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What's Hot in Workers' Comp

DELAWARE WORKERS' COMPENSATION

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Paul V. Tatlow

The Superior Court holds that the Board correctly determined that under Delaware law the employer is prohibited from asserting a credit for workers' compensation benefits against an underinsured motorist recovery made by the claimant even where the employer had purchased that policy.

The Rock Pile v. John Rischitelli, (C.A. No. N18A-10-005 RRC – Decided June 14, 2019)

The employee died in an automobile accident in New Jersey on August 7, 2014, while driving a tractor-trailer that was owned and operated by the employer. There was initial litigation before the Board on a petition for death benefits brought by the claimant as the surviving spouse. The Board determined that the decedent was an employee at the time of the accident and that the claimant was entitled to death benefits.

The claimant also filed a lawsuit in New Jersey against the third-party tortfeasor. That litigation was settled with payment of the policy limits of $15,000. At that time, the employer had paid the claimant $55,382.77 in death benefits and was paying benefits on an ongoing basis at the rate of $333.35 per week. The parties did agree that the employer was entitled to a proportionate reimbursement from the $15,000 third-party recovery, with the reimbursement amount being $9,474.74 pursuant to 19 Del. C § 2363 (e).

The claimant also pursued an underinsured motorist claim (UIM) against the carrier that insured the vehicle the decedent had been operating. This UIM policy had been paid for by the employer. After the claimant recovered the UIM policy limit of $300,000, the employer asserted a credit against the UIM recovery, which the claimant opposed. This issue was litigated before the Board, which issued a decision on September 27, 2018, denying the employer's request for a credit or lien in connection with the UIM recovery.

The employer appealed to the Superior Court, arguing that the Board erred as a matter of law in denying the employer a future credit. The court denied the appeal and held that under Delaware law, the employer was prohibited from asserting a credit for future workers' compensation benefits against the UIM recovery even where the employer had purchased the policy. In so ruling, the court relied on *Simendinger v. National Union Fire Ins. Co.*, 74 A.3d 609 (Del. 2013), in which the Delaware Supreme Court noted that, prior to 1993, the subrogation provision—Section 2363 (e)—provided a right of reimbursement from UIM benefits received by the claimant if the policy was purchased solely by the employer. The *Simendinger* court determined that the 1993 amendment to that statute eliminated any distinction between UIM coverage purchased by an employee versus UIM coverage solely paid for by the employer. As such, an employer can no longer assert a lien against any UIM policy for reimbursement.

The employer's appeal in the instant case made the further argument that they were not seeking reimbursement for a lien but, rather, a credit for future death benefits to be paid. The employer contended that a credit is different from reimbursement, but the court rejected this argument out of hand. The court stated that this difference is merely a matter of timing since reimbursement applies to workers' compensation benefits already received whereas a credit applies to benefits that will be received in the future.

Finally, the employer contended that Delaware law generally disfavors allowing a double recovery in personal injury cases. The court responded that the General Assembly has made it clear that UIM benefits are an exception to that general rule. Accordingly, the decision of the Board was affirmed. II

Florida Workers' Compensation

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Linda W. Farrell

Judge of Compensation Claims should not speculate about claimant's future employment with regard to Social Security entitlement and supplemental benefits.

SBCR, Inc. dba Southern Concrete Repair/BITCO Insurance v. Calvin Doss; DCA#: 19-0099; Aug. 1, 2019

The insurance carrier accepted the claimant as permanently and totally disabled and paid supplemental benefits until the claimant turned 62 years of age. At the final hearing, the Judge of Compensation Claims found that the claimant was entitled to continued supplemental benefits because the compensable injury prevented him from working sufficient quarters to be eligible for Social Security disability benefits. The claimant was eligible for retirement benefits, but not disability.

The carrier argued that disability benefits were denied because the claimant did not work at least 20 quarters during the ten-year period as required by 42 U.S.C. § 523(c)(1)(b)(i). The judge's finding of ineligibility was based solely on the claimant's testimony that he was told he did not have sufficient quarters to qualify for Social Security disability and that he would have continued to work for his employer if he had not been injured. The claimant provided no documentation and no details to support these assertions.

The carrier appealed. The First DCA held that no competent substantial evidence supported the judge's finding concerning the claimant's eligibility for Social Security disability benefits. Therefore, the court reversed on that basis and found it unnecessary to address the statutory interpretation issue. The First DCA pointed out that the claimant's work history had been sporadic and the Judge of Compensation Claims should not have speculated about his future employment. II

Once the carrier authorizes medical treatment, they are not obligated to accept claimant's self-help physicians.

