MD MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Delaware Workers' Compensation

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The Superior Court affirms the Board's decision granting the termination petition and emphasizes that the employer need only show the claimant is capable of working and not that the injury has resolved.

Claudia Davalos v. Allan Industries, Inc., (C.A. No. N19A-10-006 CEB – Decided Mar. 31, 2021)

This case came before the Superior Court on the claimant's appeal from the Board's decision granting the employer's termination petition. The claimant was employed as a housekeeper and on February 22, 2018, she lifted a bag of trash out of the can to throw into a dumpster and in so doing experienced pain and pressure in her mid to low back. The claimant received medical treatment, which showed she had several disc bulges in the lumbar spine but no acute fractures. An open agreement for temporary total disability was issued.

The employer filed a termination petition that came before the Board for a hearing in July 2019. Dr. Kates was the medical expert for the employer and performed DMEs of the claimant on two occasions. At his first exam in June 2018, Dr. Kates indicated the claimant had sustained a lumbosacral sprain and strain in the work injury and had signs of symptom exaggeration. His opinion was that the claimant could work but with restrictions. The second DME with Dr. Kates took place on January 7, 2019, at which time he again concluded the claimant had a lumbosacral sprain and aggravation of her degenerative disc condition, but he found no objective evidence of any ongoing injury. Dr. Kates expressed the opinion that the claimant was capable of returning to work full time in a full-duty capacity. He also opined that the claimant reached maximum medical improvement by the date of the second DME and that no further treatment was necessary.

Dr. Eskander, the claimant's medical expert, began treating her on April 3, 2018, and diagnosed her as having lumbar radiculopathy. His treatment involved diagnostic studies and injections into the lumbar spine. His final diagnosis was that the claimant had soft tissue and structural injuries, and he was of the opinion that the degenerative condition in the lumbar spine was made symptomatic from the work injury. Dr. Eskander testified that he did not believe the claimant was functional enough to return to work.

The Board's decision accepted the testimony of Dr. Kates as more credible than that of Dr. Eskander. They also found the claimant to not meet the criteria to be a *prima facie* displaced worker. They concluded she was able to work in her usual capacity without restrictions as of January 7, 2019.

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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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On appeal, the claimant argued that the Board erred since the testimony of Dr. Kates was contradictory and inconsistent. Specifically, the argument was made that Dr. Kates used the terms "maximum medical improvement" and "resolved" and that an injury can be only one or the other, not both. The court rejected that argument and found that the Board's acceptance of Dr. Kates' testimony constituted substantial evidence to support his finding, even with the slight definition inconsistency he had given. As an aside, this writer would point out that the term "maximum medical improvement" has no legal significance in Delaware, unlike some other jurisdictions. In rejecting the claimant's appeal, the court further stated that the claimant had misinterpreted the requisite burden to terminate benefits since there must be a showing only that she is not fully incapacitated for purposes of working, but it need not be shown that the work injury has resolved. Therefore, the court affirmed the Board's decision granting the termination since there was ample proof through Dr. Kates' testimony that the claimant was no longer incapacitated.

Florida Workers' Compensation

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Linda W. Farrell

The workers' compensation insurance policy cancellation was not valid because a condition precedent had not been met, and promissory estoppel applied because the employer relied on the certificate of insurance.

Scott v. Jones Construction Co. v. Central Florida Siding Pros, NorGuard Ins. Co., Southeast Personnel Leasing, Inc., Lion Ins. Co., Packard Claims, Nobles American Services, LLC, First District Court of Appeals; Decision date Mar. 16, 2021; No. 1D20–689

The claimant appealed and Jones Construction Co., the contractor, cross appealed the judge's non-final order ruling that the claimant was employed by Central Florida Siding Pros, LLC, a subcontractor, and statutorily employed by Jones and that neither carried workers' compensation coverage.

The claimant and Jones Construction raised three arguments on appeal, but the First District Court of Appeal only found one warranting discussion. The claimant and Jones Construction argued that the judge erred in concluding that there was no coverage with NorGuard Insurance Company because the policy was not properly canceled and/or NorGuard was estopped to deny coverage to Central Florida Siding Pros based on the theory of promissory estoppel. The First District Court of Appeal disagreed and affirmed the lower court's finding.

NorGuard provided coverage to Central Florida Siding through Paychex. Neither the claimant nor Jones Construction was a party to this insurance contract. NorGuard issued a notice of cancellation of the policy on January 24, 2018, with an effective date of February 10, 2018. Despite the impending cancellation, Paychex issued a certificate of insurance for Central Florida Siding to Jones Construction on February 6, 2018, indicating that the policy had gone into effect previously on February 29, 2017, and would expire on April 29, 2018. The judge ruled that the policy was not in effect on the date of the claimant's accident because NorGuard had canceled it for nonpayment of premium two months before the date of the accident. This ruling meant that the general contractor (Jones Construction) was the statutory employer.

The First District Court of Appeal rejected the arguments, contending that the policy cancellation was not valid because a condition precedent had not been met and that promissory estoppel applied because Jones Construction had relied on the certificate of insurance.

