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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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

Francis X. Wickersham

Commonwealth Court holds that employer had a reasonable basis for its termination petition, even though employer's medical expert questioned whether an accepted work injury occurred.

Lourdes Sarmiento-Hernandez v. WCAB (Ace American Insurance Company); 1799 C.D. 2016; filed Feb. 13, 2018; by Judge Cohn-Jubelirer

The claimant sustained a work-related injury to her right wrist. The employer accepted by issuing a Notice of Compensation Payable, which described the injury as a right wrist sprain. Later, the employer filed a petition to terminate the claimant's workers' compensation benefits, alleging she was fully recovered. The claimant filed a review petition, seeking to amend the Notice to include additional conditions.

In connection with the termination petition, the employer deposed the physician who performed an IME on the claimant. When questioned on cross examination, the expert said he was not aware of the fact that a Notice of Compensation Payable was issued indicating that the claimant had a right wrist sprain due to the repetitive nature of her job until the day of his deposition. He also stated that he did not see a work injury to begin with.

The Workers' Compensation Judge dismissed the termination petition and granted the review petition. Furthermore, he found that the employer's contest of the termination and review petitions was not reasonable on the basis that the IME physician did not believe that the claimant sustained a work injury.

The employer appealed the unreasonable contest issue to the Appeal Board. They reversed, finding that there was conflicting medical evidence to support the employer's contest. The Commonwealth Court agreed and affirmed the Appeal Board.

According to the court, the employer presented competent, conflicting medical testimony that rendered its contest reasonable. According to the court, although the IME physician did not believe the claimant suffered a work injury, he still testified that he thought the claimant had fully recovered from what he "assumed" to be a work injury. The court held that this was sufficient to satisfy the standard for presenting competent medical evidence that the claimant was fully recovered from the work injury. In addition, the court pointed out that the IME physician's testimony that the claimant's work played no role in exacerbating an underlying condition of the right wrist satisfied the employer's challenge of the review petition. II

Side Bar

Judge Covey authored a dissenting opinion in which he emphasized that the employer's medical expert specifically stated that, based on the records he reviewed, he did not see any work injury (when, in fact, one was recognized by the Notice of Compensation Payable). In her view, the employer failed to produce any evidence that the expanded injury was not work-related and the Workers' Compensation Judge properly determined that the employer's expert's testimony was incompetent. Since that was the only medical evidence the employer presented in opposition to the claimant's review petition, Judge Covey questioned how the Appeal Board—and the Commonwealth Court—could conclude that the employer presented conflicting medical testimony.

This newsletter is prepared by Marshall Dennehey Warner Coleman & Goggin to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects when called upon.

What's Hot in Workers' Comp is published by our firm, which is a defense litigation law firm with 500 attorneys residing in 20 offices in the Commonwealth of Pennsylvania and the states of New Jersey, Delaware, Ohio, Florida and New York. Our firm was founded in 1962 and is headquartered in Philadelphia, Pennsylvania.

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Delaware Workers' Compensation

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

Paul V. Tatlow

The Board grants the claimant's petition, finding that the claimant sustained a compensable injury and was entitled to compensation for total disability benefits, even during periods of time where she had been released to modified work, since the employer had led her to believe she would be returned to work in a modified-duty position. By giving the claimant a reasonable expectation of continued employment with the employer, she had no duty to seek work elsewhere.

Nina Baen v. Urgent Ambulance, (IAB Hearing No. 1456738 – Decided Aug. 29, 2017)

In the DCD petition filed on behalf of the claimant, the parties stipulated prior to the hearing that the claimant had sustained a compensable low back injury on October 27, 2016, while caring for a patient during the course of her employment as a driver, which required her to assist with transporting patients to various locations. It was further stipulated that the employer had paid the claimant wages in lieu of compensation up through January 20, 2017. The issue before the Board was whether the claimant was entitled to total disability benefits as of January 21, 2017, and thereafter, even during periods of time when she had been released by the treating physician to modified work. The claimant contended the employer had held out the notion that she would be returned to work in a modified-duty position, but the employer disputed this.

