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What's Hot in Workers' Comp

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2016

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

Paul V. Tatlow

1. Employer successfully asserts idiopathic injury defense against claimant's Petition to Determine Compensation Due.

Linda Capone v. State of Delaware, (IAB No. 1376808 – Decided October 3, 2016)

Following a lengthy three-day hearing with nine lay witnesses, the Board issued a record-breaking 94-page decision in favor of the employer. In this case, which was successfully litigated by my colleague Jessica Julian, the Board denied the claimant's petition seeking compensability for ankle, low back and cervical spine injuries. The claimant alleged she had stepped on a rock in the parking lot outside of the school where she worked, causing her to roll her ankle and fall to the ground. The Board did not find the claimant or her witnesses credible and noted that, at times, even the claimant and her husband contradicted her own testimony. The evidence from the employer showed that there was, in fact, no rock near the site where the claimant fell. Further, the employer's medical expert was found credible as he testified that the claimant suffered from cervical myelopathy, making her lean to the right while walking, which had caused multiple prior falls. Thus, the claimant's fall was due to a medical condition personal to her and did not "arise out of [her] employment."

2. Based on exclusivity provision of the Act, claimant is barred from recovering underinsured motorists benefits from the self-insured employer for the same injuries for which she had already received workers' compensation benefits.

Carletta Simpson v. State of Delaware and Government Employees Insurance Co., (C.A. No. N15C-02-138 WCC – Decided January 28, 2016)

The claimant was injured in a work-related motor vehicle accident and received compensation benefits from the State of Delaware as her employer. The claimant then sought UIM benefits from her employer for injuries sustained in the work accident. The State moved for summary judgment on the basis that the claimant had accepted workers' compensation benefits to the exclusion of other remedies. The court noted that this was a case of first impression since the workers' compensation insurer and the UM/UIM insurer were the same entity, namely, the State of Delaware. The court concluded that § 2304, as the exclusivity provision of the Act, barred the claimant from recovering the UIM benefits for essentially the same injuries for which she had already received compensation benefits.

3. Medical provider's attempt to obtain pre-authorization for a spinal cord stimulator is prohibited by the Healthcare Practice Guidelines.

Tracy Phipps v. Lowe's Home Centers, Inc., (IAB No. 1285110 – Decided October 24, 2016)

Counsel for the claimant filed a legal motion to obtain pre-authorization of a request by claimant's pain management physician to do a spinal cord stimulator trial procedure. The employer, represented by my colleague Linda Wilson, contended that the spinal cord stimulator trial procedure was not contemplated by the pre-authorization regulations in the Practice Guidelines. The applicable regulation in the Guidelines pertaining to pre-authorization for a procedure refers to "open surgery" recommended by a medical provider. The Board agreed with the employer's argument that the spinal cord stimulator trial was not a procedure contemplated by that regulation since it is distinguishable from open surgery, as are procedures such as an arthroscopy. Therefore, the motion for pre-authorization was denied.

4. New workers' compensation rates.

The Department of Labor announced that the new workers' compensation rates effective July 1, 2016, establish an average weekly wage of $1,034.18. Accordingly, the maximum compensation rate is now $689.45, and the minimum compensation rate is $229.82

5. Personnel changes at the Industrial Accident Board during the past year.

The new Secretary of Labor is Dr. Patrice Gilliam-Johnson, the new Department of Labor Communications Director is Leon Tucker and the new Director of Industrial Affairs is Julie Petroff, Esquire. After nearly 30 years of distinguished service, Lowell Groundland retired as Chair of the Board. John Daniello, now Chair of the Board, and Peter Hartranft, who joined in midyear, comprise the current Board along with Marilyn Doto, William Hare, Mary McKenzie-Dantzler, John Brady, Robert Mitchell, Patricia Maull, Mitchell Crane and Gemma Buckley.

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6. Board did not abuse its discretion by allowing limited testimony about the severity of claimant's work-related auto accident when denying petition for additional compensation.

