress the claimant experienced came from her own personality and communication style in relating to other people but was not from any work stress.

The Board cited the case of *State v. Cephas*, 637 A.2d 20 (Del. 1994) for the applicable legal standard. In that case, the Delaware Supreme Court established the standard for determining causation in a situation where a mental injury is alleged to have resulted from work stress. This standard requires a claimant "to offer evidence demonstrating objectively that his or her work conditions were actually stressful and that such conditions were a substantial cause" of her injury. The stress causing the injury need not be unusual or extraordinary, but it must be real and proved by objective evidence.

The Board found that the claimant had failed to prove that her work environment was actually stressful and a substantial cause of her psychological diagnosis and treatment. In so finding, the Board accepted the testimony of Dr. Langan, the employer's expert, and the managers who testified for the employer, which evidence revealed that the employer had made efforts over the years to work with the claimant to improve her interpersonal skills. It also showed the reasonable nature of the claimant's job duties and her workload. Further, the evidence indicated the claimant had an inability or an unwillingness to accept criticism or improve her behavior. The Board did not find any evidence that the claimant was mistreated by the employer or her co-workers, or that the employer was unfair in how it handled the claimant's interpersonal problems. The Board stated that, if anything, it was the claimant's perception of how she interacted with others that appeared to be skewed. They also pointed out that the claimant had a preexisting history of chronic depression for which she had been receiving ongoing treatment and medication for many years.

Therefore, the Board found there was insufficient objective evidence that the work environment was actually stressful or the cause of the claimant's anxiety and depression. As a consequence, the claimant's Petition to Determine Compensation Due was denied.

Florida Workers' Compensation

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Linda W. Farrell

Court finds that the judge's findings were supported by competent, substantial evidence and, therefore, affirmed the judge's order denying the employer's misrepresentation defense.

LSG Sky Chefs, Inc./Liberty Mutual Ins. Co. v. Gertrudis Santaella, No. 1D19-4073, Decision date: Jul. 20, 2020

The employer appealed the judge's order denying their misrepresentation defense. The judge found that the employer did not prove that the claimant had violated section 440.105(4)(b), Fla. Stat. (2015), by knowingly and intentionally making, or causing to be made, any false, fraudulent, incomplete, or misleading oral or written fraudulent statement for the purposes of obtaining benefits. The judge awarded the claim for a psychological evaluation, holding that the employer waived its right to challenge the medical necessity. The First District Court of Appeal found that the judge's findings were supported by competent, substantial evidence and, therefore, affirmed. They felt compelled to explain why they agreed with the judge's rejection of the misrepresentation defense.

The employer contended that the claimant misrepresented her post-accident earnings while receiving temporary partial disability benefits. In her

deposition, the claimant testified that her husband was delivering car parts for ADL Delivery but that the paychecks were issued in her name. She testified that her husband did not have a bank account and declined to elaborate further. She admitted that she rode with him often and sometimes did the paperwork while sitting in the car. In a second deposition, she testified that she never got out of the car during the deliveries. In a third deposition, she said that she had reported the earnings to the IRS, and the tax returns for two consecutive years showed that she was noted as a self-employed driver. ADL had no record of the husband's employment but produced payroll records, personnel records, driving history, insurance, a W-9 and an independent contractor driver agreement for the claimant.

The employer presented two Employee Earnings Reports (DWC-19s) where the claimant denied any earnings, but explained: "Claimant does not receive income from any other source. Any checks issued to claimant's name are for work done and performed by claimant's husband." At the final hearing, the claimant testified that she did not knowingly or intentionally provide false statements when completing the DWC-19s.

The employer also argued misrepresentation based on surveillance that contradicted her deposition testimony and what she told the doctors. Two authorized doctors testified that the video showed her engaging in activities beyond what was recommended and what she represented to them during her treatment.

