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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

An interlocutory order striking a joinder petition is final and appealable; however, identifying the order as interlocutory may allow the filing of an appeal *nunc pro tunc*.

Department of Labor and Industry, Uninsured Employers Guaranty Fund v. WCAB (Gerretz, Reliable Wagon and Autobody, Inc., and Somerset Casualty Insurance Company); 445 C.D. 2015; filed June 14, 2016; by Judge Brobson

The claimant filed a claim petition against the employer. The employer was uninsured; therefore, the claimant filed a claim petition against the Uninsured Employers Guaranty Fund (Fund). The Fund then filed a joinder petition against an insurance company, alleging they were the insurer of the employer at the time of injury. Later, the Workers' Compensation Judge granted a motion to dismiss the joinder petition and issued a decision to that effect. The judge described the decision as "interim/interlocutory" and stated that it was not subject to appeal. The Fund did not file an appeal of the order. Ultimately, the judge granted the claim petitions filed against the employer and the Fund. The Fund appealed the decision to the Workers' Compensation Appeal Board, challenging the judge's dismissal of the joinder petition filed against the insurance company.

The Board dismissed the appeal, concluding that the Fund should have appealed the earlier order dismissing the joinder petition, which the judge described as interlocutory. The Board concluded that the prior order was, in fact, a final, appealable order and, therefore, the Fund's current appeal was late.

The Fund appealed to the Commonwealth Court, which, overall, agreed with the Board. According to the court, case law and regulations suggest that an order of a Workers' Compensation Judge striking a joinder petition constitutes a final, appealable order because the order disposes entirely of the issues set forth in the joinder petition. However, the court also pointed out that, in this case, the judge explicitly identified the decision and order as interlocutory and not subject to appeal. The court considered this to be relevant to the issue of timeliness that may have entitled the Fund to an appeal *nunc pro tunc* on the basis of a breakdown in the administrative process. The court remanded the case to give the Fund the opportunity to establish whether a breakdown in the administrative process occurred. II

The claimant's attorney is not entitled to a 20% fee of medical bills when the Workers' Compensation Judge properly performs a *quantum meruit* analysis in connection with the attorney's request for a fee.

Patricia Righter v. WCAB (Righter Parking); 1356 C.D. 2015; filed June 14, 2016; by Judge Cohn Jubelirer

The claimant filed a claim petition against the employer for work injuries that occurred as a result of being struck by a company truck. The employer filed a timely answer, denying all of the allegations in the claim petition. Later, though, the employer agreed to accept the injury via a stipulation. The parties stipulated that claimant's counsel was entitled to 20% of the indemnity benefits received by the claimant as a fee. The parties continued to litigate the issue of whether counsel was entitled to 20% of any work-related medical bills, as well as the issues of penalties and unreasonable contest. Later, a second stipulation was signed resolving the penalty and unreasonable contest issues. The only issue that went to decision was whether counsel was entitled to a 20% fee of the medical bill payments.

In connection with that, the claimant testified to signing the contingent fee agreement, which stated that her counsel would receive 20% of **"all compensation payable"** as long as the claimant received workers'

compensation benefits. The agreement did not specify, however, that **"compensation payable"** included medical bills. The Workers' Compensation Judge concluded that the claimant did not establish counsel's entitlement to receive 20% of the medical bill payments. The claimant appealed to the Appeal Board, which affirmed.

The Commonwealth Court affirmed as well. In doing so, they reviewed the judge's analysis of the issue and concluded that the judge performed a proper *quantum meruit* analysis. The court noted that the judge first assessed the agreement between the claimant and counsel, which failed to specify medical bill payments. The judge also reviewed the claimant's testimony, which was silent as to the extent of the agreement between she and her attorney. Additionally, the court assessed the nature and difficulty of the work performed by counsel and agreed with the judge that the case did not appear to have been exceedingly difficult or time consuming in that major issues were resolved through two stipulations. Furthermore, there was no evidence in the record showing a dispute to claimant's entitlement to medical benefits that required extensive legal work. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

A workers' compensation carrier remains entitled to reimbursement for medical benefits from the proceeds of the petitioner's third-party recovery from a negligent motorist despite the petitioner's inability to recover medical costs under New Jersey'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 plaintiff was involved in a motor vehicle accident while in the course of her employment which was caused by defendant Burns. The plaintiff sustained injury to her neck, requiring surgery. The employer's workers' compensation carrier paid over $127,000 in medical, wage and indemnity benefits. The plaintiff brought a tort action against Burns and recovered the amount of Burns' automobile insurance policy limit of $250,000. The employer's workers' compensation carrier asserted a lien of $84,510.78 from the proceeds of the third-party recovery.