Alethea Davis-Moses v. Keystone Human Services, (C.A. No. N15A-10-013 AML – Decided June 24, 2016)

The claimant was involved in a work-related auto accident and received total disability benefits for about one month of disability. She later filed a DACD Petition, alleging a recurrence of total disability, and a second petition seeking payment for cervical spine surgery she had undergone. The Board's decision concluded the claimant's cervical spine surgery was not causally related to the work injury and, also, that the claimant failed to establish a recurrence of total disability. On appeal, the claimant argued that the Board erred by allowing defense counsel to focus on the nature and seriousness of the auto accident. The court concluded that the Board did not run afoul of case law on this issue nor did it abuse its discretion by allowing limited testimony regarding the force of the collision. The court noted that, in fact, it was the claimant's medical expert who had relied on the severity of the auto accident to support his causation opinion and justify the need for the surgery. Thus, once the claimant had opened the door with that testimony, it was entirely reasonable to allow the employer to offer contradictory evidence as to the severity of the accident.

7. Chronic pain treatment continues to be, by far, the most frequently challenged Guideline in Utilization Review requests.

The 18th Annual Report from the Department of Labor on the Status of Workers' Compensation Case Management shows that, according to the most recent data in 2015, there were 397 requests for Utilization Review, a 4% decrease from the prior year. Chronic pain treatment, and in particular pain medication, continues to be the most challenged treatment in the Utilization Review process. The data show that there were 254 UR requests challenging chronic pain treatment, far exceeding the low back treatment of 73 requests, and was the second most challenged Guideline.

8. Superior Court affirms denial of termination petition because Labor Market Survey evidence did not establish that employment was available to claimant, an undocumented worker.

Roos Foods v. Magdalena Guardado, (C.A. No. S15A-05-002 ESB – Decided January 26, 2016)

Finding that the claimant was a *prima facie* displaced worker and that the employer had not shown work was available to the claimant given her physical and vocational limitations, the Board denied the employer's termination petition. The claimant had injured her left wrist, undergone surgery and was now limited to one-handed, light-duty work. Importantly, the claimant was from El Salvador, spoke only Spanish and was an undocumented worker. The court concluded that the Board did not commit any legal error in finding that the claimant was a *prima facie* displaced worker and that the employer did not establish that work was available to the claimant within her restrictions and qualifications since the vocational expert had been unaware of the claimant's undocumented worker status. Even without that status, the court suggested there were other factors that served to establish that the claimant was a *prima facie* displaced worker.

9. Delaware Supreme Court hears oral argument in closely watched case where a termination petition was denied based on finding that employer did not show work was available to claimant, an undocumented worker.

Roos Foods v. Magdalena Guardado, (pending before the Delaware Supreme Court – Case No. 160, 2016)

The Delaware Supreme Court just recently heard oral argument in the employer's appeal of the *Roos Foods* case. At oral argument, counsel for the employer argued that the Board's decision contained errors of law and would make it virtually impossible for any employer to terminate the total disability benefits of an undocumented worker. Questioning from the court challenged the employer's argument and pointed out that the vocational expert who performed the Labor Market Survey, and who had not even been aware of the claimant's undocumented worker status, conceded that this was an important factor to prospective employers. Thus, the court seemed to be suggesting that the employer's evidence was clearly deficient. Other questioning from the court focused on the Superior Court's decision stating that, even had the Board erred in focusing on the claimant's undocumented worker status, there were, nevertheless, many other factors making the claimant a *prima facie* displaced worker. The much anticipated decision from the Supreme Court should be issued in the near future.

10. 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 the five-year cumulative summary of appeals from Board decisions. For the five-year period from 2011 through 2015, the Board rendered 2,023 decisions on the merits. From that number, 246 were appealed, which is an average of 49.2 appeals per year. Further, of the cases appealed, only 21 were reversed and/or remanded in whole or in part. This means that of the total number of decisions issued in those five years, the reversal rate was only 1.04%. Thus, it continues to be extremely difficult to overturn Board decisions on appeal. **II**

TOP 10 DEVELOPMENTS IN NEW JERSEY WORKERS' COMPENSATION IN 2016

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

Dario J. Badalamenti

1. Dismissal of petitioner's claim with prejudice affirmed as workplace assault that caused injuries did not arise out of employment but resulted from personal circumstances.