The judge, however, concluded that she was a credible witness (although a "remarkably poor historian"), was sincere and testified to the best of her capacity. The judge noted specifically that the claimant had not performed labor sufficient to meet the definition of income; the surveillance videos supported that her husband performed the job and she did not; and she disclosed the situation in deposition before completing the DWC-19s.

The judge also found the surveillance combined with her statements were insufficient to show misrepresentation, noting that the video was not close in time to the depositions.

The First DCA agreed with the judge and held that the claimant did not earn the ADL wages because she did not perform the actual work. Therefore, she did not misrepresent the earnings that were paid on behalf of her husband. Neither court found any intent on the part of the claimant to misrepresent the ADL wages because she believed that they were for her husband's work.

With regard to the surveillance, the court held that the judge had concluded, within her discretion, that, while there may have been come inconsistencies between her deposition testimony and presentation to the doctors versus the surveillance, there was no intentional misrepresentation. The doctors ultimately testified that the surveillance was not inconsistent with her diagnosis and that she would have "good days and bad days."

The First DCA affirmed, finding competent, substantial evidence supported the judge's holdings.

News

Shannon Fellin (Harrisburg, PA) and **Daniel Deitrick** (Pittsburgh, PA) were among 24 of our attorneys who are recognized in the 2021 Edition of The Best Lawyers in America®. Since it was first published in 1983, Best Lawyers® has become universally regarded as the definitive guide to legal excellence. Best Lawyers lists are compiled based on an exhaustive peer-review evaluation. For more information, please visit https://www.bestlawyers.com/.

For the third time in eight years, Marshall Dennehey was selected as the top scorer in the Extra Large Company category of the *Philadelphia Business Journal*'s Best Places to Work program. The program recognizes the company's achievements in creating a positive work environment that attracts and retains employees through a combination of benefits, working conditions and company culture. Our firm has been recognized as a "Best Place to Work" every year since 2013, winning the extra large company category in 2019 and 2017.

New Jersey Workers' Compensation

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The Appellate Division finds that a Judge of Compensation has statutory authority to enter an order requiring petitioner and petitioner's counsel to repay a workers' compensation award which the Division subsequently overturned.

Malone v. Pennsauken Board of Education, Docket No. A-3404-18T3 (App. Div., Decided Jul. 28, 2020)

In this *per curiam* decision, the Appellate Division found that a Judge of Compensation has the necessary jurisdiction to enter an order requiring the petitioner and his counsel to repay a workers' compensation award that was subsequently overturned. The Appellate Division noted that under N.J.S.A. 34:15-57, a Judge of Compensation has the statutory authority to "modify any award of compensation, determination and rule for judgment" which was issued.

The petitioner was employed as a custodian with the respondent beginning in 2007. His responsibilities included sweeping floors, taking out the trash, cleaning the blackboards and desktops, removing shoe marks from the gymnasium floor and scrubbing toilets. According to the petitioner's testimony at trial, his work required "a lot of kneeling, stooping, and squatting," though he did not testify as to the frequency with which he did any of these tasks. The petitioner also testified that he was a "life-long janitor" who had been employed elsewhere prior to his employment with the respondent. By 2012, the petitioner began to experience constant bilateral knee pain and was diagnosed with osteoarthritis of both knees. In 2013, he underwent bilateral knee replacement surgery.

At trial, Dr. Ralph Cataldo, an anesthesiologist, testified on the petitioner's behalf. Dr. Cataldo conceded the petitioner did have a preexisting osteoarthritis of the bilateral knees. However, based on the petitioner's reporting that he was asymptomatic prior to his employment with the respondent, Dr. Cataldo found that the petitioner's work duties with the respondent aggravated this preexisting osteoarthritis.

The respondent produced Dr. Francis Meeteer, a family and occupational medicine physician, who testified that the petitioner's osteoarthritis condition was chronic, progressive, and degenerative and that his need for bilateral knee replacement surgery was a result of the natural aging process, not his employment.

