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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

The Bureau's Medical Fee Review Section lacks jurisdiction to determine whether an entity is a provider of medical services or simply a billing agency and to consider provider's fee review petitions.

Physical Therapy Institute, Inc., v. Bureau of Workers' Compensation Fee Review Hearing Office (Selective Insurance Company of SC); 71 C.D. 2014; filed January 16, 2015; by Judge Leavitt

In this case, the insurer asserted that it did not have liability for medical bills issued by an entity that was not the provider of medical treatment to a claimant. The entity, PTI, filed five separate fee review applications requesting review of the amount of payment. The Bureau's Medical Fee Review Section ordered full payment on all but one of the invoices, plus 10% interest. The insurer then filed a request for hearing to contest the Fee Review Determinations. The insurer took the position that PTI was not entitled to payment because it did not provide the services for which it was billing. The insurer took the claimant's deposition, and he testified that he received physical therapy at a facility called "THE pt GROUP." The claimant said that he never heard of PTI.

Before the parties finished their case before the Fee Review hearing officer, the Commonwealth Court issued its decision in *Selective Insurance Company of America v. Bureau of Workers' Compensation Fee Review Hearing Office (The Physical Therapy Institute)*, 86 A.3d, 300 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 96 A.3d. 1030 (Pa. 2014), involving the same parties and nearly identical facts. In that case, the court held that the Bureau lacked jurisdiction to determine whether an entity was a provider of medical services or simply a billing agency. According to the court, this was an issue that must be decided by a Workers' Compensation Judge. The court also held that the Bureau's Medical Fee Review Section lacked jurisdiction to consider PTI's Fee Review Petitions in the first instance and, therefore, vacated the Fee Review Determinations. Thus, in the underlying case, the hearing officer dismissed the insurer's hearing request for lack of jurisdiction and vacated the Fee Review Determinations. PTI then appealed to the Commonwealth Court.

The Commonwealth Court held that the hearing officer correctly vacated the Fee Review Determinations based on the holding in *Selective Insurance*. According to the court, although a provider's only remedy for non-payment of an invoice is a Fee Review Petition under the Act, this does not mean that PTI lacked any recourse. The claimant can file a petition to establish the insurer's liability to PTI through a Review or Penalty Petition. Should PTI be adjudicated the provider, it can re-bill the insurer and proceed to Fee Review if an issue arises involving the amount or timeliness of payment. II

Claimant was not entitled to an award of partial disability benefits after returning to work because she was earning less than her pre-injury wage due to economic conditions and not her work injury.

Janice Donahay v. WCAB (Skills of Central PA, Inc.); 869 C.D. 2014; filed February 4, 2015; by Judge Leavitt

The claimant sustained a work-related injury and received payment of temporary total disability benefits. She then returned to work, with restrictions, earning less than her per-injury average weekly wage. Pursuant to a Supplemental Agreement, the claimant was paid partial disability benefits. Later, the employer filed a petition to terminate the claimant's workers' compensation benefits and in the alternative, sought a suspension of benefits, alleging that, even if the claimant was not fully recovered, she was fully capable of doing her pre-injury job.

In litigating the petitions before the Workers' Compensation Judge,

the claimant said that her hourly wage was higher than when she was injured. She also said that she set her own work schedule because her treating physician limited her to working no more than 45 hours per week. The claimant also said that, due to funding cuts, the employer limited the amount of overtime available to all employees. The employer also testified to significant funding cuts that occurred after the claimant's work injury, requiring limits to be imposed on overtime hours. The judge denied the termination petition but suspended the claimant's disability benefits, concluding that the employer met its burden of proving that the claimant's work injury was not causing a loss of earning power. The claimant appealed to the Workers' Compensation Appeal Board, and they affirmed.

On appeal to the Commonwealth Court, the claimant argued that, because she suffered a loss of wages after returning to work and was under physical restrictions, her disability benefits should not have been suspended. The Commonwealth Court disagreed and held that, if a reduction in earnings is not tied to a loss of earning power attributable to the work injury, no disability benefits are due. The court noted that the claimant earned a higher hourly wage post injury, was not limited in the number of overtime hours she could work, and her loss of earnings resulted from the addition of staff and limitations on overtime for all employees because of funding cuts, not the work injury. **II**

A Workers' Compensation Judge's rejection of an impairment rating given by an IRE physician must be supported by substantial competent evidence.

