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What's Hot in Workers' Comp

PENNSYLVANIA WORKERS' COMPENSATION

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Francis X. Wickersham

The Supreme Court holds that unless an injured employee assigns a cause of action or voluntarily joins litigation as a party plaintiff, the insured may not enforce its statutory right to subrogation by filing a direct action against the tortfeasor.

The Hartford Insurance Group on Behalf of Chunli Chen v. Kafumba Kamara, Thrifty Car Rental and Rental Car Finance Group; No. 24 EAP 2017; decided Nov. 21, 2018; Justice Baer

The claimant sustained multiple injuries when she was standing in a parking lot of Thrifty Rental Car and was struck by a rental vehicle driven by one of the defendant tortfeasors. The claimant was in the course of employment at the time of the accident and was paid workers' compensation benefits by the insurer, The Hartford Insurance Group. The claimant did not seek to recover damages by filing an action against the tortfeasors and, shortly before the two-year statute of limitations was set to expire, the insurer filed a Writ of Summons against them, with the intention of effectuating its subrogation rights under § 319 of the Workers' Compensation Act. Later, the insurer filed a complaint against the tortfeasors.

Preliminary objections were filed, with the tortfeasors alleging that the attempt to enforce its subrogation rights in a direct action against third parties was prohibited by the Pennsylvania Supreme Court's decision in *Liberty Mutual Insurance Co. v. Domtar Paper Co.*, 113 A.2d 1230 (Pa. 2015), which held that the right of action against a third party under § 319 of the Act remains in the injured employee and that the right of subrogation must be achieved through a single action brought in the name of the injured employee or joined by the injured employee. The insurer responded by maintaining that it complied with *Domtar Paper*'s requirement by captioning its complaint as being filed "on behalf of" the claimant, rather than as "the subrogee" of the claimant.

The trial court sustained the preliminary objections and dismissed the insurer's complaint, with prejudice. The Superior Court vacated the trial court's order and remanded the matter for further proceedings, finding that the court erred in sustaining the preliminary objections and dismissing the complaint. According to the Superior Court, the insurer complied with the *Domtar Paper* requirement to bring an action "in the name of" the injured employee by filing its action "on behalf of" the claimant.

The Supreme Court reversed, holding that the trial court properly sustained the preliminary objections filed by the tortfeasors. The court said its *Domtar Paper* decision does not support the proposition that an employer or workers' compensation carrier can seize an injured employee's cause of action against a tortfeasor by merely captioning the complaint "on behalf of " the employee and/or by including in the complaint independent claims of the employee in addition to the claim of subrogation of workers' compensation benefits. The court described the insurer's interpretation of *Domtar Paper* as overly literal and one that goes against jurisprudence, establishing that it is the injured worker who retains the cause of action against the tortfeasor. Absent an injured employee's assignment or voluntary participation as a party plaintiff, the insurer may not enforce its § 319 right to subrogation by filing an action directly against the tortfeasor. **II**

A Workers' Compensation Judge's decision ordering random drug screens before the claimant's office visits was a condition precedent for the prescription of narcotic medications; it did not apply to the claimant's treatment with a pump ordered by a doctor who was not performing drug screens.

Rogele, Inc. v. WCAB (Hall); 595 C.D. 2018; filed Nov. 30, 2018; by Judge Covey

The claimant suffered multiple work-related injuries to his low back. He settled his wage loss claim by a Compromise and Release Agreement. The employer remained responsible for payment of the claimant's medical treatment. The claimant was receiving pain management treatment, consisting of various pain medications. In connection with the employer's review medical petition, a Workers' Compensation Judge found that the claimant's medications were reasonable and necessary, but he ordered random toxicology screens to be conducted before each office visit.

Later, in November of 2010, a provider implanted a pump in the claimant that dispensed narcotic pain medications. The pump required monitoring and refills approximately every two months. The provider also prescribed Oxycodone. However, because the doctor did not conduct complete drug screens before each visit, the employer denied payment for the medications. The claimant filed a penalty petition on this issue, as well as a petition to review a utilization review determination. The employer filed a review medical treatment petition.

These petitions were decided by another judge, who denied the claimant's penalty petition as well as the claimant's UR petition, accepting the utilization reviewer's opinion that additional Oxycodone was not reasonable and necessary in light of the pump. The judge also found, however, that the programming and refilling of the pump—ongoing every two months—was reasonable and necessary. The claimant appealed to the Workers' Compensation Appeal Board, which affirmed the judge's decision.

The claimant subsequently filed another review medical petition, alleging that the employer had not paid medical expenses related to a 2015 pump replacement or the medication refills. He also filed a penalty petition, alleging the employer violated the Act. A Workers' Compensation Judge granted the review medical petition, requiring the employer to reimburse the claimant for expenses related to the replacement pump and its refills. However, the judge denied the penalty petition. The employer appealed the judge's decision on the review medical petition, and the Appeal Board affirmed.

