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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

The hospital-provider is entitled to reimbursement for trauma center treatment and services for 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); 1627 C.D. 2015; filed April 21, 2016; by Senior Judge Pellegrini

The claimant sustained a work injury when a board he was using as a lever broke and lodged near his left orbit. The claimant was taken by ambulance to the Geisinger Health System (the provider), where he was seen in the emergency room for treatment, after the provider called a trauma alert. One day later, the claimant was discharged. He returned to the provider the following day for repair of his left eyelid. There was no dispute that the treatment provided was at a Level I trauma center for life threatening or urgent injuries.

The provider submitted the bill to the insurer, seeking full payment for services rendered in a Level I trauma center (actual charges) without reference to how other trauma centers in the geographic region reimbursed for similar treatment. The insurer reimbursed the provider based on the usual, customary and reasonable rates for the geographic area. The provider then filed an Application for Fee Review.

The Medical Fee Review Section concluded that the insurer owed the provider an additional amount for the claimant's treatment. In response, the insurer filed a timely request for a hearing. The hearing officer reversed the Medical Fee Review Section's determination, concluding that the insurer's payments to the provider must be based on 100% of the usual and customary charge, rather than 100% of the provider's actual charge. The provider appealed to the court and then to the Commonwealth Court.

The Commonwealth Court affirmed the determination of the hearing officer. In doing so, they rejected the provider's argument that it was entitled to be reimbursed for its actual charges, not on a calculation based on other providers' charges for similar treatment and services provided in the same geographic area. According to the court's interpretation of § 306 (f.1)(10) of the Act, the term "usual and customary charge" means "[t]he 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 is provided." The court pointed out that term is defined in § 109 of the Act. II

The employee's injury, sustained in the employer's parking lot while 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); 1570 C.D. 2015; filed April 25, 2016; by Senior Judge Friedman

In his claim petition, the claimant alleged that he sustained an injury to his right knee while in the course and scope of his employment. On the date of injury, the claimant was paged at the employer's warehouse and informed that he had a telephone call. The claimant's fiancé was hysterical on the phone and told him he needed to come home because their nine-year-old daughter was missing from school. The claimant informed his manager, who told the claimant that he would clock him out, and the claimant ran out of the building. While hurrying to his car in the parking lot, he felt a pop in his knee and excruciating pain.

The Workers' Compensation Judge granted the claim petition, concluding that the claimant was on the employer's premises while in the course and scope of employment at the time of his injury. The Workers' Compensation Appeal Board (Board) affirmed.

However, the Commonwealth Court reversed, concluding that the claimant failed to present evidence establishing that the injury was caused by a condition of the employer's premises or the operation of the employer's business thereon. Noting that injuries suffered on an employer's premises at a reasonable time before or after the work period are compensable, the court pointed out that an employee must prove course of employment by showing: (1) the injury must have occurred on the employer's premises; (2) the employee's presence thereon was required by the nature of his employment; and (3) the injury was caused by the condition of the premises or by the operation of the employer's business thereon. Although the claimant satisfied the first two prongs of the test, he failed to satisfy the third. According to the court, the claimant's injury was caused by his own act of running, not a condition of the employer's premises. In fact, the claimant admitted that there was no physical condition of the parking lot that caused his injury. ||

Claimant is not entitled to payment of wage loss and medical benefits from the Uninsured Employers Guaranty Fund until notice to the Fund is given by the claimant.

Commonwealth of Pennsylvania, Department of Labor and Industry Uninsured Employer's Guaranty Fund v. WCAB (Kendrick and Timberline Tree & Landscaping, LLC); 1849 C.D. 2014; filed May 9, 2016; by Judge Cohn Jubelirer

The claimant filed a claim petition against the employer for a November 7, 2011, work injury. At a December 21, 2011, hearing, the claimant learned that the employer did not have workers' compensation insurance. On February 8, 2012, he then filed a notice of claim against the Uninsured Employers Guaranty Fund (Fund), and he later filed a claim petition against the Fund.

The claimant and the Fund stipulated that the claimant was entitled to receive benefits from the Fund. However, an agreement could not be reached as to when the claimant's benefits would commence. The Fund maintained that benefits were not payable until February 8, 2012, the date it was provided notice. The claimant argued he was entitled to benefits as of the date of injury.

The Workers' Compensation Judge decided that benefits were payable as of the date of injury. The Fund appealed to the Appeal Board. The Board concluded the Fund did not owe the claimant wage loss benefits prior to the date notice was given, but medical benefits were payable as of the date of injury.