IA Construction Corporation and Liberty Mutual Insurance Company v. WCAB (Rhodes); 2151 C.D. 2013; filed February 19, 2015; by Judge Brobson

In this case, the claimant was awarded benefits after a Workers' Compensation Judge granted a claim petition, finding that the claimant sustained a traumatic brain injury with organic affective changes and persistent cognitive problems, memory impairment, post-traumatic headaches, post-traumatic vertigo or impaired balance, and musculoskeletal or myofascial neck and back injuries. The employer later filed a modification petition based on the results of an IRE performed on the claimant, resulting in a 34% impairment rating.

A Workers' Compensation Judge denied the modification petition. In doing so, the judge rejected the impairment rating, finding that only three of the recognized injuries were rated and that several other injuries were lumped together into three categories that were rated. The judge concluded that the IRE physician did not address all of the diagnoses that should have been considered part of the work injury. The judge also noted that a significant portion of the rating was due to cognitive impairment exhibited from the traumatic brain injury and that the rating for traumatic brain injury was mainly based on records reviewed rather than an examination. The judge also questioned the qualifications of the IRE physician, since the physician was a physical medicine and pain management specialist, and there was no indication the physician treated traumatic brain injuries on a consistent basis.

The employer appealed to the Workers' Compensation Appeal Board, and they affirmed. However, the Commonwealth Court reversed. The court agreed with the employer that the IRE was performed in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). Overall, the court found that the reasons for the judge's rejection of the IRE physician's opinion did not have any basis in the evidentiary record. The judge did not cite any provisions of the AMA Guides or other evidence in support of her reasoning that the IRE physician miscategorized or improperly grouped the claimant's injuries or that he improperly calculated the claimant's impairment rating. Furthermore, the claimant did not elicit any evidence that could support the reasoning. Thus, the court granted employer's appeal and reversed the decisions of the judge and the Board. **II**

New Jersey Workers' Compensation

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

Dario J. Badalamenti

The Appellate Division finds that a licensed horse trainer is not an employee of the owners of the horses he trains but, rather, an independent contractor.

Perry v. Robert Horowitz Stable, Docket No. A-3845-12T2, 2014 N.J. Super. Unpub. LEXIS 2850 (App. Div., decided December 9, 2014)

The petitioner was a horse trainer licensed by the New Jersey Board Racing Association and Trotting Association. He rented five stalls at the Meadowlands Racetrack where he trained several horses for various owners, one belonging to the respondent. The petitioner charged these owners a per diem rate and submitted monthly bills to those for whom he had performed services. On January 19, 2004, while tending to the respondent's horse, the petitioner slipped and fell, sustaining significant bodily injury.

The petitioner filed a claim with the Division of Workers' Compensation for medical and indemnity benefits. The respondent denied the claim, asserting that the petitioner was not an employee under the Workers' Compensation Act but, rather, was an independent contractor. At trial, the Judge of Compensation found the petitioner to be an employee of the respondent and entitled to workers' compensation benefits. The respondent appealed.

In reversing the Judge's ruling, the Appellate Division relied on *Pollack v. Pino's Formal Wear & Tailoring*, 253 N.J. Super. 397, *cert. denied*, 130 N.J. 6 (1992), in which the court utilized two tests to determine whether an individual is an employee or an independent contractor – *i.e.*, the "control test" and the "relative nature of the work test." The "control test" considers several factors in determining whether an employer-employee relationship exists, including right of control, right of termination, furnishing of equipment and method of payment. Under the "relative nature of the

work test," the primary inquiry is whether there is a substantial economic dependence upon the employer by the employee.

In finding that the petitioner was not an employee of the owners of the horses he trained, the Appellate Division detailed its reasoning as follows:

> First, he is not in a "servant" role with respect to those owners. Second, although Perry is compensated for his work, he does not receive wages. There is no evidence in the record that he receives a W-2 or 1099 form from any of the owners. There are no deductions or withholdings from his compensation. These would be indicia of employment. Third, Perry submits a monthly bill to those owners for whom he has performed services. This is indicative of an independent contractor. Lastly, Perry's work arrangements do not meet the "right to control" tests[.] We note that Perry rents stalls directly from the Meadowlands Racetrack in which he performs his work with the horses. Once again, this is indicative of an independent contractor, *i.e.*, "one who in carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his [client] as to the means by which the result is accomplished, but only as to the result of the work.