Joseph v. Monmouth County, Docket No. A-4044-13T3, 2015 N.J. Super. Unpub. LEXIS 2887 (App. Div., decided December 14, 2015)

Those risks distinctly associated with employment, such as when a painter falls from a scaffolding, or neutral risks arising from uncontrollable circumstances, such as being struck by lightning at work, are compensable. However, solely personal risks that have little, if any, connection with one's employment are not compensable. The assault arising out of the petitioner's involvement in his assistant's pyramid scheme in the instant case is an example of just such a personal risk.

2. Petitioner not entitled to temporary disability benefits when he fails to establish he has any promise or prospect of employment that he must forego due to work injury.

Katzenstein v. Dollar General, Docket No. A-1141-13T3, 2016 N.J. Super. Unpub. LEXIS 120 (App. Div., decided January 22, 2016)

The Judge of Compensation's ruling in this case was strongly influenced by his assessment of the petitioner's credibility. Although the petitioner testified

that he had made an effort to find employment following his termination by the respondent, the Judge of Compensation found that the petitioner lacked credibility due to inconsistencies in his statements and a general lack of "accuracy and veracity" during his testimony.

3. Dismissal of petitioner's injuries due to violent assault at work by ex-husband affirmed as it did not have sufficient causal nexus to employment for a finding of compensability.

Rosario v. State of New Jersey, Docket No. A-4526-13T3, 2016 N.J. Super. Unpub. LEXIS 165 (App. Div., decided January 28, 2016)

The Judge of Compensation rejected the petitioner's argument that her injuries arose out of her employment because her employer was negligent in disclosing her location to her ex-husband after being advised of his potential threat to her. The Appellate Division concurred with the Judge of Compensation's reasoning that whether an employer actually commits a negligent act is irrelevant to a determination of compensability.

4. A statutory lien attaches under N.J.S.A. 34:15-40 regardless of whether cumulative awards are sufficient to fully compensate injured worker.

Cabrera v. Cousins Supermarket, Docket No. A-5287-13T1, 2016 N.J. Super. Unpub. LEXIS 392 (App. Div., decided February 23, 2016)

The petitioner's third-party recovery was recognized pursuant to a "high/low" agreement. In a high/low arbitration, the parties specify the award will be no higher than a certain amount and no lower than another amount. High/low parameters are set forth in an independent contract that the parties make prior to the arbitration. The arbitrator is not usually made aware of the parameters of the high/low and makes his or her recommendation based on the evidence. Any award not within the parameters of the high/low is then reduced or increased in order to conform with the parameters. Here, despite a finding by the arbitrator that the petitioner's claim was without merit, he received the minimum award permitted under the high/low agreement – *i.e.*, $25,000.

5. Petitioner's heart attack at work found compensable based on standard set forth in *Hellwig*.

Haynes v. Hall Construction Co., CP# 2011-9740 (Division of Workers' Compensation, Camden Vicinage, decided March 21, 2016)

The *Hellwig v. J.F. Rast & Co., Inc.*, 110 N.J. 37 (1988) decision rejected prior holdings imposing a categorical requirement that a petitioner's work effort that causes cardiovascular injury or death cannot result in a compensation award unless it exceeds the petitioner's ordinary or routine work efforts. Rather, the *Hellwig* court held that, "[t]he specific requirement under N.J.S.A. 34:15-7.2 that the work effort or strain involve a 'substantial condition, event or happening' does not mean that a worker's ordinary work effort is insufficient to establish causation. Rather, the statutory language is designed to focus attention on the intensity and duration of the precipitating work effort or strain in evaluating its capacity to cause cardiac dysfunction."

6. Workers' compensation carrier entitled to reimbursement for medical benefits from proceeds of third-party recovery from negligent motorist despite petitioner's inability to recover medical costs under NJ's no-fault system.

