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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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In a modification petition based upon a labor market survey, the employer meets its burden of proving that it does not have an open and available job for the claimant through testimony from the employer that the jobs it did have did not comply with the claimant's restrictions.

James Reichert v. WCAB (Dollar Tree Stores); 42 C.D. 2013; filed 11/8/13; by Judge Brobson

After the claimant's work injury, the employer filed a modification petition based on the results of a labor market survey. In connection with that petition, the employer presented testimony from its district manager, who testified that the employer, which had a total of 10 retail stores, had positions available in the stores that required a lot of physical movement. He also testified that there was very little office work to be done in the stores. The witness further said that, having reviewed the restrictions given by an IME physician, who released the claimant to do light-duty work, the employer did not have any open positions that met these limitations. On cross examination, the employer admitted that no one asked him to look for a job and that he was never contacted by the employer's vocational expert. He also acknowledged that he did not have any actual written job descriptions for the retail store positions.

The Workers' Compensation Judge granted the modification petition. In doing so, he found the testimony given by the employer's witness credible that there were no open and available jobs for the claimant within the restrictions of the IME physician. The claimant appealed to the Appeal Board, which affirmed.

In his appeal to the Commonwealth Court, the claimant argued that the employer did not meet its *prima facie* burden of proof because it failed to establish the absence of open and available positions at the employer's retail stores. The claimant also argued that the employer's vocational expert failed to contact the employer to determine whether any open and available positions were available for the claimant prior to conducting the labor market survey. The court held that the employer presented sufficient evidence to establish that it did not have an open and available position for the claimant. It went on to note that, once an employer has presented evidence that it does not have an available position, a claimant is entitled to rebut that evidence by demonstrating that during the period in which the employer has or had a duty to offer a specific job, the employer was actively recruiting or had posted or announced the existence of a specific job vacancy. In this case, the claimant did not present any evidence that the employer was actively recruiting for a specific job vacancy. The court also held that there was no legal authority for the proposition raised by the claimant that a vocational expert is prohibited from conducting a labor market survey unless he first contacts the liable employer to determine whether it has any open and available positions for a claimant. **II**

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The court emphasized that they have held in the past that an employer does not have the burden to prove the "nonexistence" of available work at its own facility as a necessary element to be successful in a modification petition. A claimant may present evidence that during the period which the employer had a duty to offer a specific job, the employer had a specific job vacancy it intended to fill that the claimant was capable of performing. The burden then shifts to the employer to rebut the claimant's evidence.

Benefits were properly suspended after the claimant returned an employment verification form by fax which was signed but not dated.

John McCafferty v. WCAB (Trial Technologies, Inc.); 208 C.D. 2013; filed 11/21/13; by Judge Leavitt

The claimant filed a claim petition for an injury he sustained while working for the employer. While the claim petition was pending, the employer sent the claimant an "Employee Verification of Employment, Self-Employment or Change in Physical Condition Form" (LIBC-760). The claimant was instructed to sign, date and return the form within 30 days. The form was sent on January 18, 2010, and returned by fax on February 22, 2010. On April 13, 2010, the forms were rejected by the employer since they were not the originals and were not dated. About 30 days thereafter, the claimant returned the form by hand delivery, but the form was still not dated. The claim petition was granted, and the employer then sent the claimant a notification of suspension because he had not properly completed and returned the LIBC-760 to the employer. The claimant then mailed a second LIBC-760 to the employer which was dated, and the employer promptly reinstated benefits. The claimant filed a penalty petition, alleging that the employer violated the Act for suspending benefits and sought a reinstatement of benefits for the period benefits were suspended.

The judge dismissed the claimant's petitions, concluding that the claimant's failure to date the form on a line that was located next to the signature line was a fatal omission. The claimant appealed to the Appeal Board, and the Board affirmed the judge's decision.