The Judge of Compensation found Dr. Cataldo to be more credible, reasoning:

> [A]n extensive amount of bending, squatting, and lifting can cause increased discomfort in one's knees. The Court finds the testimony of Dr. Cataldo satisfies the burden of establishing a causal connection with probability that petitioner's injuries were aggravated by his occupational duties.

The judge accordingly granted the petitioner an award of permanent disability of the bilateral knees, as well as a period of temporary disability benefits for his time out of work. The respondent appealed.

In reversing the judge's ruling, the Appellate Division found that Dr. Cataldo's opinion constituted a "net opinion" under N.J.R.E. 703. The so-called "net opinion" rule requires that a trial court exclude expert opinions that have no factual or evidentiary support and are based on nothing other than the expert's own unsupported conclusions. As the Appellate Division reasoned:

> There was no evidence concerning how often and to what extent Malone engaged in the various physical activities about which he testified. Simply to identify that the tasks he performed entailed "a lot" of kneeling, stooping, and squatting fails to impart any reliable information about how arduous and physically demanding Malone's job actually was. And, the only objective medical evidence Cataldo identified were the surgical scars and the swelling he found around each knee. Neither [petitioner's testimony or the objective medical evidence cited to by Cataldo] indicate how Malone's job duties aggravated the underlying osteoarthritic condition.

Based on the Appellate Division's reversal of the petitioner's award, the respondent requested that the petitioner and his counsel reimburse them for all funds paid pursuant to the reversed order. After both the petitioner and his counsel refused, the respondent filed

a motion asking the judge to enter an order for reimbursement. According to the respondent, it intended to obtain an order that could be docketed in the Superior Court as a judgment to facilitate collection against the petitioner and his counsel. The judge denied this motion, indicating that, as the decision was reversed and not remanded, the Appellate Division retained jurisdiction over the matter. Also, the judge questioned whether she would have statutory authority to order reimbursement, even if the Appellate Division had remanded the matter. The respondent appealed.

In reversing and remanding the Judge of Compensation's dismissal of the respondent's motion, the Appellate Division noted that, as a general rule, once an appeal is perfected, the trial court is divested of jurisdiction to act. That notwithstanding, the Appellate Division found that under N.J.S.A. 34:15-57:

> [A] Judge of Compensation does have the statutory authority to "modify any award of compensation, determination and rule for judgment" it has issued. This provision vests in the Division of Workers' Compensation and its judges "discretionary power over its own judgments as is inherent in other courts."

Accordingly, the Appellate Division reasoned the Judge of Compensation had the statutory authority to enter a judgment against the petitioner and his counsel for the amounts paid by the respondent under the order which was later reversed. The matter was remanded to allow the judge to enter such an order.

This Appellate Division ruling delineates one of the many powers of a Judge of Compensation, namely, to hear and determine workers' compensation matters in dispute in a summary manner. This includes the power to modify any award of compensation, determination and rule for judgement or order approving settlement which the judge may enter, and to provide for commutation of any such award, determination, and rule for judgment or order approving settlement. Additionally, when ancillary to the determination of an employee's rights, the judge is also vested with the power to rule on questions relating to workers' compensation insurance coverage, including fraud in the procurement, mistake of the parties, reformation of the policy, cancellation, existence or validity of an insurance contract, coverage of the policy at the time of the injury, construction of the extent of coverage and claims for reimbursement by one carrier against another.

Outcomes

Judd Woytek (Allentown, PA) received a decision from the Benefits Review Board (BRB) affirming the denial of a claim for Federal Black Lung benefits. The claimant worked as a coal miner for approximately nine years in underground mining. The administrative law judge denied benefits, finding the claimant had failed to establish that he suffered from a totally disabling respiratory condition. The claimant appealed, and the denial of benefits was affirmed on appeal. The BRB dismissed the claimant's arguments that he had additional coal mine employment that would have entitled him to a presumption that his total disability was related to his coal mine employment. The BRB noted that the claimant failed to prove a total respiratory disability; therefore, the presumption would not apply irrespective of the number of years of coal mine employment that he proved.

