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What's Hot in Workers' Comp

25th Year in Publication!

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2014

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwcg.com)

Paul V. Tatlow

1. Supreme Court holds that claimant is not entitled to reimbursement for surgery performed by a non-certified Maryland surgeon.

Howard Vanvliet v. D&B Transportation, (No. 242, 2014 – Decided November 20, 2014)

The claimant sought reimbursement for surgery performed on him by a Maryland surgeon who was not certified under the Act. In denying that request, the Delaware Supreme Court relied on its prior decision in *Wyatt v. Rescare Home Care* and concluded that the two cases are not distinguishable. The court reasoned that it was undisputed that the surgery was performed by a non-certified, Maryland surgeon and that none of the statutory exceptions apply.

2. House Bill 373 went into effect on July 15, 2014. Its objective is to control the level of workers' compensation insurance premiums by making significant changes in the medical reimbursements allowable under the Healthcare Payment System.

The summary to House Bill 373 gives the following as the reasons behind its enactment: "This Act makes substantial changes to Titles 18 and 19 of the Delaware Code designed to control the level of workers' compensation premiums in Delaware. The most significant changes are: (a) a 33% reduction in medical costs to the workers' compensation system, phased in over a period of three years; (b) absolute caps, expressed as a percentage of Medicare per-procedure reimbursements, on all workers' compensation medical procedures beginning on January 17, 2017; and (c) increased independence for the Ratepayer Advocate who represents ratepayers during the workers' compensation rate approval process and for the committee that oversees the cost control practices of individual workers' compensation insurance carriers." The legislation also provided that the Health Care Advisory Panel will now be known as the Workers' Compensation Oversight Panel (WCOP).

3. The employer has a legal basis for denying payment for a claimant's narcotic medication on causation grounds where the claimant has been arrested and charged with illegally selling medication that was prescribed for the work injury.

Nathaniel Brandon v. State of Delaware, (IAB No. 1372970 – Decided April 4, 2014)

The Industrial Accident Board addressed the issue of whether the denial of the medication should have been submitted to Utilization Review as not being necessary and reasonable. The Board's analysis shows that the situation falls into a gray area in which it could be contended that the claimant no longer needs the medication and it is, therefore, not necessary and reasonable and that the dispute should be sent to Utilization Review. On the other hand, the Board also indicated that the employer could contend that since the claimant no longer needs the medication, the work injury is then no longer causing the need for the claimant's medication. Thus, it can be denied on causation grounds. The Board concluded that the employer did not act improperly in characterizing the denial of the medications as being due to causation and not required to be submitted to Utilization Review. In conclusion, the Board denied the claimant's motion to compel payment for the medication and indicated that the claimant's counsel would need to file a Petition to Determine Additional Compensation Due to pursue this issue further.

4. Personnel changes at the Industrial Accident Board made during the past year.

There were a number of changes in Board personnel this past year. Board members Alice Mitchell and Victor Epolito departed and were replaced by new Board members Robert Mitchell and Patricia Maull. In addition, John F. Kirk, who was the administrator, and Linda Sewell, who was the deputy administrator, both retired after many years of service. The new administrator is Stephanie Parker, and as of this writing, the deputy administrator post has not yet been filled. Finally, Angela Fowler left her position as a hearing officer and was replaced by Heather Williams.

5. Superior Court holds that Board committed an error of law in determining sua sponte that claimant was a displaced worker.

Haines Fabrication and Machine v. Ralph G. Burkovich, (C.A. No. S13A-10-004 (THG) – Decided June 20, 2014)

This case involved the employer's termination petition. The Board found that the claimant was medically capable of working in a sedentary capacity, but it then went on to find that he was a *prima facie* displaced worker and entitled to temporary total disability. In concluding that the Board committed legal error in determining *sua sponte* that the claimant was a displaced worker, the court noted that the claimant had failed to raise that issue prior to the trial and also failed to develop that issue at the Board hearing. Consequently, neither party was afforded a fair opportunity to develop the displaced worker theory. The court indicated that fairness considerations require a remand for further proceedings so the parties can fully develop the displaced worker theory.

6. New workers' compensation rates.

The Department of Labor announced that the new workers' compensation rate effective July 1, 2014, establishes an average weekly wage of $998.35. Accordingly, the maximum compensation rate is now $665.57, and the minimum compensation rate is $221.86.

7. The Delaware Supreme Court reverses Superior Court and holds that the Board erred in finding the claimant not eligible for temporary partial disability where the evidence showed that the employer would hire the claimant for a light-duty job only if he could provide a valid Social Security number.