In its appeal to the Commonwealth Court, the employer argued that the Workers' Compensation Judge and the Appeal Board lacked subject matter jurisdiction and were barred from ordering payment for the pump replacement and its refills because the doctor providing this treatment was not conducting drug tests as previously ordered. Based on a review of all prior decisions, as well as testimony from the claimant in subsequent litigation that he received all of his work-related pain medication through the pump, the court rejected the employer's lack of subject matter jurisdiction argument. The court concluded that the toxicology screening was not a condition precedent to use of the pump, but rather, a condition precedent only when the claimant controlled his medications to ensure he was taking them as prescribed. The court also held that the evidentiary record supported the judge's conclusion that, but for the work injury, the claimant would not need the pump and that the claimant experienced issues with the pump before being shocked in February of 2015. Thus, the judge and the Appeal Board properly ordered the employer to reimburse the claimant for a replacement pump and its refills. II

For death benefits to be paid to a dependent beyond the age of 18, the claimant must prove that the dependent's physical impairment caused a disability that made it impossible to earn an income.

Aqua America, Inc. v. WCAB (Jermon Jeffers, Dec'd.); 1831 C.D. 2017; filed Dec. 4, 2018; Judge Covey

The decedent was fatally injured in a work-related tractor trailer accident. At the time of death, he was married to the claimant, and they had a 17-year-old daughter who suffered from Retinitis Pigmentosa. The employer acknowledged the claim by issuing a notice of temporary compensation payable and began paying the claimant benefits. Later, a fatal claim petition for death benefits was filed by the claimant for her daughter.

A Workers' Compensation Judge granted the petition with respect to the daughter's entitlement to dependency benefits, stating the benefits shall continue beyond the age of 18 until such time as the employer meets its burden of proving that she was capable of self support. The employer appealed to the Appeal Board, but they affirmed. The employer then appealed to the Commonwealth Court.

The court noted that Section 307 of the Act states that payment of dependency benefits are payable to a child until they are 18 years old; until they are 23 years old, if they are enrolled as a full-time student in an accredited educational institution; or, they are over 18 years of age but dependent due to disability. According to the court, the decedent's daughter was entitled to benefits until she turned 18 years of age. Thereafter, to be eligible for such benefits, the claimant had to prove the daughter was a full-time student or dependent because of a disability. In reviewing the evidence, the Commonwealth Court concluded that, although the claimant proved that her daughter had a physical impairment, she was not able to show a loss of earning power, which is required to prove disability as defined under the Act. Consequently, the court granted employer's appeal, holding that there was not substantial evidence to support a conclusion that the daughter's Retinitis Pigmentosa made it impossible for her to earn an income. II

Florida Workers' Compensation

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Kelly M. Scifres

The First District Court of Appeals reversed the Judge of Compensation Claims' ruling on the basis that the judge relied on inadmissible medical evidence in finding the employer wrongfully denied a surgical recommendation.

Hansen and Adkins Auto Transport/ Gallagher Bassett Services v. James Martin, No. 1D17-3339, (Fla. 1st DCA 2018)

The employer denied surgery recommended by the authorized provider. The claimant then underwent a less invasive surgery with an unauthorized provider. The Judge of Compensation Claims found that the surgery performed was sufficiently similar to the procedure recommended and was medically necessary to treat a compensable work injury. The First District Court of Appeals found that the judge correctly found that the employer wrongfully denied the initial surgery, but erred in finding that the actual surgery performed was medically necessary. The authorized provider testified that he could not state that the surgery actually performed was medically necessary. No other admissible evidence was provided to meet the claimant's burden under the self-help provision of 440.13(2)(c). The First DCA ruled that inadmissible opinions of the self-help provider cannot be "bootstrapped" into evidence in the absence of other admissible evidence establishing care as compensable and medically necessary.

This opinion clarified and reaffirmed both the *Parodi* self-help provisions of 440.13 and the *Hidden v. Day* prohibition on "bootstrapping" inadmissible medical opinions, which are frequently used together by claimants. *Parodi v. Fla. Contracting Co.*, 16 So. 3d 958 (Fla. 1st DCA 2009); *Hidden v. Day & Zimmerman*, 202 So. 3d 441(Fla. 1st DCA 2016). II

Side Bar

In cases involving self-help treatment, watch out for the type of care actually recommended versus received, and claimants' attempts to bootstrap inadmissible medical evidence.

News from Marshall Dennehey

Michele Punturi (Philadelphia, PA) is speaking at the 2019 CLM Annual Conference in Orlando, Florida, which will be held from March 13 through March 15, 2019. In "Driven to Distraction – Mitigating Distracted Driving Claims," Michele joins other industry professionals to discuss the importance of developing a roadmap to minimize the impact and effect of distracted driving by limiting exposures, reducing costs, and mitigating workers' compensation claims. By identifying potential sources of distracted driving, employers can take the necessary steps to help curb behaviors and control risks and exposures. The CLM Annual Conference is the premier annual event for professionals in the claims and litigation management industries. For more information, click here.