Guerline Edouard v. Pioneer Growers and Zenith Insurance Company; OJCC# 19-002680; Aug. 5, 2019

This case involved a work accident that was not initially reported to the carrier by the employer. Therefore, the claimant sought medical treatment on her own under the Self-Help Provision. After the carrier was aware of the injury, it authorized care. However, the claimant refused to treat and petitioned to continue care with her own doctors. The claimant argued that she had established a patient-physician relationship with her chiropractor and did not want to treat with the authorized orthopedic physician. The carrier's adjuster then agreed to authorize a chiropractor in addition to the orthopedic physician. The claimant still refused and continued treating on her own and undergoing MRIs without prior authorization. The Judge of Compensation Claims held that the period of self-help ended when the carrier authorized care. The judge stated, "By their appropriately stepping up to the workers' compensation plate and authorizing treatment, pursuant to *Carmack v. State of Florida*, 31 So.3d 798 (Fla. 1st DCA 2009), the employer/carrier retains the right to control the selection of the future treating physicians. They are not obligated to accept the claimant's selection of the self-help doctors for future care." II

There is no entitlement to allow claimant's attorney and a court reporter or videographer to attend examination with an authorized treating provider.

Dennis Lopez v. Broward County Permitting, Licensing & Consumer Protection and Broward County Board of County Commissioners; OJCC# 18-027455; Aug. 30, 2019

This case involves a compensable low back injury. The claimant requested a one-time change of physician, and the carrier authorized same. However, the claimant refused to treat with the selected doctor because the doctor would not allow the claimant to have a videographer, court reporter and/or the claimant's counsel present for his examination. The Judge of Compensation Claims held that case law instructs us that it is an established principle of Florida law that a person who is required to submit to a compulsory physical or mental examination in an adversarial proceeding or setting is entitled to have the examination attended by her attorney and a court reporter or videographer, subject to the tribunal's authority to limit attendance for good cause. In this case, however, the judge said that there is no corresponding entitlement in a non-adversarial proceeding and to allow same would lead to "doctor-shopping." The judge pointed out that one of the goals of the 1993 statutory reforms was to limit perceived doctor-shopping. The judge also said that allowing the claimant to doctor-shop would defeat the underlying purpose of the workers' compensation system to allow for the prompt delivery of benefits to injured employees. II

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division revisits *Connolly v. Port Authority of New York & New Jersey* and the issue of exercise of jurisdiction in extraterritorial injury cases.

Marconi v. United Airlines, Docket No. A-0110-18T4, 2019 N.J. Super. LEXIS 119 (App. Div., Decided July 22, 2019)

The petitioner was employed as an aircraft technician for the respondent and filed two claim petitions: (1) a work-related injury to his left hip while working for the respondent in Philadelphia; (2) alleged occupational exposure to repetitive motion while employed with the respondent in Philadelphia from 1986 through present. The respondent moved to dismiss both claims for lack of jurisdiction. The judge of compensation conducted a hearing limited to the jurisdictional issue with the petitioner as the sole witness.

The respondent's counsel indicated that the petitioner was hired in San Francisco in 1986; began working at the Philadelphia International Airport in 1988; was displaced due to furlough in 2009, when he was transferred to Dulles Airport in Washington, DC; was transferred back to Philadelphia in 2012; and has worked in Philadelphia ever since.

The petitioner testified that he was born and raised in New Jersey, where he lived continuously since 1988, when the respondent transferred him to Philadelphia. His supervisor in Philadelphia reported to an employee at Newark's Liberty International Airport, which was a "hub" for the respondent for about ten years. Although the petitioner was never stationed in Newark, he frequently depended on the technical advice of the respondent's staff at that location and would call every few months for assistance. He testified that he received training all over the world, including in Newark, and would fly from Newark whenever his assistance was needed in servicing the respondent's planes at other airports. He requisitioned parts from the respondent's Chicago and San Francisco operations, and these parts would routinely be delivered first to Newark before being rerouted to him in Philadelphia. At times, his supervisor would drive to Newark to retrieve the parts delivered there.

At the conclusion of the hearing, the Judge of Compensation applied the six grounds for asserting jurisdiction as set forth in Larson's Workers' Compensation, Section 142.01 (Matthew Bender, Rev. Ed. 2019): [1] place where the injury occurred; [2] place of making the contract; [3] place where the employment relation exists or is carried out; [4] place where the industry is localized; [5] place where the employee resides; or [6] place whose statute the parties expressly adopt by contract. The judge determined that the petitioner was a resident of New Jersey at the time of his work-related accident and exposure and that the respondent had a substantial "localized" presence in the state. However, the judge erroneously believed that under the Appellate Division's holding in *Connolly v. Port Authority of New York & New Jersey*, 317 N.J. Super. 315 (App. Div. 1998), he was required to "decline to exercise jurisdiction even if the injured worker is a New Jersey resident and there is substantial localization of the employer's operations in New Jersey." Accordingly, the judge held that the petitioner failed to establish jurisdiction as to his work-related accident and exposure, and he dismissed both claims. This appeal ensued.