Talmadge v. Burns and The Hartford, Docket No. A-3160-14T1, 2016 N.J. Super. Unpub. LEXIS 1434 (App. Div., decided June 22, 2016)

The Appellate Division did briefly reference in its decision the so-called "collateral source rule," N.J.S.A. 39:6A-6, which relieves the PIP carrier from the obligation of making payments for expenses incurred by the insured that are covered by workers' compensation benefits. When an employee suffers an automobile accident while in the course of employment, workers' compensation is the primary source of satisfaction of the employee's medical bills. The primacy of workers' compensation in such scenarios was established by the court in *Aetna Ins. Co. v. Gilchrist Bros., Inc.*, 85 N.J. 550 (1981).

7. Workers' compensation carrier's lien pursuant to N.J.S.A. 34:15-40 attaches even if injured worker's third-party recovery was for pain and suffering only.

Dorflaufer v. PMA Management Corp., Docket No. A-1727-14T3, 2016 N.J. Super. Unpub. LEXIS 1861 (App. Div., decided August 9, 2016)

As a basis for its holding, the Appellate Division did reference N.J.S.A. 2A:15-97. This so-called "collateral sources" provision of New Jersey's PIP statute was interpreted by the Appellate Division in *Aetna Casualty & Surety Co. v. Para Manufacturing Co.*, 176 N.J. Super. 532 (App. Div. 1980). The court in *Aetna Casualty & Surety Co.* held that, where a PIP insured is entitled to, but never files a workers' compensation claim, the PIP carrier, as subrogor for its insured, may file a claim for reimbursement in the Division of Workers' Compensation to prove that the motor vehicle accident in which its insured was injured is compensable under the Workers' Compensation Act.

8. Dismissal of occupational claims affirmed for failing to establish that disability was due in material degree to conditions at work that were characteristic of or peculiar to petitioner's employment.

Scafuri v. Sisley Cosmetics, USA, Docket No. A-2065-14T3, 2016 N.J. Super. Unpub. LEXIS 1457 (App. Div., decided June 24, 2016)

Of significance here, the Judge of Compensation found that there was overwhelming evidence showing that the petitioner's cervical disability was related to her March 18, 2005, work-related incident and resulting fusion, for which no claim was ever filed. Apparently, the petitioner was concerned that filing a workers' compensation claim at that time would have jeopardized her continued employment. Rather, the petitioner filed occupational exposure claims against the companies that employed her following her return from surgery in July of 2006, alleging that working for them caused her to suffer an occupational disease. As the Judge of Compensation stated, "[t]he issue in this case is whether the petitioner's occupational disease claims against the respondents . . . can survive if her cervical disability is found to be related to her March 18, 2005, accident while in the stockroom at Neiman Marcus, for which no claim was ever filed." The Judge of Compensation properly concluded that the petitioner's occupational claims could not survive.

9. Appellate Division addresses high burden of proof necessary to overcome exclusive remedy provision of New Jersey Workers' Compensation Act.

Lassandro v. The Pep Boys, Docket No. A-1897-15T1, 2016 N.J. Super. Unpub. LEXIS 1334 (App. Div., decided June 10, 2016)

A fairly recent New Jersey Supreme Court case, *Van Dunk v. Reckson Assocs. Realty Corp.*, 210 N.,J. 449 (2012), demonstrates in its use of fairly strong language just how high the burden of proof is to overcome the exclusive remedy provision of the Act. In *Van Dunk*, the court stated that the standard for proving the intentional wrong exception is "formidable." It is interpreted very narrowly so "that as many work-related disability claims as possible be processed exclusively within the workers' compensation system."

10. Eleventh Circuit Court of Appeals held that Medicare Advantage Organizations have same standing as CMS to recover secondary payments made on beneficiary's behalf.