We are happy to announce that **Raphael Duran** (Philadelphia, PA) is among the 13 associates elevated to shareholder at our annual shareholder meeting. Raphael focuses his practice exclusively on workers' compensation litigation. He has represented some of the largest employers in the Philadelphia area, including those in the retail, construction, transportation, health care and food processing industries. He also has extensive experience working with self-insured and high retention clients. He is a graduate of the University of Pittsburgh and the Drexel University Kline School of Law, and is admitted to practice in Pennsylvania and New Jersey.

Linda Wagner Farrell (Jacksonville, FL) successfully defended a petition for permanent total disability benefits, supplemental benefits and penalties, interest, costs and attorneys fees. The judge entered a Final Compensation Order, finding the claimant was not permanently and totally disabled despite a substantial, but not exhaustive, job search. The judge found the claimant's job search was not sufficient or reasonable in light of the totality of the circumstances, including her physical impairment, age, employment history, training, education, motivation, work experience, work record, and diligence to establish entitlement to permanent and total disability benefits. The judge held the testimony of the employer's vocational experts was persuasive in his decision to deny benefits, finding the claimant was employable with the assistance of vocational counseling.

Linda Wagner Farrell (Jacksonville, FL) also obtained a defense verdict in a Final Compensation Order involving multiple petitions filed by a pro se claimant for compensability of contact dermatitis and concrete burns allegedly sustained while working. The judge ruled in favor of the employer on all petitions, finding

compensability was previously resolved and the ongoing issues were moot. The judge denied and dismissed, with prejudice, claims for temporary total and temporary partial disability benefits, authorization of medical care, and all corresponding penalties and interest. Most significantly, the judge granted the employer's defense of medical non-compliance from March 21, 2017, present and found the claimant required no further treatment for his work-related injury. The employer can recover taxable costs against the claimant pursuant to Florida Statute 440.34 as the prevailing party on all petitions.

Tony Natale (Philadelphia, PA) successfully defended a Philadelphia-based university in the litigation of a claim petition. The claimant alleged first that during the course and scope of her employment with the university, she fell while walking across the street. She claimed injuries to her neck and shoulder, but she was able to return to work at her pre-injury duties. Several weeks later, the claimant was taking the company elevator when she alleged the elevator suddenly dropped several floors. She was not jostled in the elevator nor did she strike any part of her body against the elevator walls. Nonetheless, she claimed injuries in the form of a lumbar disc herniation and aggravation of the previous injuries she sustained when she fell in the street. The claimant presented medical evidence that both injuries caused disc herniations in the neck and back along with a shoulder tear that would require surgery. Tony presented medical evidence supportive of a minor strain of the neck and hip as the only nature of injury arising out of the slip and fall. Tony asserted absolutely no injury in the elevator incident. He also presented evidence from the employer confirming that the claimant's date of alleged disability from her work injuries coincided with the date she was discharged for cause for various work rule violations. The judge found that the only injuries sustained were minor strains to the neck and hip, and that the claimant was pronounced fully recovered from those strains.

Tony also defended the same university in an action by a local medical provider for submissions of compound cream medication. The provider submitted the medication to the carrier via three medical specialists from the same medical group. The first doctor submitted an expensive bill for the compound cream to the carrier for payment. A second doctor from the same office submitted another expensive bill for the same compound cream allegedly based on an exam that took place on the same day as the first doctor. Then a physician's assistant submitted an expensive bill for the same compound medication allegedly arising out of an exam she had with the claimant on the same day as the first two doctors. The carrier refused payment of the bills and filed a Utilization Review Request against all three providers. The UR requests came back in the carrier's favor and the providers' attorney filed a review petition to challenge the UR determinations. Tony defended the review by establishing that the providers illegally billed the carrier for exams that allegedly took place on the same day resulting in the same medication being prescribed and submitted for payment three separate times by three separate practitioners. The judge found the medical providers not to be credible and upheld the UR determination in its entirety.

Tony Natale (Philadelphia, PA) also defended a Philadelphia-based insurance company with a fee review de novo hearing requests made by a psychologist. The requests alleged that the reduction provisions of the Workers' Compensation Act (which incorporate Medicare reduction codes) are unconstitutional and "unfair." The provider's attorney attempted to sway the court with a claimant-friendly decision from a well known judge on the exact same issue. Tony argued that the court is not bound by a decision of a workers' compensation judge in another action and submitted evidence to demonstrate that four of the six original fee review applications were untimely filed, while the other two applications were correctly paid under the reduction provision standards and Medicare standards. The court dismissed all six de novo requests on that basis.

Michele Punturi (Philadelphia, PA) successfully defended a manufacturing company in the litigation of a termination petition. The claimant suffered a compensable right knee injury for which he received a period of total disability benefits and then ultimately returned back to work with use of a brace. However, he still complained of ongoing work injury. The IME physician, a Board certified orthopedic surgeon, conducted a comprehensive physical examination and reviewed all the medical records, including the claimant's MRIs and x-rays, and concluded that the claimant had fully recovered from the work injury. The claimant failed to present any medical evidence because it was his position the employer did not meet its burden of proof. The termination petition was granted with no award of litigation costs to the claimant's counsel. ||