Jose Campos v. Daisy Construction Co., (No. 33, 2014 – Decided November 13, 2014)

The claimant had a compensable work injury. While receiving total disability benefits, the employer discovered that he was an undocumented worker. When he could not provide a valid Social Security number, his employment was terminated. The Supreme Court concluded that the Board erred in finding that the claimant was not eligible for partial disability benefits based on evidence that the employer would hire the claimant for light-duty work if not for his immigration status since, in reality, that job was not available to the claimant. The court reasoned that to allow such evidence to constitute proof of job availability would allow employers to hire undocumented workers who then suffer a workplace injury and thereby avoid partial disability benefits by "discovering" the immigration status and offering to re-employ the claimant if they could fix that undocumented workers status. Such an outcome would be contrary to the Act and the case law according to the court.

8. Chronic pain treatment continues to be the most frequently challenged Guideline in Utilization Review requests.

The Department of Labor's Annual Report, which gives statistics for 2013, shows that 458 requests for Utilization Review were received that year, a 15% decrease from the prior year. A total of 134 Utilization Review Appeal Petitions were filed with the Board, which represents 29% of the 458 total Utilization Review requests. The breakdown on those petitions shows that 110 were filed by claimants and 24 were filed by employers. As far as the seven Practice Guidelines within the Healthcare Payment System, chronic pain treatment continues to be the most often challenged with 291 UR requests dealing with chronic pain, which outpaces the low back Guidelines, which were challenged 77 times.

9. The Board denies the claimant's motion for payment of medical bills since the employer was entitled to have the bills submitted in a "clean claim" format, which includes having the provider submit the bills on the proper forms.

Jeffrey Evick v. Cutting Edge Lawn Care Service, (IAB No. 1386464 – Decided October 17, 2014)

This case came before the Board in a legal hearing filed by the claimant on a motion to compel the employer to pay medical bills. The Board noted that, under the provisions of the Act, an obligation to pay bills is not triggered until a proper "clean claim" is submitted to the employer. The Board then addressed the question of what data is required in order to constitute a "clean claim." The Act, in authorizing the development of the Healthcare Payment System and the regulations adopted along with it, clarifies what is needed for a proper "clean claim." In analyzing that issue, the Board concluded that the employer is within its rights to demand that the charges be submitted on a HCFA form. The Board noted that under the current fee schedule Guidelines, the CMS-1500 form is the same as the previous HCFA form 1500.

10. The five-year statistics on appeals from Board decisions show that reversal rates continue to be extremely low.

The Annual Report from the Department of Labor gives a five-year cumulative summary of appeals from Board decisions. For the five-year period from 2009 through 2013, the Board rendered 2,360 decisions on the merits. From that number, 296 were appealed, an average of 59.2 per year. Further, only 39 of the cases appealed were either reversed and/or remanded in whole or in part. This represents a reversal rate of only 1.65% of all decisions rendered by the Board during that five-year span. **II**

TOP 10 DEVELOPMENTS IN NEW JERSEY WORKERS' COMPENSATION IN 2014

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

Dario J. Badalamenti

1. An employer alleged to have deliberately deceived its employee into believing that the personal protective equipment he was provided was adequate to protect him from the pesticides he was applying was not subject to liability in tort as the employer's behavior did not constitute an "intentional wrong" sufficient to overcome the exclusive remedy provision of the Workers' Compensation Act.

Blackshear v. Syngenta, Docket No. A-3525-12T1, 2014 N.J. Super. Unpub. LEXIS 2394 (App. Div., decided October 6, 2014)

Although N.J.S.A. 34:15-8 provides the exclusive remedy available to employees injured by accident during the scope of their employment, under the "intentional tort" exception, an employee may bring an action against his employer at common law for any act or omission which is an intentional wrong.

2. A Judge of Compensation properly excluded the petitioner's medical expert's testimony as an inadmissible "net opinion" because the expert testified that he had no specific knowledge of the work the petitioner performed; had not read any literature regarding the work; and had not viewed surveillance video of the petitioner shopping, carrying packages, lifting large plants with her hands, and gardening without much difficulty.

Russo v. Scott Schaffer, DMD, Docket No. A-2948-12T4, A-2949-12T41, (App. Div., decided August 8, 2014)

Pursuant to N.J.R.E. 703, an expert's opinion must be based on "facts, data, or another expert's opinion, either perceived or made known to the expert, at or before trial." This "net opinion" rule has been succinctly defined as "a prohibition against speculative testimony." *Grzanka v. Pfeifer*, 301 N.J. Super. 563 (App. Div.), cert. denied, 154 N.J. 607 (1997).

3. A school bus aide required to help children on and off the bus, assist them with their seatbelts, and ensure that they remained well-behaved on the way to and from school was entitled to benefits for injuries resulting when she fell while exiting the bus at the end of her run after all of the children had been dropped off.