Humana v. Western Heritage Insurance Co., Docket No. 15-11436, 2016 U.S. App. LEXIS 14509 (Eleventh Circuit, decided August 8, 2016)

The *Humana* court adopted the reasoning set forth in the Third Circuit Court of Appeals in *In Re Avandia Marketing*, Docket No. 11-2664 (Third Circuit, decided June 28, 2012). Medicare beneficiaries may purchase Medicare Part C coverage from a Medicare Advantage Organization (MAO), which makes secondary payments through a Medicare Advantage Plan (MAP). Apparently, CMS neither monitors nor has a record of a MAP's conditional payments. The *Avandia* court held that, under the Medicare Secondary Payer Act, MAOs have a private cause of action against both the Medicare beneficiary and the workers' compensation or liability carrier for repayment of so-called secondary medical payments. **II**

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2016

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

Francis X. Wickersham

1. A claimant's permanent relocation from Pennsylvania to another state, standing alone, does not support a finding of a permanent and voluntary withdrawal from the work force.

Mary Ellen Chesik v. WCAB (Department of Military and Veterans Affairs), 126 A.3d 1069 (Pa.Cmwlth. 2015)

The Workers' Compensation Judge erred in suspending a claimant's benefits based solely on her move to Nevada and her receipt of a disability pension as there was no other evidence or findings to support the determination that she had permanently removed herself from the workforce.

2. A claimant's collective statements to the employer that the increased hours he was working was making his back pain from a prior work injury worse were sufficient notice of a work injury under §311 of the Act.

Jamie Gahring v. WCAB (R and R Builders and Stoudt's Brewing Company), 128 A.3d 375 (Pa.Cmwlth. 2015)

The claimant provided adequate notice of his repetitive trauma injury where his supervisor testified that the claimant not only reported an increase in his back pain but correlated it to additional hours he was required to work. The fact that the claimant and his supervisor believed the back problems were due to a recurrence of a prior injury, until the claimant learned otherwise, was of no moment.

3. Under § 319 of the Act, an employer is entitled to subrogation against a claimant's recovery of uninsured motorists benefits from the policy of a co-employee.

Karen Davis v. WCAB (Pa Social Services Union and Netherlands Insurance Company), 131 A.3d 537 (Pa. Cmwlth. 2015)

Where a claimant was injured in an accident in the course of her employment while riding in a vehicle owned and operated by a co-employee, the Workers' Compensation Appeal Board properly affirmed a Workers' Compensation Judge's decision granting the respondents, an employer and its insurer, subrogation under the Act against the claimant's third-party recovery of uninsured motorists benefits because the co-employee paid for the insurance policy.

4. Although the Mcare Act precludes subrogation against medical malpractice proceeds incurred before trial, an employer is entitled to subrogation against future medical expenses and wage loss.

Maryann Protz v. WCSB (Derry Area School District), 131 A.3d 572 (Pa.Cmwlth. 2016)

When the claimant obtained a medical malpractice award for her medical treatment for a workplace injury, and the employer and the insurer sought to subrogate that recovery under the Act, a Workers' Compensation Judge did not err in relying on a physician's report she submitted stating she was injured by a negligently performed knee replacement necessitated by her work injury because the employer offered it as to the subrogation issue, and she did not object on relevancy grounds. It was also not error to award the employer and insurer subrogation as to the claimant's future medical expenses and wage loss because, while Mcare barred subrogation as to past expenses and wages, it was silent as to future expenses and wages, so pre-existing law allowing subrogation applied.

5. An employer is not required to file a notice stopping temporary compensation and a denial when it seeks to revise a notice of temporary compensation payable by filing an amended TNCP.

William J. Church v. WCAB (Wayne Cook t/a Cook Landscaping and Fleming Termite and Pest Control), 135 A.3d 1153 (Pa.Cmwlth. 2016)

The Workers' Compensation Appeal Board properly affirmed the denial of a claimant's petition to reinstate his benefits under the Act because the employer properly filed first a notice of temporary compensation payable, and an amendment thereto did not convert it to a notice of compensation payable such that the employer was not obligated to pay benefits at that weekly rate for all periods when the claimant was not working.