New Jersey Workers' Compensation

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Kiara K. Hartwell

The Appellate Division affirms a Judge of Compensation's decision to include the petitioner's portion of attorneys' fees and costs in the employer's Section 40 lien.

Panckeri v. Allentown Police Dep't, Docket No. A-2015-19, (Appellate Division, Decided Mar. 2, 2021)

In this *per curiam* decision, the Appellate Division reviews Section 40 of the workers' compensation statute. In enforcing a statutory lien, the Appellate Division agreed with the Judge of Compensation that the petitioner's share of costs and fees should be included as a part of the subrogation calculation.

In April 2012, the petitioner was working as a police officer for the respondent and, while assisting at a motor vehicle accident, he injured his left foot. A claim was filed with the Division of Workers' Compensation, and an order approving settlement was entered in January 2014 for 33 1/3% permanent partial disability of the statutory foot and $1,524 was assessed to the petitioner's attorney for fees and costs.

Due to a worsening in his foot condition, the petitioner filed an application for review or modification of formal award. In March 2017, another order approving settlement was entered, increasing the award to 40% permanent partial disability of the statutory foot, and $844 was assessed to the petitioner's attorney for fees and costs. Based on the two awards, the total amount of attorneys' fees and costs was $2,368.

The petitioner also filed a lawsuit in the Law Division against the driver and owner of the vehicle who injured him. These claims were settled for $99,000, reduced $5,000 for his ex-wife's *per quod* claim. The settlement was reduced by $30,693.39 in attorneys' fees and $1,919.82 in expenses.

The respondent reserved its right to assert a lien against the petitioner's recovery from the third party case pursuant to N.J.S.A. 34:15-40 (Section 40). The lien asserted totaled $53,717.28 for:

$16,547.13 in temporary disability benefits;
$16,287.05 in medical benefits;
$16,560.01 in permanency benefits for the January 2014 settlement; and
$4,323.09 in permanency benefits for the March 2017 settlement.

When the respondent asserted the $20,883.10 amount in total permanency benefits paid, the petitioner contested that the lien should not include the $2,368 in fees and costs paid. Specifically, the petitioner argued his share of fees and costs should not be included in the lien amount as it was not "recoverable monies" per the statute, whereas the respondent disputed that statutory interpretation and noted the "longstanding practice" of having the lien contain the gross amount of the award. After hearing arguments, the Judge of Compensation issued a written decision where the sole issue was "whether the [c]ourt must deduct [petitioner's] share of fees and costs from the subrogation calculation."

In rejecting the petitioner's contention, the judge first cited another Appellate Division decision, *Wager v. Burlington Elevators, Inc.*, 116 N.J. Super. 390, 395 (App. Div. 1971), where it was noted an employee was not entitled to double recovery. Further, the judge highlighted the notion that the employer's subrogation rights are "statutorily created and generally attaches to 'any sum' recovered…" *Lambert v. Travelers Indem. Co. of Am.*, 447 N.J. Super 61, 73 (App. Div. 2016) (citing *Primus v. Alfred Sanzari Enters.*, 372 N.J. Super. 392, 400 (App. Div. 2004)).

The judge relied on prior case law to find "benefit" under Section 40 equated to "overall recovery." Additionally, it was noted that, while N.J.S.A. 34:15-40(e) specifically carved out an exception for the amount of fees and costs that could be deducted from a civil action, since the Act was silent for a workers' compensation case, the judge declined to draw additional inferences from the plain language of the statute. Also, the judge mentioned that the Legislature would amend the statute if it believed a court misconstrued its intent. Finally, based on the fact that the Legislature only increased the deductible amount under Section 40 in its 2007 amendment, the judge reasoned that it concurred with the Division's practice of including attorneys' fees and costs. The petitioner filed a motion for reconsideration, which the judge denied.

In affirming the judge's decision, the Appellate Division heavily relied on the reasons articulated by the Judge of Compensation. The Appellate Division only added that the petitioner's reliance on *Kuhnel v. CNA Insurance Cos.*, 322 N.J. Super. 568 (App. Div. 1999) was misplaced. *Kuhnel* did not address the petitioner's share of fees and costs. Rather, the Appellate Division only focused on a respondent's portion of fees and costs, noting expenses that benefit an employee should be included in a Section 40 lien. Moreover, in *Kuhnel*, the petitioner's portion of fees and costs, among other things, were included in the employer's Section 40 lien. Finally, the Appellate Division noted *Kuhnel* was decided eight years prior to the 2007 amendment of Section 40, in which there was no mention of a petitioner's portion of fees and costs.

Pennsylvania Workers' Compensation

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Francis X. Wickersham

A determination that claimant sustained a disabling, work-related injury was not based on impermissible speculation as the judge believed the claimant and found sufficient corroborative evidence in the record to support her testimony; employer entitled to credit for gross short-term disability benefits.