In affirming the Judge of Compensation's ruling, the Appellate Division revisited *Connolly* and posited that the Judge of Compensation misinterpreted its holding when he stated that residency and substantial localization of the respondent's operations in New Jersey were insufficient to confer jurisdiction upon the New Jersey Division of Workers' Compensation.

In *Connolly*, a New York resident and employee of the Port Authority filed for benefits in New Jersey, claiming an occupational hearing loss. Although the petitioner never lived in New Jersey and worked entirely in New York, the Judge of Compensation concluded that "localization" was determinative, and because the Port Authority was localized in both New Jersey and New York, jurisdiction was present in either state. The Appellate Division rejected this conclusion, indicating that despite the Port Authority's localized presence in New Jersey, "there was no . . . employment relationship between the Port Authority and Connolly in New Jersey." As the Appellate Division stated, it's not simply the localization of the employer but, rather, "the nature and frequency of the employee's relationship with the localized presence of the employer that lends weight" to the inquiry. Accordingly, the Appellate Division in *Connolly* found that the Division lacked jurisdiction.

After clarifying its holding in *Connolly*, the Appellate Division reframed the issue in the instant case as follows: "Did Marconi's duties to a substantial extent implement the localized business of United in New Jersey?" Based upon its reading of the record, the Appellate Division concluded that it did not. As the Appellate Division stated:

> Marconi's contacts with United's Newark hub were, in large part, to advance Marconi's ability to perform his work in Philadelphia. Even when Marconi used United's facilities at [Newark] Liberty International Airport, it was to serve United's interests elsewhere around the country. Essentially, nothing in the course of Marconi's two-decade employment with United advanced the company's localized interests in New Jersey. In these circumstances, although United maintained a localized business interest in Newark, New Jersey has no substantial interest in exercising jurisdiction over the petitions. **II**

Verdicts

Tony Natale (Philadelphia, PA) successfully argued before the Pennsylvania Worker's Compensation Appeal Board. Tony argued that a lumbar strain injury sustained while the claimant was working was rightfully deemed fully recovered by the underlying Workers' Compensation Judge, and the claimant's allegations of bias by the judge did not warrant remand or reversal of the full recovery conclusion. The claimant had sustained a strain injury to his back while lifting paint cans for the employer. Previously, the claimant had been treating for disc herniations and degenerative findings throughout his spine which were unrelated to the work injury. After the injury, the claimant argued that all of the pre-existing spinal problems were aggravated by the lifting incident and the employer should have accepted more than just a strain injury. Tony was able to highlight the claimant's treating doctor's file notes that the claimant's original diagnoses were "unchanged" after the the work injury. The judge found that only a strain had occurred, which had fully recovered. Through two appeals, the claimant argued that the record established new annular tears related to the work incident. The Appeal Board held that the annular tears were properly found by the judge to be unrelated to the work injury. The claimant then argued the judge was biased. That argument was quashed by the Board.

Ross Carrozza (Scranton, PA) successfully defended against claim and review petitions. The claimant filed a claim petition alleging a concussion, post-concussion syndrome and a cervical injury when he struck his head on a cross member underneath a truck while at work. The Workers' Compensation Judge found the claimant's testimony completely not credible, that he sustained a disabling work injury as alleged. After going through the factual testimony from the claimant and the employer's witness, along with the medical expert testimony of the claimant's expert and our two medical experts, the judge specifically found the claimant not to be credible. Further, he found that the claimant's expert witness was not credible or persuasive to establish that the claimant's condition was related to a work injury. The judge pointed out Ross's cross-examination of the claimant's medical expert, which showed that the claimant was initially treated for a stroke and did not return for medical treatment for neck pain until six weeks later, at which time the emergency room records were suspicious for acute coronary syndrome or heart attack, as opposed to a work-related injury. Based on the judge's findings that the claimant and his expert were not credible, he did not even feel the need to review the opposing expert testimony that we presented since it was unnecessary in his decision denying the claimant's petition. ||

News

The Workers' Compensation Department will be holding its biannual seminar on Thursday, October 24. This day-long seminar covers hot topics in workers' compensation in Pennsylvania, New Jersey and Delaware. Our distinguished lineup of presenters will share their insights and discuss how these issues are affecting the practice of workers' compensation. Topics include:

- How to identify fraudulent claims
- The impact of medical marijuana
- The intersection of workers' compensation and health care
- Valuing a case
- Workplace bullying
- A legal update
- The growing opioid crisis

The seminar will be held at Chubb Hotel & Conference Center, 800 Ridge Pike, Lafayette Hill, Pennsylvania. The event begins with registration and lunch from 11:00 a.m. – 12:00 p.m. and concludes at 4:00 p.m., with a reception to follow. For more information, click **here** or contact Robin Christman at 215.575.2641 or rlchristman@mdwcg.com. ||