The Appellate Division concluded its inquiry by finding that the petitioner's arrangement with the respondent failed the "relative nature of the work" test. Specifically, because the petitioner relied on multiple horse owners for income, the Appellate Division reasoned that it could not be said that the petitioner's work arrangement created a "substantial economic dependence" on the respondent. ||

Side Bar

In reversing the Judge's ruling, the Appellate Division placed great significance on the petitioner's lack of economic dependence upon the respondent. At trial, the petitioner testified that he relied on multiple owners for income over his 40-year career. In fact, depending on the petitioner's financial situation at any given time, he would charge owners accordingly. "If I needed the money," he testified, "I would [train the horses] for less. If I didn't need it, I would charge more." The Appellate Division reasoned that the respondent could not be considered an employee given his own testimony evidencing a lack of economic dependence on the respondent or any other owner.

News from Marshall Dennehey

From Monday, June 1st through Tuesday, June 2nd, the Pennsylvania Bureau of Workers' Compensation will hold its 14th Annual Pennsylvania Workers' Compensation Conference at the Hershey Lodge and Convention Center. **Niki Ingram** (Philadelphia, PA), director of the Workers' Compensation Department, will participate in "Basic WC Law, Part 2," where she joins four other industry professionals for a panel discussion on the specific claims processes from the moment of injury until the final adjudication from both the injured worker's and the employer's point of view. For more information or to register, visit http://www.portal.state.pa.us/portal/server.pt/community/annual_conference/12991.

Jim Pocius (Scranton, PA) is speaking at the 35th annual SEAK National Workers' Compensation and Occupational Medicine Conference, which is being held at Crowne Plaza Chicago O'Hare Hotel and Conference Center, Rosemont, IL from Tuesday, June 9th through Thursday, June 11th. During the informational session "High Anxiety: Medical Marijuana, Workers' Comp, and Occupational Medicine," Jim will review the latest developments in the rapidly evolving interplay between the spreading legalization of marijuana and the workers' compensation and occupational medicine arena. He will discuss discovery and HIPAA issues that may emerge in the handling of these claims; reimbursement issues that may be seen in the absence of a medical marijuana national drug code; liabilities for employers and insurance companies who do not pay for medical marijuana, including additional injuries caused by drug intoxication; and the safety implications for employers. Jim will also offer practical suggestions for when employers, insurers, and self-insurers can and need to pay for medical marijuana. For more information or to register, visit http://workerscompensationconference.com/conference/.

On Monday, April 27, 2015, **Angela DeMary** (Cherry Hill, NJ) will be a presenter at the Advanced Workers' Compensation seminar hosted by the National Business Institute. The seminar will provide current, definitive information on all aspects of workers' compensation law and procedure. Angela will be discussing issues in workers' compensation law, such as permanent total and partial disability, managed health care provisions, computation of benefits, fraud, settlement and average weekly wage considerations. She will also address litigation techniques for handling difficult cases, including preparation of the injured employee's case, preparation of the employer's case, presenting evidence, settlement strategies, and ADA and FMLA implications. For more information and to register, visit http://www.nbi-sems.com/Details.aspx/Advanced-Workers-Compensation/Seminar/R-68767ER%7C?NavigationDataSource1=Rpp:20,Nra:pEventDate%2bpEventStartTime%2bCredit+Hours%2bpCreditRecordCreditHours%2bCredit_C2%2bpStandardPrice%2bSeminar+Location%2bScope+of+Content%2bpLocationCity%2bpDescription%2bpDivision%2bpProductId%2bpProductDescription%2bProductCode+%28HIDDEN%29%2bpAdditionalFormats%2bpEventId%2bpAltSpaceDesc%2bpEventIndicator%2bpEventEndDate%2bpMultiDayEvent,N:63943-59. ||

Delaware Workers' Compensation

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

Paul V. Tatlow

The Board denies the claimant's petition to determine additional compensation seeking payment of 2013 lumbar spine surgery bills, which were allegedly related to the claimant's low back injury sustained in February 2000, based on its rejection of the novel causation theory of the claimant's medical expert.