On appeal to the Commonwealth Court, the claimant argued that a facsimile transmission of the LIBC-760 form was proper, especially since the fax provides the date. The claimant also argued that his LIBC-760 form was not defective because it was undated since the date was established by the fax. The Commonwealth Court agreed that transmission of an LIBC-760 form by facsimile is proper. However, they rejected the claimant's argument that the form was not defective because the date was contained on the fax. According to the court, there was no way of determining from the fax when the claimant signed the form. This would have an impact on when the employer could send another form to the claimant, which they are entitled to do every six months. The court held that the signature and date are essential to an unsworn statement being given and that the date is necessary to confirm the substance of the statements made in the form as of a date certain. II

An automobile insurance carrier that pays first-party benefits to a claimant and fails to pursue their lien during the pendency of workers' compensation proceedings fails to exhaust its remedy under §319 of the Act and may not recoup its lien.

Liberty Mutual Insurance Company a/s/o Catherine Lamm v. Excalibur Management Services d/b/a Excalibur Insurance Management and Luzerne County; 1792 C.D. 2012; filed 11/8/13; by Judge Leadbetter

The claimant sustained injuries as a result of a work-related motor vehicle accident and filed a claim against the employer. Later, a settlement was reached by compromise and release agreement. Subsequently, the automobile carrier filed a complaint in the Court of Common Pleas to recover first-party benefits it paid to the claimant pursuant to an automobile insurance policy. The payments were made as a result of the workers' compensation carrier's initial denial of the workers' compensation claim. The automobile insurance carrier sought recovery of the payments it made from the workers' compensation carrier. The workers' compensation carrier secured a dismissal of the complaint by successfully arguing that the automobile insurance carrier failed to exercise or exhaust its statutory remedy under §319 of the Workers' Compensation Act (the subrogation provision) during the pendency of the workers' compensation claim.

The Commonwealth Court agreed. The automobile insurance carrier argued that §319 of the Act did not apply. The court cited the second paragraph of §319, which contemplates subrogation established either by contract or by litigation. The automobile insurance carrier did not file a complaint in Common Pleas Court seeking reimbursement until one year after the settlement by compromise and release agreement was approved. The court held that the automobile insurance carrier not only sought reimbursement in the wrong form, but waited too long to do so. II

A judge does not have jurisdiction for a utilization review petition filed on the basis that records were not timely supplied to the URO by a foreign provider who was treating a claimant who had permanently relocated to his native country.

Peter Leventakos v. WCAB (Spyros Painting); 2156 C.D. 2012; filed 12/5/13; by President Judge Pellegrini

The claimant sustained injuries in October of 1983. About ten years later, the claimant permanently relocated to his native country of Greece. Many years later, a judge suspended the claimant's workers' compensation benefits based on his voluntary removal from the work force.

The employer filed a utilization review request (UR) seeking review of the claimant's treatment with a physician in Greece. The UR notified the physician and instructed him to submit his treatment records. The URO advised that a summary of the claimant's treatment could not be considered in lieu of the records. The physician, however, provided the URO with a treatment summary. The treatment summary was sent to the provider performing the UR, and that provider discussed the treatment with the claimant's physician in a phone conversation. During that conversation, the provider performing the review was informed that there were no medical records documenting treatment. Consequently, a utilization review determination was issued indicating that the treatment was not reasonable or necessary due to a lack of documentation. The claimant filed a petition challenging the determination.

The judge dismissed the utilization review petition, concluding that she lacked jurisdiction because the physician in Greece failed to submit any medical records to the URO. The judge also said that there was no basis for an exception because the provider was out of the country or because of "foreign convention" that medical records are not kept in Greece. The claimant then appealed to the Board, which affirmed.

The claimant then appealed to the Commonwealth Court, which affirmed the decisions below. They agreed that the judge lacked jurisdiction because none of the information provided could be considered a "record" appropriate for review. However, they also rejected the claimant's argument that his physician's oral account of the treatment constituted a "record." II

Side Bar

"Simply put, a 'record' is something documented, not something remembered." (*Leventakos* at p. 6.).

An employer or workers' compensation carrier that secures a claimant's signature on a final receipt and files it with the Bureau without any information regarding the claimant's full recovery from a work injury does so fraudulently and subjects the final receipt to be set aside, even after the three-year statute of limitations has passed.