Ford v. Durham D&M, LLC, Docket No. A-2071-13T4 (App. Div., July 11, 2014)

N.J.S.A. 34:15-36, the "premises rule," provides that "[e]mployment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer." Here, the Appellate Division determined that the petitioner's work day began when she boarded the bus in the morning and ended when she exited the bus at night.

4. Petitioner's counsel was entitled only to a modest counsel fee, not a fee based on the costs of the petitioner's medical treatment, because the petitioner's medical treatment did not result from his Motion for Medical and/or Temporary Benefits but, rather, from the uncontested reinstatement of benefits by the respondent.

Patel v. Showboat Casino, Docket No. A-3739-12T3 (App. Div., decided May 22, 2014)

An award of counsel fees on a Motion for Medical and/or Temporary Benefits is at the discretion of the Judge of Compensation. However, as this case illustrates, when the respondent is able to demonstrate prompt compliance with its obligation to furnish reasonable and necessary medical treatment, either before or after the filing of the motion, it can be argued that only a modest counsel fee is appropriate.

5. An award of compensation benefits was reversed by the Appellate Division due to the Judge of Compensation's failure to properly weigh the testimony of the petitioner's and respondent's competing medical experts.

Ascione v. U.S. Airways, Docket No. A-5049-12T1, 2014 N.J. Super. Unpub. LEXIS 810 (App. Div., decided April 10, 2014)

In reversing the Judge of Compensation's holding and remanding for further proceedings, the Appellate Division relied on *Perez v. Pantasote, Inc.*, 95 N.J. 105 (1984), in which the court explained that, in order to obtain disability under the workers' compensation statute, a claimant must first make a satisfactory showing of demonstrable, objective medical evidence of functional loss. The Appellate Division concluded that the Judge of Compensation failed to provide "clear, complete and articulate reasons grounded in the evidence" to explain her specific findings as to the credibility of the petitioner's and respondent's competing medical experts.

6. The New Jersey Supreme Court held that an employee, injured on a public street while en route to her employer's premises after parking her car in a garage designated for her use by her employer, was not entitled to benefits because public places not under the control of the employer are not considered part of the employer's premises for purposes of workers' compensation benefits, even if employees use the route as a means of ingress or egress to their place of employment.

Hersh v. County of Morris, A-59 September Term 2012, 07143, 2014 N.J. LEXIS 251 (Supreme Court, decided April 1, 2014)

As the New Jersey Supreme Court reasoned, "In walking a few blocks from the garage to her workplace, Hersh did not assume any special or additional hazards. Nor did County of Morris control Hersh's ingress or egress route to work. County of Morris provided Hersh with the benefits of off-site but paid-for parking, but did not dictate which path Hersh had to take to arrive at her place of employment."

7. In reversing and remanding to the Division of Workers' Compensation to determine the plaintiff's employment status, the Appellate Division held that, although the Superior Court and the Division of Workers' Compensation have concurrent jurisdiction to decide an exclusivity defense under N.J.S.A. 34:15-8, primary jurisdiction is in the Division of Workers' Compensation because it can decide all aspects of the controversy in a manner binding on all interested parties.

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

Here, the Appellate Division 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 an independent contractor," the Appellate Division explained, "the failure to recognize the Division's primary jurisdiction would not, standing along, 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."

8. An employee involved in a motor vehicle accident while exiting her employer's premises was still in the course and scope of her employment as her vehicle was partly extended over her employer's driveway apron at the moment of impact.

Burdette v. Harrah's Atlantic City, Docket No. A-4797-12T1, 2014 N.J. Super Unpub. LEXIS 114 (App. Div., decided January 17, 2014)

The Judge of Compensation based his decision on a remarkably rigid interpretation of N.J.S.A. 34:15-36, the "premises rule," which provides, in relevant part, that "[e]mployment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer." As surveillance video demonstrated, at the time of the accident, all four wheels of the petitioner's vehicle were firmly planted on MGM Mirage Boulevard, and only roughly one foot of the rear-end of the petitioner's vehicle extended over her employer's property line.

9. A nanny and housekeeper injured when she slipped and fell on the premises of the home in which she worked was prohibited under the Workers' Compensation Act from pursuing a tort claim against the defendant homeowners because they were her "special employer."

Pineda v. Zulueta and Zulueta, Docket No. A-1552-13T4, 2014 N.J. Super. Unpub. LEXIS 2527 (App. Div., decided October 23, 2014)

The relevant inquiry in assessing a claim of "special employment" is whether the work relationship bears sufficient indicia of employment to invoke the rights and remedies provided by the Act. In *Blessing v. T. Shriver & Co.*, the Appellate Division described a five-factor test to determine whether a "special employment" relationship exists. The court must consider whether: (a) an express or implied contract existed between the special employee and the special employer; (b) the work was essentially that of the special employer; (c) the special employer had the right to control the details of the work; (d) the special employer paid the employee's wages; and (e) the special employer had the power to hire, release, or re-hire the employee.

