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BETTER NOT BE LATE! WORKERS' COMPENSATION OCCUPATIONAL EXPOSURE CLAIMS AND THE STATUTE OF LIMITATIONS

BY ROBERT J. FITZGERALD, ESQ.

In the recent case of *Bender v. Township of North Bergen*, Docket No. A-4564-18T3, Dec. 24, 2020, the Appellate Division addresses the statute of limitation defense between traumatic and occupational exposure claims in New Jersey workers' compensation. The petitioner, Robert Bender, worked as a police officer with the Township of North Bergen from 1979 until 2004, when he retired. In October 2007, he filed a claim petition alleging psychiatric and orthopedic injuries from occupational exposure. The claim petition was dismissed based on the petitioner's failure to file the claim within the two-year statute of limitations.

On appeal, the Appellate Division upheld the dismissal of the psychiatric component of the claim petition based on the statute of limitations. However, the case was remanded on the orthopedic claim for the workers' compensation judge to make particularized findings. Specifically, to determine whether the petitioner's orthopedic claim was filed within the appropriate statute of limitations. On remand, the remaining orthopedic component of the claim petition was dismissed "for failure to sustain the burden of proof."

The petitioner then filed an appeal of the dismissal of the orthopedic claim. He contended he did not realize until 2007 (more than two years after his 2004 retirement) that his orthopedic injuries were work-related. He claimed this his injuries resulted from "numerous falls, motor vehicle accidents, lifting stretchers" and fights during his tenure as a police officer.

The petitioner returned to work after each traumatic injury, **including three for which he filed claim petitions and received workers' compensation benefits.** He further testified his condition after each injury was tolerable. He testified, "You never heal completely from those things, but it's tolerable. You can live with it. You heal the best you can." With regard to his physical complaints, he indicated he had pain in his right knee for almost a year before seeking treatment in 2007. With regard to his

shoulder, the petitioner did not seek treatment until after he filed his 2007 claim petition. For his back and neck complaints, he did not have symptoms until after he retired.

The Appellate Division affirmed the dismissal of the orthopedic claim petition on remand. In its opinion on the statute of limitations issue, the court noted the workers' compensation judge's reference to the New Jersey Supreme Court's ruling:

[T]hat in the limited class of cases in which an unexpected traumatic event occurs and the injury it generates is latent or insidiously progressive, an accident for workers' compensation\ filing purposes has not taken place until the signs and symptoms are such that they would alert a reasonable person that he had sustained a compensable injury. [*Brunell v. Wildwood Crest Police Dep't.*, 176 N.J. 225, 254 (2003).]

In *Brunell*, the court held the statutory requirements that an injured worker "must give notice to the employer within ninety days . . . of an injury," N.J.S.A. 34:15-17, and must file a claim petition within two years of the date the 'accident' occurred, N.J.S.A. 34:15-51," 176 N.J. at 250, "do not begin to run until the worker is, or reasonably should be, aware that he has sustained a compensable injury," *id.* at 252.

Based on *Brunell*, more commonly referred to as the "discovery rule," the Appellate Division determined that the workers' compensation judge had correctly reasoned that, had the orthopedic condition been related to an occupational exposure, then clearly one would expect some manifestation to arise during the work exposure or within two years of the work exposure. Finding "a lack of nexus," the judge correctly dismissed the orthopedic claims because there was "no meaningful showing of any insidious progression of an orthopedic disability."

In completing its decision, the Appellate Division noted that the discovery rule was intended narrowly as to give some leeway to avoid a legitimately injured worker losing an **occupational exposure claim.** However, it remains fact that the **traumatic accident** calculation begins when the worker knows or should know he has incurred any compensable injury, the worker "must act" when he or she knows "any compensable injury" is sustained. Moreover, applying a discovery-type rule to this narrow class of accident cases will not result in the obliteration of the distinction between accidental injury and occupational disease for notice and filing purposes.

While there may be nothing particularly new about this decision or the principles discussed, the *Bender* case does highlight a common scenario when dealing with alleged occupational exposure claims. Often times occupational exposure claims are filed when a petitioner misses the statute of limitations on a traumatic accident claim. The court here confirms that a failure to file a timely claim for a few specific accident claims does not generate a theory for an occupational exposure scenario. The court will also be less generous to allow the discovery rule argument where you have a petitioner who has already timely filed traumatic claims previously. Frequently, an occupational claim petition is the first notice of work injury. Employers and carriers should always investigate prior claims through an index check and docket request to see whether a new occupational exposure claim is really an untimely traumatic claim in disguise.

Robert J. Fitzgerald is a shareholder in the Workers' Compensation Department in the Mount Laurel office of Marshall Dennehey Warner Coleman & Goggin. He devotes his entire practice to workers' compensation defense litigation, providing experienced counsel to employers and insurance carriers. He may be reached at rjfitzgerald@mdwvcg.com.