Celeste Kraeuter v. WCAB (Ajax Enterprises, Inc.); 457 C.D. 2013; filed 12/19/13; by Judge Leadbetter

The claimant sustained a work-related injury on September 24, 2004. She continued working but eventually became disabled and began receiving workers' compensation benefits. Approximately one and a half years later, in May of 2006, the employer sent the claimant a notification of suspension (LIBC-751), notifying her that her disability benefits were suspended due to a return to work three days before. Three days later, the claimant signed a final receipt, which stated that the claimant was able to return to work without a loss of earnings and that the claimant received benefits for a period of 69 weeks and two days. The employer then filed the final receipt with the Bureau of Workers' Compensation.

Thereafter, in July of 2011, the claimant filed a petition to set aside the final receipt, alleging fraud and/or improper action. The claimant also filed a penalty petition, alleging that the final receipt and notification of suspension were fraudulently filed because they were based on a return to work that never happened. The claimant also filed a petition challenging the notification of suspension.

At the Workers' Compensation Judge level, the claimant acknowledged her signature on the final receipt and said she was pretty sure the employer asked her to come in and sign it. However, she also said that her doctor had performed surgery on her and did not release her to return to work when she signed the final receipt. She further said that she did not return to work for the employer nor was she working for any other employer at the time the final receipt was signed. Finally, she said that she had not fully recovered from her work injury when she signed the final receipt. The employer presented deposition testimony of a claims adjustor who said that he prepared and sent the suspension notification and final receipt to the claimant based on his understanding from paperwork from the employer that the claimant had returned to work. He admitted that the form he received from the employer did not indicate that the claimant had fully recovered from her work injury and that he was not in possession of any medical evidence of full recovery. The judge granted the claimant's petitions, finding that the claims adjustor engaged in fraudulent conduct and that the employer violated the Act by unreasonably and excessively delaying compensation payments. The judge also concluded that the employer did not have a reasonable basis to contest the claimant's petitions.

The employer appealed to the Board, and they reversed. The Board concluded that the claimant failed to establish that the claims adjustor's actions rose to the level of fraud, which would be the only reason to justify setting aside the final receipt beyond the three-year statute of limitations in §434 of the Act. The Board further noted that the claimant failed to present medical evidence establishing that her disability had not terminated when she signed the final receipt. The claimant then appealed to the Commonwealth Court.

The court agreed with the claimant and reversed the decision of the Board. The court noted that the claims adjustor conceded that he prepared and sent the claimant the final receipt for signature relying solely on dated information provided by the employer in February of 2005 and without any information that the claimant had returned to work in May of 2006 or had fully recovered from the work injury as of that date. In short, the court concluded that the adjustor failed to perform his duty to ascertain the claimant's medical status before preparing and sending the final receipt to the claimant and that the claimant was receiving medical treatment, had not fully recovered from the work injury and had not returned to work, contrary to the statements in the notification of suspension and the final receipt. Concluding this, the court also held that the claimant was not required to present any medical evidence in order to set aside the final receipt. **II**

Side Bar

The only silver lining for the employer in this case was that the Commonwealth Court disagreed with the judge that the employer's contest was not reasonable. The court noted that the petition to set aside the final receipt was filed beyond the three-year statute of limitations and nothing in the record suggested that the employer was contesting the relief sought by the claimant merely to harass her.

News from Marshall Dennehey

On February 4-5, 2014, **Anthony Natale** (Philadelphia, PA) will be a featured speaker at the 11th Annual National Workers' Compensation Insurance ExecuSummit being held at the Mohegan Sun Convention Center & Hotel in Connecticut. His presentation, "Busted! Identifying, Proving and Prosecuting Workers' Compensation Fraud," will address how to identify the different types of workers' compensation fraud, focusing on the warning signs of fraud as they relate to employees, employers and health care providers. For more information, visit www.workerscompconference.com.

J. Jeffrey Watson (Harrisburg, PA) and **Keri Morris-Johnston** (Wilmington, DE) were elected shareholders of the firm at our annual shareholders' meeting on December 10, 2013.