10. The Appellate Division reversed and remanded a Judge of Compensation's denial of a Motion to Vacate a dismissal of the petitioner's claim for lack of prosecution beyond the one-year statutory period set forth in N.J.S.A. 34:15-54, as the circumstances were arguably sufficient to warrant equitable relief under Rule 4:50-1(f), and the respondent was unable to demonstrate prejudice due to the delay beyond the one-year statutory period.

Planes v. Village Townhouse, Docket No. A-6025-12T3 (App. Div., decided November 25, 2014)

Under Rule 4:50-1(f), motions to set aside judgments should be made within one year after entry of judgment, but they can be made beyond that time for any reason justifying relief from the operation of the judgment or order. Here, the Appellate Division believed that in deciding the motion, the Judge of Compensation relied solely on N.J.S.A. 34:15-54 and was clearly of the mistaken belief that he was unable to grant relief absent specific authority in the statute. II

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2014

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

1. Commonwealth Court holds that the employer's attorney is not permitted to have *ex parte* communication with a claimant's treating physician prior to deposing the physician.

Pennsylvania State University v. WCAB (Sox), 83 A.3d 1081 (Pa. Cmwlth. 2013)

2. Injuries sustained by a claimant who, through a state funded program, was employed by her son as his caregiver are compensable pursuant to the "bunk house rule" in that her presence on the premises was required by the nature of her employment.

Laura O'Rourke v. WCAB (Gartland), 83 A.3d 1125 (Pa. Cmwlth. 2014)

3. Pennsylvania Supreme Court vacates Commonwealth Court decision, finding psychic injury suffered by a liquor store clerk robbed at gunpoint not compensable, in light of the Supreme Court's decision in *Payes v. WCAB (Commonwealth of PA State Police)*, 79 A.3d 543 (Pa. 2013) which held that the psychic injury of a Pennsylvania state trooper was compensable.

Kochanowicz v. WCAB (Pa. Liquor Control Bd.), 85 A.3d 480 (Pa. 2014)

4. Employer's modification petition based on the results of an IRE was properly dismissed where the IRE physician failed to satisfy section A306 (a.2) of the Act by not being active in clinical practice for at least 20 hours per week.

Verizon Pennsylvania, Inc. v. WCAB (Ketterer), 87 A.3d 942 (Pa. Cmwlth. 2014)

5. An order from a Workers' Compensation Judge denying a claim made against the uninsured employer's guaranty fund on the basis of untimely notice was properly reversed where evidence showed that the claimant did not know of the employer's uninsured status until being notified of that possibility by the Bureau.

Pennsylvania Uninsured Employers Guaranty Fund v. WCAB (Lyle and Walt and Al's Auto and Towing Service), 91 A.3d 297 (Pa. Cmwlth. 2014)

6. The employer bears the burden of proving that a claimant's loss of earning power is due to the claimant's lack of U.S. citizenship, and a claimant's invocation of his Fifth Amendment rights does not constitute substantial evidence to support a suspension of benefits on the basis that the claimant lacks legal authorization to be employed in the United States.

David Cruz v. WCAB (Kennett Square Specialties), 99 A.3d 397 (Pa. 2014)

7. A diagnosis of malingering can be a sufficient change in condition as a matter of law to support a modification of benefits based on the results of a labor market survey.

Gregory Simmons v. WCAB (Powertrack International), 96 A.3d 1143 (Pa. Cmwlth. 2014)

8. A claimant who quits his job just before suffering an injury may nevertheless be within the course and scope of employment; the employer is not judicially estopped from arguing the claimant was not an employee at the time of the work injury, even where employment was admitted in the employer's answer to a civil action complaint.

Paul Marazas v. WCAB (Vitas Healthcare Corporation), 2014 Pa. Commw. LEXIS 462

9. Although the claimant began each work day by reporting to the employer's facility to receive assignments and pick up equipment, the claimant was a travelling employee and the injuries he sustained in a motor vehicle accident while driving to work were compensable.

Dane Holler v. WCAB (Tri-Wire Engineering Solutions, Inc.), 2014 Pa. Commw. LEXIS 509

10. House Bill 1846, imposing limits on direct dispensing of medications to injured workers by physicians, became law in Pennsylvania. The Bill will limit dispensing of medications to 30 days, or 7 days for more serious drugs, from an injured workers' first treatment with a health care provider. II