The evidence showed that the claimant had worked for the employer for nine years as a driver and that her job duties required driving and assisting with transporting patients. Although the claimant was CPR certified, the emergency medical technicians typically took care of actual patient care. The claimant's treating physician either had her on no-work status or on sedentary-work restrictions, but she had never been released to full duty. The claimant testified that when she was released to modified work, she kept in communication with the employer about her work restrictions. She attempted to return to work with them but was never actually given a modified job to do. She testified that she remained an employee with them and still had her health benefits through the employer. The witness for the employer testified that the claimant had not, in fact, been terminated from her employment since they had a policy of not terminating employees who were out of work due to a compensable injury. However, the employer's witness, the Director of Operations, testified that they did not have a job available for the claimant given her sedentary work restrictions and that they had actually down-sized and laid off some workers.

The Board analyzed this case under the *Hoey* case doctrine, a bright line standard placing the burden on the employer to take affirmative steps to place a worker on notice that he or she is a displaced worker by either discharging the employee or giving direct notice that a position will likely never be made available. Under the *Hoey* doctrine, a claimant with a compensable injury who has work restrictions may still be considered effectively totally disabled if the employer engages in contact providing the employee with reason to believe the work restrictions will be accommodated but then fails to provide suitable employment. The Board noted that they have long recognized that the Act does not require a claimant with a transient injury to find other work during the period of recovery, so long as the job with the pre-injury employer has not been terminated. The focus needs to be on whether the claimant has a "reasonable expectation of continued employment."

After reviewing the evidence, the Board concluded the claimant was credible and the evidence established that the employer did, in fact, string the claimant along in the belief that her work restrictions would be accommodated and, therefore, she had no reason to seek work elsewhere. In finding the claimant's testimony credible—that she had reason to believe the employer would return her back to work at some point at a modified position—the Board noted that the claimant had never been terminated by the employer and she still had her health benefits through them. The employer had also conceded that it has a specific policy against terminating employees who have active workers' compensation claims. The Board concluded that the claimant was essentially "strung along" by the employer with the notion that she would be returned to work at some point in a modified job even though this never occurred.

The Board held that under the *Hoey* doctrine, the claimant was entitled to total disability benefits from January 21, 2017, up through the hearing date of August 29, 2017, and even for periods when she was clearly able to do modified work. The Board further found that as of August 30, 2017, and ongoing, the claimant was entitled to partial disability benefits based on a loss of earning power established by Labor Market Survey evidence that was presented. The Board reasoned that as of the hearing date, the claimant was certainly put on notice that the employer did not have work available to her within her current restrictions; therefore, at that point, she had the obligation to seek work elsewhere.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Judge of Compensation's deference to the medical opinion of the treating physician in granting petitioner's motion for medical and temporary disability benefits was merited as the treating physician's credibility was heightened due to his familiarity with the petitioner's medical care.

Staikos v. Fairview Board of Education, Docket No. A-0723-16T3, 2018 N.J. Super. Unpub. LEXIS 389 (App. Div., decided Feb. 21, 2018)

In 2009, while employed as a maintenance engineer by the respondent, the petitioner injured his back, neck and left shoulder while shoveling snow. The respondent authorized treatment with Dr. Cole, who performed a decompression surgery of the lumbar spine on May 13, 2010. Thereafter, the petitioner received a course of physical therapy and a series of post-operative epidural injections due to persistent low back pain. On December 1, 2010, the petitioner was involved in a motor vehicle accident and injured his neck, back and right knee. Following this accident, the petitioner's treatment with Dr. Cole continued, and he received additional epidural injections. He was soon assessed at maximum medical improvement and discharged from care.

Due to complaints of renewed and worsening pain in the months following his discharge, the petitioner made several requests of the respondent to authorize additional medical treatment. These requests were denied. Accordingly, he filed a motion for medical and temporary disability benefits.