Note that our Harrisburg, Pennsylvania, office has relocated to new office space in Camp Hill. The new office address is 100 Corporate Center Drive, Suite 201, Camp Hill, PA 17911. All telephone numbers remain the same, with the exception of a new office fax number: 717-651-3707.

Recently Published Articles:

- *The Disregarded Diagnosis—How to Litigate the Termination Petition Without an Unreasonable Contest* by Andrea Cicero Rock and Raphael Duran.
- *Not So Fast!!! The Court Reverses Dismissal of Unjust Enrichment Claim for Overpayment of Workers' Compensation Benefits* by Robert Fitzgerald.
- *That 70s Show: Obamacare Takes Federal Black Lung Claims Back in Time* by A. Judd Woytek.

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwcg.com)

Dario J. Badalamenti

The Division of Workers' Compensation and the Superior Court share concurrent jurisdiction to determine employment status in the context of an exclusivity defense.

Estate of Kotsovska v. Saul Liebman, Docket No. A-5512-11T4, 2013 N.J. Super. LEXIS 186 (App. Div., decided 12/26/13)

The defendant was an elderly man living alone, and his daughter sought someone who could move into her father's home, cook his meals and assist him in his daily activities. The decedent was referred to the defendant by a mutual friend. The parties agreed that the decedent would move into the defendant's home and work seven days per week for $100 a day, which she would receive in cash. The decedent was responsible for preparing three meals a day, doing the laundry, performing light housekeeping, and accompanying the defendant on errands and to go out to eat. The parties met on October 21, 2008, and the decedent began her duties immediately thereafter.

On December 8, 2008, the defendant and the decedent were running errands when they stopped at a restaurant for lunch. Upon arriving, the decedent exited the vehicle and stood on the sidewalk while the defendant parked the car. The defendant suddenly accelerated his vehicle, which jumped the curb onto the sidewalk, striking the decedent and pinning her against a wall. The decedent's left leg was severed below the knee, resulting in her death less than an hour later.

The decedent's estate filed a wrongful death action against the defendant in Superior Court. The defendant answered, asserting an affirmative defense of lack of subject matter jurisdiction, contending that the decedent was his employee and that exclusive jurisdiction was with the Division of Workers' Compensation. The defendant also filed a motion to transfer the case to the Division. The judge denied the decedent's motion as there was no claim pending in the Division and the limitations period had expired. The defendant moved for reconsideration, having obtained a certification from his homeowner's insurance carrier conceding compensability of the decedent's accident and agreeing not to raise a limitations defense were the matter to be transferred to the Division. The court again denied the decedent's motion.

At trial, the jury determined that the decedent was an independent contractor and awarded her estate damages for both pain and suffering and wrongful death. This appeal ensued.

In reversing and remanding to the Division for a determination of the decedent's employment status, the Appellate Division relied on *Kristiansen v. Morgan*, 153 N.J. 298 (1998), in which the court held:

> [A]lthough the Superior Court and the Division have concurrent jurisdiction to decide an exclusivity defense, primary jurisdiction is in the Division because it can decide all aspects of the controversy in a manner binding on all the interested parties.

The *Kristiansen* court found that, regardless of whether the employer admits or denies the compensability of an accident, the Division was the forum best suited to decide whether the accident falls within the coverage of the Workers' Compensation Act.

Accordingly, the Appellate Division reversed the judgment on liability only and remanded the matter to the Division for a determination of the decedent's employment status. The Division was instructed to thereafter transfer the matter to the Law Division, which shall, in accordance with the Division's determination, either reinstate the judgment in favor of the decedent's estate or dismiss the matter with prejudice. II

Side Bar

Interestingly, the Appellate Division only found it necessary to reverse and remand to the Division of Workers' Compensation due to the fact that the jury had been improperly instructed as to the issue of employment at trial. "Because the Law Division had concurrent jurisdiction to decide whether the decedent was an employee or independent contractor," the Appellate Division explained, "the failure to recognize the Division's primary jurisdiction would not, standing alone, require the case to be reversed." However, the Appellate Division determined that the instructions to the jury were so seriously flawed that the resulting charge both failed to properly convey the law and created the potential for producing an unjust result. Accordingly, the Appellate Division found that reversal and remand was required.