The Commonwealth Court reversed the decision of the Board. According to the court, § 1603(b) of the Act states that no compensation shall be paid from the Fund until notice is given. Citing its 2015 decision in *Lozado v. WCAB (Dependable Concrete Work and Uninsured Employers Guaranty Fund)*, 123 A.3d 365 (Pa. Cmwlth. 2015), the court concluded that those who do not meet the statutory deadline are only entitled to compensation for medical treatment or lost wages incurred from the date notice was provided. The court also held that the term "compensation" as used in § 1603(b) includes both wage loss and medical benefits. The court pointed out that employees injured while working for uninsured employers do not assume the costs of medical treatment prior to notice being given since medical providers are prohibited from requiring injured employees to pay for work-related treatment by § 306(f.1)(7) of the Act. ||

Medical Marijuana Update

On April 17, 2016, medical marijuana became legal in Pennsylvania. For more information on Pennsylvania's Medical Marijuana Law, go to https://www.governor.pa.gov/governor-wolf-signs-medical-marijuana-legalization-bill-into-law/. Also, please feel free to contact me with any questions you have about the legalization of medical marijuana and its impact on workers' compensation.

New Jersey Workers' Compensation

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

Dario J. Badalamenti

Petitioner's heart attack at work found to be compensable based on the standard set forth in *Hellwig v. J.F. Rast & Co., Inc.*, 110 N.J. 37 (1988).

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

The petitioner was employed by the respondent as a laborer. On November 1, 2010, he and a number of his co-workers were tasked with removing construction debris, including scrap wood, scrap carpet and pieces of sheetrock, from a building undergoing renovations. The project supervisor instructed the petitioner and his co-workers that they were not to utilize the building's elevator, rather, they were to carry the debris from the building using the staircase. The debris was then to be placed in a nearby dumpster. The petitioner testified that he made approximately 25 trips up and down the stairs, hauling bags of debris weighing up to 50 pounds each. At some point during this process, he began to experience shortness of breath and a "tingling" sensation into his arms. Shortly before his lunch break, the petitioner experienced what he described as an "intense" chest pain, causing him to collapse near the dumpster. The petitioner was taken to the hospital where it was determined that he had suffered a heart attack. He underwent a cardiac catheterization and stent implant. Following his hospitalization, the petitioner came under the care of a cardiologist and was prescribed a number of medications for ongoing cardiac management due to the damage to his heart.

The petitioner filed a claim with the Division of Workers' Compensation, seeking permanent disability benefits. In finding that the petitioner had met his burden of proof as to compensability, the Judge of Compensation relied on N.J.S.A. 34:15-7.2 and *Hellwig v. J.F. Rast & Co., Inc*., 110 N.J. 37 (1988), the relevant New Jersey Supreme Court decision demonstrating that provision's application. N.J.S.A. 34:15-7.2 provides that:

> In any claim for compensation for injury or death from cardiovascular . . . causes, the claimant shall prove by a preponderance of the credible evidence that the injury or death was produced by the work effort or strain involving a substantial condition, event or happening, in excess of the wear and tear of the claimant's daily living and in reasonable medical probability caused in a material degree, the cardiovascular . . . injury or death[.]

In *Hellwig*, the New Jersey Supreme Court clarified N.J.S.A. 34:15-7.2 by holding that cases alleging cardiovascular injury or death require proof that the strain of the work effort that allegedly precipitated the worker's disability or death from coronary disease was qualitatively more intense than the strain of the physical activity to which the worker was accustomed in his leisure time.

As the Judge of Compensation reasoned:

> [t]he petitioner's work effort, which involved repeatedly climbing and descending stairs while hauling 40 to 50 pound bags of debris, was clearly in excess of the rigors of his daily living, and [based on the testimony of petitioner's expert] was causally related to petitioner's heart attack to a material degree.

The judge also found that the petitioner had proven via medical expert testimony that he had sustained a level of permanent disability as a result of the damage to his heart that was caused by his cardiac episode. ||

Side Bar

The *Hellwig* 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, "The 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."

News from Marshall Dennehey

Rachel Ramsay-Lowe (Roseland, NJ) successfully prevailed on a motion to dismiss for lack of employment in the Bergen County workers' compensation court. The petitioner was picked up at a Lowe's Home Improvement Center and was paid $100 to assist the homeowner/respondent with some garage door repairs. The petitioner alleged that he was in the employ of the respondent when he was struck by a rolling overhead garage door, which knocked him off a ladder, causing him to injure his right forearm, right foot and front teeth. Rachel argued that, pursuant to N.J.S.A. 34:15-36 et seq., the petitioner was a casual employee, "[w]hich shall be defined, if in connection with the employer's business, as employment for the occasion which arises by chance or is purely accident; or if not in connection with any business of the employer, as employment not regular, periodic, or recurring." The court agreed and granted the motion to dismiss with prejudice.

Michele Punturi (Philadelphia, PA) obtaining a favorable decision and defeated a claim petition. The claimant, a teacher, alleged that a student threw a "very large, heavy" screw at her, hitting her head just above her ear, resulting in pain, dizziness, and difficulty with balance coordination and memory. She sought immediate treatment at a hospital and, thereafter, with her own physicians. The claimant was diagnosed with post-concussive symptom, close head injury, traumatic headaches, vestibulopathy and encephalopathy. In opposition to this claim, Michele challenged the mechanism of injury and was able to present an affidavit from a police officer who measured the screw involved and determined it was significantly smaller and lighter than alleged. Michele highlighted contradictions in the claimant's medical records and noted that the plaintiff's medical records outlined prior headaches, vertigo and a concussion. The claimant had failed to report the extent and nature of her prior medical condition to the medical providers or the IME physician.