West Penn Allegheny Health System, Inc. and BrickStreet v. WCAB (Cochenour); 85 C.D. 2020; filed Apr. 16, 2021; Judge Fizzano Cannon

In this case, the claimant reported sustaining work-related injuries to her neck and back as a result of an incident that occurred while she was on the employer's parking shuttle. The employer issued a Medical-Only Notice of Temporary Compensation Payable (NTCP). Later, the claimant filed a claim petition, requesting payment of temporary total disability benefits for cervical, thoracic and lumbar spine injuries.

According to the claimant, on the morning of September 14, 2016, she was travelling to her job at the hospital in an employer-provided shuttle bus from the parking garage. She alleged that during the ride, the bus turned a corner to the left, hit a curb, bounced across the lanes in the street and hit another curb. Although the claimant did not immediately feel any symptoms, two days later, while not working, she experienced symptoms in her legs, arms, neck and head. The claimant then reported the incident to the employer.

The employer presented a litany of witnesses in an attempt to establish that the incident the claimant alleged to have happened did not occur. The witnesses included two representatives of the shuttle company, who testified that they pulled video footage from the shuttle matching the claimant's description of the driver and no injury was observed. The employer also presented two shuttle drivers, both of whom said they could not recall an incident matching the claimant's description occurring on September 14, 2016. One of the drivers said that if an incident happened, it would have shown up on camera and would have been reported, particularly if there was vehicle damage.

The Workers' Compensation Judge said at a hearing that he viewed video of the shuttle runs and did not detect an incident that corresponded to the claimant's description. However, the judge granted the claim petition and awarded the claimant benefits. The judge further found the employer was entitled to a credit against the net amount of short-term and long-term disability benefits the claimant received, not the gross amount the employer paid. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, the employer argued that the Workers' Compensation Judge's finding that the claimant sustained a disabling, work-related injury was not based on substantial competent evidence but, rather, on speculation. The employer acknowledged that the judge found the claimant's testimony of the incident to be credible, but maintained that the judge wrongly ignored evidence to the contrary in order to come up with an alternative theory to award benefits. The court disagreed and dismissed the employer's appeal on this issue.

According to the court, it was the claimant's burden to prove that she sustained a work-related, disabling injury and that, in the end, the judge found sufficient corroborative evidence in the record to support her testimony. The court did not consider this to be judicial speculation but, rather, a balanced consideration of all of the evidence at hand.

The court did reverse the underlying decisions as to the employer's credit for short- and long-term disability benefits paid to the claimant, holding the employer was entitled to a credit for the gross pre-tax amount in non-pension disability payments, pending adjudication of a claim petition.

News

Please join us in welcoming shareholder **Michael Sebastian** to the firm in our Scranton office. Michael brings more than 20 years of experience in defending employers, insurance carriers and third-party administrators in workers' compensation claims, working together with his clients to achieve their desired result. Michael can be reached at (570) 496-4601 or masebastian@mdwcg.com.

Michele Punturi (Philadelphia) and **Judd Woytek** (Allentown) presented "Workers' Compensation Spring Fling" to staff at Everest Insurance. Topics included an in-depth review of the Pennsylvania Workers' Compensation LIBC Forms and a discussion on recent case law.

Michele Punturi (Philadelphia) is speaking at the 2021 CLM Worker's Compensation and Retail, Restaurant & Hospitality Conference to be held virtually on May 12-14. In "Changing the Employee Safety and Wellness Mindset to Reduce Workers' Compensation Costs and Avoid Liability," Michele is part of a panel discussion that will focus on changing the claims management mindset surrounding employee safety and wellness to drive down workers' compensation costs and avoid liability exposure. Today's litigious environment, particularly considering COVID-19, calls for an innovative approach that might include self-reporting programs and dedicated medical case management teams to help employers spot issues before they become costly claims. For more information, click here.

Outcomes

Estelle Kokales McGrath (Pittsburgh) and **Audrey Copeland** (King of Prussia) won an appeal on behalf of a newspaper before the Pennsylvania Supreme Court, which denied the claimant's petition for allowance of appeal on March 30, 2021. The claimant, a newspaper delivery person, filed a claim petition in 2018 alleging that he suffered serious injuries to his right leg after slipping and falling on ice when he was delivering newspapers. The newspaper asserted that the claimant was an independent contractor. The case was bifurcated to determine whether the claimant was an employee. After fully litigating the issue, the judge found in favor of the newspaper and found that the case was not so different than the seminal case of *Johnson v. WCAB (DuBois Courier Express)*, 631 A.2d 693 (Pa. Cmwlth. 1993), where the court held that a thirteen-year-old newspaper carrier was an independent contractor because the newspaper did not exercise substantial control over his activities.

The claimant appealed to the Workers' Compensation Appeal Board. After hearing argument and reviewing the parties' briefs, the Board affirmed the judge's decision and order. The claimant appealed to the Commonwealth Court, urging the court to consider the evolving nature of the newspaper delivery business in rendering its decision. The court refused to do so and highlighted the lack of control by the newspaper because there was no prohibition on delivering competing newspapers or enlisting a substitute without prior notice or permission. The claimant's suit ended when the Pennsylvania Supreme Court denied the petition for allowance of appeal.