The plaintiff moved to reduce this lien, arguing that, as a no-fault insured, she may not recover medical benefits from another no-fault insured. Since the employer's workers' compensation carrier's subrogation rights are limited to claims a plaintiff may assert under *N.J.S.A.* 34:15-40(f), she concluded that the workers' compensation carrier had no entitlement to attach the recovery from the tortfeasor to recover medical expenses it previously paid. The Law Division judge denied the plaintiff's motion. This appeal ensued.

In affirming this ruling, the Appellate Division relied on a review of the Automobile Insurance Costs Reduction Act, *N.J.S.A.* 39:6A-1.1 to 35, in conjunction with *N.J.S.A.* 34:15-40, the subrogation provision of the Workers' Compensation Act. The Appellate Division reasoned:

> The statutory construct under the no-fault insurance system provisions of the Automobile Insurance Costs Reduction Act . . . is intended to serve as the exclusive remedy for payment of out-of-pocket medical expenses arising from an automobile accident as a trade-off for lower premiums and prompt payment of medical expenses. Accordingly, an injured no-fault insured person who receives PIP benefits may not seek recovery from the tortfeasor for claims resulting from medical, hospital and other losses for which he had already been reimbursed.

In instances where an employee, as a result of injuries sustained from a work-related motor vehicle accident, also has a claim for recovery against a third party, the New Jersey Legislature overcame the possible inequity of double recovery by including *N.J.S.A.* 34:15-40 of the Workers' Compensation Act, which requires an injured employee to refund paid workers' compensation benefits once recovery is obtained from the tortfeasor, thereby avoiding duplication of the workers' compensation benefits. Referring to its recent decision in *Greene v. AIG Cas. Co.*, 433 N.J. Super. 59 (App. Div. 2013), the Appellate Division concluded:

> In *Greene*, we stated that it was long understood that the clear intent of Section 40 is to prevent an injured employee from recovering and retaining workers' compensation payments, while at the same time recovering and retaining the full damages resulting from a third-party tort suit. This is so even if the net recovery after satisfaction of the workers' compensation lien does not fully compensate the employee.

Accordingly, based on its review of *N.J.S.A.* 39:6A-1.1 to 35 and *N.J.S.A.* 34:15-40, the Appellate Division found no basis to interfere with the Law Division's ruling and affirmed that The Hartford's lien must be satisfied from the proceeds of the plaintiff's third party recovery. II

Side Bar

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), "Where only workers' compensation benefits and PIP benefits are available, the primary burden is placed on workers' compensation as a matter of legislative policy by way of the collateral source rule of *N.J.S.A.* 39:6A-6."

News from Marshall Dennehey

Niki Ingram (Philadelphia) contributed the article, "Confronting Unconscious Biases in Litigation," to the May issue of *Diversity Insider*, the newsletter of the DRI's Diversity Committee. Click here to read this article.

Jammie Jackson (Cherry Hill, NJ) discusses the problem of opioid prescription abuse and misuse in the workers' compensation system in her article "The Never-Ending Opioid Problem," *WC (CLM)* April/May 2016. Click here to read this article.

Marshall Dennehey has partnered with Christian Legal Clinics of Philadelphia (CLCP) to provide *pro bono* legal services to low-income and disadvantaged people in Philadelphia. CLCP is an urban ministry that seeks to address injustice and poverty in partnership with existing inner-city host ministries by bringing volunteer attorneys into neighborhoods where their services are most needed. Since it began in 2002, CLCP has helped thousands of people and today runs 10 clinics throughout the Philadelphia area. More than 20 firm attorneys from our Philadelphia and King of Prussia offices will rotate shifts to staff the clinic, which will be open one or two evenings per month. CLCP provides required training for lawyers to assist clients in matters involving record expungement, family violence, custody battles, housing, employment, immigration, government benefits, consumer problems, and more. Participating attorneys include: Nicholas Bowers, Seth Schwartz, Donna Modestine, Elizabeth Pope, Cristin Cavanaugh, Conrad Radcliffe, Bradley Remick, Ronda O'Donnell, Colleen Bannon, Lawrence Bartel, Mark Thompson, Gregory Fox, Robert Stanko, Thomas Brophy, Frank Wickersham, Shane Haselbarth, Allison Beatty, Buck Buchanan, Niki Ingram, Keith Heinold, Sang Lee, Daniel Sherry, Jennie Philip, Jim Cole and John Hare.

The Pennsylvania Chamber of Business and Industry is hosting its annual Workers' Compensation Summit on Friday, September 30, 2016. **Niki Ingram** (Philadelphia, PA) and **Tony Natale** (Philadelphia, PA) are presenting "Pennsylvania's Workers' Compensation Law: Best Practices for Complying with Benefits, Understanding the Flow of a Workers' Compensation Claim, and Tips to Prevent Workers' Compensation Fraud." For more information and to register, click here. ||