Gloria Edwards v. State of Delaware, (IAB No. 1164832 – Decided November 14, 2014)

This case involved a DACD petition filed on behalf of the claimant seeking payment for surgical bills that were allegedly related to the low back injury the claimant had sustained on February 7, 2000. The employer denied that there was a causal relationship between the surgery bills incurred in 2013 and the accepted work injury.

The claimant had been employed as a certified nursing assistant and sustained the work injury to her back when she was lifting a quadriplegic patient. The claimant received compensation for temporary total disability, and at the time of this litigation, she was on partial disability benefits.

The claimant underwent extensive treatment to the lumbar spine for the work injury, which included a lumbar fusion surgery with Dr. Kalamchi in 2005 and another procedure by that physician in 2006 to remove the hardware. The claimant later came under the care of Dr. Rudin, who in 2009 performed another lumbar fusion procedure and then in 2010 a procedure to remove the hardware. Dr. Rudin released the claimant from his care in 2011, allowing her to work within the restrictions of a functional capacity evaluation. Later in March 2013, the claimant returned to see Dr. Rudin complaining of worsening pain and a new pain going into her groin area and legs. This led Dr. Rudin to perform a laminectomy in May 2013 at the L2-L3 level, and a later fusion at that level in December 2013.

The claimant's medical evidence consisted of the testimony of Dr. Rudin, who opined that the surgeries he had performed in May and December 2013 were causally related to the claimant's accepted work injury. His testimony indicated that, but for the multiple surgeries that had been accepted as compensable at the L4-L5 and L5-S1 levels, the claimant would not have needed the two surgeries in 2013 at the L2-L3 level. Dr. Rudin further testified that the claimant's rate of degeneration at the L2-L3 level in 2013 was not normal and that it would be exceedingly unusual for a patient to have such degeneration, as well as severe stenosis at that level, absent prior trauma. Therefore, Dr. Rudin attributed the disc degeneration at the L2-L3 level to the multiple surgeries the claimant had undergone at the L4-L5 and L5-S1 levels, as well as the nine years of stress transferred to the abnormal level above.

The employer's medical expert was Dr. Keehn, who testified that, in his opinion, the two surgical procedures in May and December 2013 were unrelated to the February 2000 work injury. In support of that opinion, he explained that the L2-L3 level was not injured in the work incident, and he opined that he did not believe that the disc at that level deteriorated because of the prior fusions at the L4-L5 and L5-S1 levels. He emphasized that the surgery at the L2-L3 level skipped a level directly above the fused level and that it was not caused by the fusions below.

The Board concluded that the 2013 surgeries were not causally related to the accepted work injury and, therefore, denied the claimant's petition. In so doing, the Board found the testimony of Dr. Keehn to be more persuasive for several reasons. Firstly, the evidence did not show that the claimant had injured the spine at the L2-L3 level in the work injury itself. Secondly, the Board found Dr. Keehn convincing in testifying that the claimant suffered normal deterioration at the L2-L3 level of the spine consistent with her age and obesity through May 2013, when Dr. Rudin had done the first surgery to the L2-L3 level. The Board believed the symptoms at that level were recent, as supported by the fact that Dr. Rudin in 2011 had found the claimant to be much improved and had released her to light-duty work. The Board rejected the theory of claimant's case, which was essentially that the so called "adjacent segment degeneration" resulting from a spinal fusion can skip a level and affect a level above the adjacent level. The Board noted that Dr. Rudin did not provide any medical literature to support that theory and that Dr. Keehn likewise insisted that there was no such literature. Therefore, the Board concluded that the L2-L3 level had simply deteriorated naturally, which led to the need for the surgeries in 2013. II

Side Bar

This case illustrates the fact that the Board does carefully review and consider all evidence, including medical evidence, in reaching a decision. Dr. Rudin is a well-known and reputable orthopedic surgeon in Delaware who has been involved in writing the Healthcare Practice Guidelines and who generally has very strong credibility with the Board. However, in this case the Board found his medical theory on causation to be a stretch that was not supported by the medical literature. This case demonstrates the need for employers to retain medical experts who thoroughly review and analyze the medical records, which in many cases can be quite voluminous and complex, in order to fully evaluate the issues, including medical causation ones, and thereby present a convincing medical defense.