At trial, Dr. Cole testified extensively as to the petitioner's symptoms and treatment prior to and after his December 1, 2010, motor vehicle accident. Specifically, Dr. Cole testified that following the May 13, 2010, lumbar surgery, the petitioner continued to experience pain and radiculopathy of the lower extremities, for which he prescribed physical therapy and epidural injections. Dr. Cole further testified that, prior to the motor vehicle accident, an additional epidural injection had been scheduled. He anticipated the petitioner would require another surgery. Dr. Cole stated that he found no difference in the petitioner's lumbar MRI studies conducted before and after the motor vehicle accident, and he concluded that the petitioner's present need for treatment was due to his 2009 work-related accident.

Dr. Halejian, who evaluated the petitioner in anticipation of litigation, testified on the respondent's behalf. Although he agreed the petitioner was in need of additional treatment and might, in fact, require a second surgery, he testified that, based on his review of the medical records, it was his opinion that the petitioner's need for treatment was not related to his work injury but, rather, to his motor vehicle accident.

In his written opinion, the Judge of Compensation found the following:

> There is no dispute that [Staikos] sustained serious back injuries in an admitted work-related accident in . . . 2009, for which he previously underwent surgery. Accordingly, the sole issue is whether there is a causal relationship between [Staikos's] current need for [treatment] and his . . . 2009 work injury. Dr. Cole, who has provided authorized treatment to [Staikos] since shortly after the work accident has opined that the current need for [treatment] is causally related to that accident. I found his testimony to be wholly credible and grounded in objective findings. Although I have no reason to doubt Dr. Halejian's expertise and general credibility, I found his opinion to have much less substantial basis in fact.

The judge granted the petitioner's motion and awarded him medical and temporary benefits. This appeal ensued.

In affirming the judge's holding, the Appellate Division relied on *DeVito v. Mullen's Roofing Co.*, 72 N.J. Super. 233 (App. Div., 1962), where the court held:

> It is generally recognized that a treating physician is in a better position to express an opinion as to cause and effect than one making an examination in order to give expert medical testimony.

As the Appellate Division noted, the trial record contained ample evidence that the Judge of Compensation discredited Dr. Halejian's testimony because it was based primarily on his review of records of other providers. However, it found Dr. Cole's credibility to be greatly enhanced because of his level of familiarity with the petitioner's care, achieved during their lengthy treating relationship. Accordingly, the Appellate Division found sufficient credible evidence to support the Judge of Compensation's ruling. II

Side Bar

Although all physicians are "expert witnesses" because of their credentials, a legal distinction is made between physicians who testify based solely on facts gained from their actual treatment of a patient and physicians who give opinions based upon facts and/or materials furnished to them during the course of litigation.

Florida Workers' Compensation

By Linda W. Farrell, Esquire (904.358.4224 or lwfarrell@mdwcg.com)

Linda W. Farrell

Employers and insurance carriers in Florida have been given a ray of hope when it comes to the major contributing cause defense.

Teco Energy, Inc. v. Williams, 42 Fla. L. Weekly D2663 (Fla. 1st DCA Dec. 19, 2017)

The employer appealed a final order of Judge Lorenzen wherein she awarded compensability of a total knee replacement along with attorney's fees and costs. The employer argued that the Judge of Compensation Claims erred in: (1) barring, as a matter of law, its defense of major contributing cause; and (2) applying, *sua sponte*, the "120-day Rule" pursuant to Section 440.20(4), Florida Statute, as a limitation of available defense. The 1st DCA agreed and reversed.