6. The Workers' Compensation Appeal Board did not err by finding that the claimant was ineligible for benefits on the basis that, by law, she was an independent contractor, not an employee at the time of the injury.

Agatha Edwards v. WCAB (Epicure Home Care, Inc.), 134 A.3d 1156 (Pa.Cmwlth. 2016)

The Workers' Compensation Appeal Board, in reversing a Workers' Compensation Judge's decision, properly found that a company was not liable for a claimant's work-related injury as its conclusion, that she was an independent contractor, was supported by the judge's factual findings that her clients paid her directly, she deducted her own taxes from the payments, identified herself as self-employed on her tax returns, she signed an independent contractor agreement, the company did not control her day-to-day tasks, and she was free to work for other agencies.

7. Penalties not payable when underlying claims between the claimant and the employer were settled by Compromise and Release Agreement without an admission of liability, no finding that the injury was work-related and there was no provision for payment of medical expenses.

Peter Schatzberg, D.D. and Philadelphia Pain Management v. WCAB (Bemis Co., Inc.), 136 A.3d 1081 (Pa.Cmwlth 2016).

Because a Compromise and Release Agreement did not admit the employer's liability for the claimant's injury and did not require the employer to pay the claimant's medical expenses, and because there was no finding or adjudication that the claimant's injury was work-related, the employer was not obligated to pay the claimant's medical bills, and a provider's penalty petition was thus properly dismissed.

8. Hospital provider is entitled to reimbursement for trauma center treatment and services in the amount of 100% of its usual and customary charges in accordance with charges for similar treatment and services in the same geographic area.

Geisinger Health System and Geisinger Clinic v. Bureau of Workers' Compensation Fee Review Hearing Office (SWIF), 138 A.3d 133 (Pa.Cmwlth. 2016)

The medical fee hearing officer did not err in determining that the State Workers' Insurance Fund appropriately reimbursed a health care provider for treatment and services rendered to an employee because nothing in the language of § 306(f.1)(10) of the Act indicated that "usual and customary charge" was other than how it was defined in § 109 of the Act. Section 109 defined "usual and customary charge" as a charge most often made by providers of similar training, experience, and licensure for a specific treatment, accommodation, product, or service in the geographic area where the treatment, accommodation, product, or service was provided. Nothing

in the context of the language surrounding the term indicated that the statutory definition meant a provider would receive actual charges.

9. An injury sustained in the employer's parking lot while the claimant was walking to his car to go home for a personal emergency was not compensable in that it did not constitute an exception to the coming and going rule.

Quality Bicycle Products, Inc. v. WCAB (Shaw), 139 A.3d 266 (Pa.Cmwlth. 2016)

A decision that the claimant suffered an injury in the course and scope of his employment—the claimant fractured his kneecap while running across his employer's parking lot to his car—was improper as the claimant failed to prove any connection between his injury and a condition of the employer's premises. The parking lot did not cause or contribute to the causative chain to the claimant's injury, the claimant did not allege that the parking lot caused or contributed to his injury, and the claimant admitted that there was no physical condition of the parking lot that caused his injury.

10. Supreme Court holds that a Workers' Compensation Judge has the authority to reject uncontradicted testimony given by a medical witness who performed an impairment rating examination.

IA Construction Corporation and Liberty Mutual Insurance Co. v. WCAB (Rhodes), 110 A.3d 1096 (Pa. 2016)

Where the claimant suffered traumatic brain injuries in a vehicular accident, Section 306(a.2)(6) of the Act did not prevent the Workers' Compensation Judge from according lesser weight to an IRE doctor's underdeveloped, out-of-specialty opinion regarding the degree of impairment associated with the brain injury. The doctor's testimony did not elaborate on the differences in impairment attached to the different classes of neurological impairment, and an impairment rating evaluation is entitled to no more or less weight than the results of any other examination. The Judge's concern with the doctor's opinion relative to traumatic brain injury served as a sufficient basis for a reasoned rejection of his testimony. The Judge was not required to identify substantial contrary evidence in the record to support the rejection. ||