Judd also successfully litigated a case where the claimant alleged he suffered a severely disabling cervical spine injury when he tripped and fell over a rake. He claimed that he did a gymnastic "round off" to try to catch himself and landed on his head. We argued that he was engaged in horseplay and had been attempting a back flip. Because the claimant was a sole proprietor, we argued several defenses including coverage, notice, and course and scope of employment. The judge found that the claimant had failed to provide notice of his alleged injury to the insurance carrier within 120 days of its occurrence and that, since the claimant was a sole proprietor, the notice provisions of the Act would require him to provide notice to the carrier within 120 days. The claimant did not report the injury to the carrier until over a year later. The claim petition was denied and dismissed.

Pennsylvania Workers' Compensation

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Commonwealth Court finds, as a matter of law, "crewmember" is interchangeable with "seaman" for purposes of the Jones Act, and Appeal Board erred in finding the claimant was entitled to Jones Act benefits and workers' compensation benefits for the same injury. But, the court affirmed the insurer was unable to subrogate against its own insured.

Robert Arlet v. WCAB (Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Workers' Compensation); No. 1722 C.D. 2018; filed Jul. 29, 2020; by Judge Wojcik

The claimant worked as a shipwright for the employer, maintaining the U.S. Brigg Niagara, and was considered a "crewmember" under the terms of a Commercial Hull policy the employer had with the insurer. The policy covered damages incurred and caused by the Brigg Niagara and provided indemnity coverage for 17 crewmembers. The employer also had workers' compensation coverage from State Workers' Insurance Fund (SWIF).

The claimant was injured in a slip and fall on an icy sidewalk on the employer's premises. The insurer paid the claimant "maintenance and cure" benefits pursuant to the Commercial Hull policy. The claimant later filed a claim petition for workers' compensation benefits. The employer asserted the claimant was a "seaman" and not entitled to workers' compensation benefits because exclusive jurisdiction was under the Jones Act. The employer also joined SWIF as an additional insurer. However, SWIF denied coverage on the basis that their policy with the employer had lapsed three days before the injury.

The claimant subsequently filed a claim petition against the Uninsured Employers Guaranty Fund (UEGF). In bifurcated proceedings, the Workers' Compensation Judge determined the claimant was a "seaman" and that the Jones Act applied. The claimant appealed to the Workers' Compensation Appeal Board, which reversed and remanded, holding that the claimant was a land-based employee.

On remand, the judge awarded the claimant benefits under the Workers' Compensation Act and ordered the employer to pay the difference between the workers' compensation benefits and "maintenance and cure" benefits, which the judge found were correctly paid by the insurer under the Commercial Hull policy. The judge also found that there was no subrogation for the insurer since its own investigation showed that the claimant's fall occurred on property owned by the employer and, therefore, they would be subrogating against their own insured. Finally, the judge ordered the UEGF to pay benefits if the employer refused or failed to make payment. The UEGF appealed to the Board, as did the claimant. The Board affirmed. The claimant appealed to the Commonwealth Court, and the employer intervened.

The claimant argued that the "law of the case" doctrine required the Board to find that the claimant was not a crewmember under the Commercial Hull Policy because the Board had previously determined that the the claimant was not a seaman. According to the claimant, the terms were interchangeable and the Board disregarded its prior determination. The claimant also argued that evidence showing that he was not a seaman could not support a finding that he was a crewmember under the Commercial Hull Policy. The employer argued that the prior determination that the claimant was not a seaman did not preclude a finding that he was a crewmember and, thus, covered under the Commercial Hull policy.

The Commonwealth Court held that, as a matter of law, the term "crewmember" was interchangeable with "seaman" for purposes of the Jones Act and that the Board erred in concluding that the claimant was entitled to Jones Act benefits and workers' compensation benefits for the same injury. But, the court affirmed the Board regarding subrogation because the insurer was unable to subrogate against its own insured.