The claimant, an electrician, suffered a work injury on April 25, 2013, involving his left knee. The employer accepted compensability and authorized treatment. Prior to his work injury, the same physician treated the claimant for a non-work-related injury to his right knee that required surgery. During that treatment, the claimant also had left knee complaints suggestive of either arthritis or a pre-existing tear, but no treatment was provided. After the 2013 work accident, the doctor indicated that the claimant had significant pre-existing left knee arthritis, which was confirmed with diagnostic studies. However, the doctor also diagnosed an acute injury of a medial mensical tear and recommended surgery. He indicated that the work injury accounted for 70% of the need for surgery, which the employer authorized. The claimant was placed at maximum medical improvement on March 20, 2014, and was asymptomatic at the time. A year later, the claimant received an injection, which the employer authorized, for occasional aches and pain, which the doctor noted was consistent with arthritis. By October 1, 2015, the claimant had constant pain with some instability. The doctor diagnosed arthritis and recommended a total knee replacement. In his deposition, the doctor opined that the need for surgery was pre-existing and not work-related. The employer denied the surgery following a petition for benefits.

The claimant's IME physician opined that the work accident was the major contributing cause of the need for the total knee replacement. Due to conflicting opinions, the employer requested and the Judge of Compensation Claims ordered an expert medical advisor. The expert medical advisor opined that the major contributing cause was the pre-existing arthritis. Prior to the final merits hearing, the claimant did not raise the 120-day rule in his pre-trial stipulation. The claimant argued that the employer accepted compensability of the arthritis by treating same (with an injection) and failed to show a break in causation. Also, the claimant argued that the arthritis could not be considered a contributing factor in any major contributing cause analysis because the condition did not qualify as a "pre-existing condition" under Section 440.09(1)(b), Florida Statutes.

The judge accepted the expert medical advisor's opinion but, nevertheless, concluded that, as a matter of law, the employer was precluded from raising a major contributing cause defense because the claimant's arthritis did not qualify as a "pre-existing condition" and the employer waived the right to deny compensability pursuant to the 120-day rule.

The 1st DCA held that the 120-day defense must be timely and specifically plead by claimants and may not be raised *sua sponte* by the Judge of Compensation Claims. The court held that the claimant's pre-existing osteoarthritis was a qualifying pre-existing condition and, therefore, was not the major contributing cause of the need for the total knee replacement. The court stated that "[t]he inquiry is whether the condition independently required treatment either before or after the compensable accident." This differs from the previous analysis held in *Osceola County Sch. Bd. v. Pabellon-Nieves*, which stated that a pre-existing condition under 440.09(1)(b) must have required "some level of treatment" before the workplace accident in question.

News from Marshall Dennehey

Andrea Rock (Philadelphia, PA) has been named the 2018 Co-Chair of the Philadelphia Bar Association's Workers' Compensation Section. The section serves as an ongoing resource for members practicing in the area of workers' compensation.

This coming April, **Niki Ingram**, (Philadelphia, PA) director of the firm's Workers' Compensation Department, is speaking at the 2018 Smith College Women of Color Conference. In "Finding Your Place at the Table," Niki will share professional development strategies for thriving—and excelling—in a male-dominated business culture. She will discuss how communication, behavior and leadership are the keys for women of color to succeed in the modern workplace. For more information, click here.

This coming April, **Heather Byrer Carbone** and **Linda Wagner Farrell** (Jacksonville, FL) are speaking at the 2018 Florida Bar Workers' Compensation Forum. Heather is presenting "Average Weekly Wage and Indemnity Benefits (Other than PTD)," while Linda is presenting "Medical Marijuana in Workers' Compensation." For more information, click here.

On March 14, 2018, **Michele Punturi** (Philadelphia, PA) is speaking at the 2018 CLM Annual Conference in Houston, Texas. Along with a panel of industry professionals, Michele is presenting "The Rise in Workplace Violence: Practical Tips and Guidance to Avoid Devastating Consequences and Reduce Liability." This session will

(continued on page 5)

discuss the rise in workplace violence and related claims, and it provide participants with a practical roadmap for developing an effective workplace violence prevention program. For more information, click here.