Tony Natale (Philadelphia, PA) successfully prosecuted a termination/suspension petition and defended penalty and reinstatement petitions in a case where the claimant suffered a traumatic fall that resulted in a myriad of neck, back and lower extremity injuries. Tony was able to establish through cross examination of the claimant's medical expert that all of the ongoing treatment and disability were unrelated to the judicially determined work-related injury. The judge rejected the claimant's medical expert on this basis and found that the claimant fully recovered from the work-related injury. Tony's termination petition was granted, and the claimant's petitions were dismissed.

Tony also successfully defended a large debt collection agency in the litigation of a joinder petition filed by a previous workers' compensation insurance carrier. The claimant had suffered a bi-lateral upper extremity injury more than seven years ago. The joinder petition made the allegation that the claimant's current symptoms and partial disability represented a new injury, which required a finding of liability against the collection agency. After cross examining the claimant's medical expert and the original defendant's expert, Tony argued that the preponderance of the medical evidence did not support a new injury theory. The judge agreed and dismissed the joinder petition. ||

Delaware Workers' Compensation

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Paul V. Tatlow

The Superior Court holds that the Board properly considered the appropriate factors in awarding the attorney's fee and did not abuse its discretion; thus, the claimant's appeal was denied.

Robert LaRue v. Ervaz Claymont Steel, (C.A. No. N15A-07-003 PRW – Decided February 10, 2016)

The claimant was injured on July 16, 2007, in an explosion at a steel mill that was owned and operated by the employer. The claimant suffered severe burns over most of his body and bilateral knee injuries. He received compensation benefits that included several permanencies. Later, the claimant filed a petition seeking to add the back as an additional body part, but this petition was withdrawn without prejudice since the medical bills at issue were already paid by the carrier. The claimant then had additional treatment to his back with Dr. X, which the employer refused to pay, leading the claimant to file a DACD Petition. That petition was granted in its entirety by the Board and included the claimant's counsel being awarded a reasonable attorney's fee that was computed to be the lessor $9,400 or 30% of the value of the award. The Board created some confusion by not specifying the amount of the medical bills that were to be paid nor the amount on which the award of attorney's fees was to be based.

Claimant's counsel demanded from employer's counsel the payment of an attorney's fee in the amount of $9,400, which the employer refused. The employer then filed a timely motion for re-argument seeking to have the award of attorney's fees reduced. The Board took evidence on that motion and modified the amount of the counsel fee to $5,417.87, which it indicated was a reasonable fee and not in excess of 30% of the value of the award. The claimant filed an appeal to the Delaware Superior Court, arguing the Board failed to conduct a proper analysis of the relevant factors.

The court set forth the *Cox* factors that must be considered by the Board in making an award of attorney's fees, and those factors derived from *Cox v. General Motors Corp*., 304 A.2d 55(Del.1973) are:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fees customarily charged in the locality for similar legal services;

(4) The amount involved, and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent;

(9) The employer's ability to pay; and

(10) Whether fees and expenses have been received, or will be received, from any other source.

In considering the *Cox* factors, the court stated that, based on prior case law, the Board need not isolate and analyze each of them individually. Further, if the Board does not discuss each of the factors in its written decision, it does not constitute an abuse of discretion. Rather, it is sufficient that the record establish that the Board did consider the *Cox* factors in reaching its decision on the fee issue.

In this appeal, claimant's counsel asked the court to find that he was due an award of attorney's fees based on all of the medical bills the employer had ever paid in relation to the back injury, not just those from Dr. X that were at issue on the DACD etition. However, the court determined that those prior bills had never really been in dispute and that, accordingly, the claimant had not received a favorable change or benefit from the mere recognition of past bills the carrier had already paid. The court concluded that the Board's decision on appeal had only awarded the claimant payment for the medical bills of Dr. X, which were in the amount of $2,095, as opposed to the previously paid bills, which were in the much higher amount of $10,072. The court concluded that the claimant failed to show that the Board had abused its discretion in reducing the counsel fee. Further, the court reasoned that, since there was no award for those previously paid bills, the Board was likewise correct in refusing to award an attorney's fee for those bills. Accordingly, the Board's decision awarding the reduced counsel fee of $5,417.87 was affirmed. ||

Side Bar

Decisions issued by the Board routinely summarize the *Cox* factors and whether they have been properly addressed by claimants' counsel in the submission of an affidavit and fee agreement at the conclusion of a hearing. Pursuant to § 2320(10)(a) of the Act, a reasonable counsel fee shall be the smaller of 30% of the award or ten times the applicable average weekly wage at the time of the hearing. In making that determination, the Board can look not only at the monetary award of benefits, but also at the non-monetary components of the award in determining the appropriate counsel fee, which can include such items as establishing compensability of a claim and potential future benefits.