Judd Woytek (Allentown, PA) successfully defended against a fatal claim petition filed by the widow of a coal miner. In 1984, the miner had been awarded benefits for totally disabling coal workers' pneumoconiosis. Despite the fact that the miner had been collecting temporary total disability benefits from 1984 until he died in 2016, Judd was able to present credible and persuasive medical evidence that coal workers' pneumoconiosis was not a substantial contributing factor to the miner's death. Judd was able to get the miner's treating physician to admit that the miner's pneumoconiosis was stable over the years and that, while it may have contributed to his death, it was not a substantial contributing factor.

Michele Punturi (Philadelphia, PA) was successful in terminating a claimant's benefits and defending the nature and extent of the injury. The mechanism of injury was challenged by two fact witnesses from the employer. One witness was with the claimant at the time of the incident and afterward. Based upon the testimony of these fact witnesses, as well as the IME examiner's review of all medical records and diagnostic study films prior- and post-incident—which were contrary to the claimant's expert—the Workers' Compensation Judge narrowed the nature of injury consistent with the "medical only" notice of compensation payable. The judge recognized the IME examiner, who provided a detailed explanation using the MRIs to establish no injury beyond a contusion, and found no traumatic back injury.

John Swartz (Harrisburg, PA) was successful in defending against a claim petition that alleged herniated discs in the low back and neck for an injury initially accepted by a "medical only" notice of compensation payable for low back sprain/strain. The Workers' Compensation Judge denied the claim petition on the basis that the testimony from the employer showed the claimant was appropriately discharged for cause (he failed to comply with company policy on calling off of work for the injury). In addition, the judge found the testimony of the defendant's medical expert more credible and persuasive than the claimant's medical expert. The judge also found that the claimant had not incurred any herniated discs from the work injury and was fully recovered from the work injury. No indemnity benefits or ongoing medical benefits were payable to the claimant under the judge's decision, nor was claimant's counsel reimbursed for over $4,000 in litigation costs.

Judd Woytek (Allentown, PA) received a favorable decision in a case where the claimant filed a review petition seeking to expand the description of injury to include herniated cervical discs, along with cervical radiculopathy and cervicalgia. The Workers' Compensation Judge denied and dismissed the claimant's review petition, finding that the cervical spine problems were not work related based upon the expert medical testimony that Judd presented. The claimant also filed a petition to reinstate compensation benefits, but the judge found that the claimant failed to provide any evidence to support a reinstatement of benefits to either total or partial disability at any point in time. Finally, the judge found that the claimant had fully recovered from almost all of the accepted work injuries (bilateral wrist sprain/strain, bilateral carpal tunnel syndrome, and left cubital tunnel syndrome) with the exception of right lateral epicondylitis. Overall, Judd obtained a very favorable decision that limited the injuries and reduced future exposure significantly.

Ross Carrozza (Scranton, PA) successfully defended an employer against claim and penalty petitions filed by the claimant, who had worked for the employer for more than 40 years. Ross established that the claimant failed to provide timely notice under the applicable statute, and his medical expert was found to be more credible than the claimant's expert. During cross examination of the claimant's expert, Ross brought to light the fact that the claimant had treated with several different doctors for "daily back pain" and radiculopathy-type complaints in 2010 and 2013, prior to the alleged work injury. The Workers' Compensation Judge denied and dismissed the claim and penalty petitions accordingly.

Ross Carrozza (Scranton, PA) successfully prosecuted a petition for termination and a utilization review petition. The employer's medical expert pointed out that the claimant had no objective signs of any abnormalities that would be related to the 2009 work-related injury. She did, however, have a Tarlov cyst in her spine near her nerve roots, which could be causing her subjective complaints. Ross forced the claimant's expert to admit that the claimant had the cyst in her spine. The Workers' Compensation Judge found that the treatment by the claimant's doctor was unreasonable and unnecessary based on the utilization review petition filed by Ross. The judge further found the testimony of the employer's medical expert more credible than that of the claimant's expert. He did not find the claimant's testimony credible as to her ongoing complaints. II