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What's Hot in Workers' Comp

Delaware Workers' Compensation

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Paul V. Tatlow

Supreme Court affirms the Superior Court, which had affirmed the Board's decision that the employer is only required to reimburse the claimant for mileage, but not tolls and parking expenses, incurred for attending medical appointments in treatment for the work injury.

Rebecca Failing v. State of Delaware, (No. 137,2019 - Decided Oct. 3, 2019)

This case was successfully handled by my colleague, Benjamin Durstein. The Delaware Supreme Court issued an order affirming the final judgment of the Superior Court which had, in turn, affirmed the Board's decision. The claimant sustained a work injury to her right knee on October 4, 2016, and sought medical treatment from specialists in Philadelphia. In so doing, the claimant incurred travel expenses that included mileage, tolls and parking fees. The employer reimbursed the claimant for the mileage expense only, totaling $761.20. Claimant's counsel filed a motion with the Board seeking reimbursement for the fees associated with tolls and parking. The Board found that pursuant to Section 2322 (g) of the Act, the claimant could only be reimbursed for mileage related to travel for medical treatment. The Supreme Court's order indicates it agrees with the reasoning of the Superior Court.

The crux of the claimant's argument on appeal was that the Board failed to act on implicit authority granted in the Act because of the Board's mistaken belief that they could not grant reimbursement for tolls and parking incurred in the claimant's commutes to Philadelphia. The employer argued in support of the Board's decision that the claimant was essentially asking the court to find ambiguity in Section 2322 (g) where none existed, thereby creating a new liability on employers that is not based in the Act or any case law.

The court noted that Section 2322 (g) provides that in obtaining medical treatment and medical supplies for a compensable injury, "an employee shall be entitled to mileage reimbursement in an amount equal to the State specified mileage allowance rate in effect at the time of travel …" The court concluded that it was not persuaded by the claimant's argument because that section is clear and unambiguous concerning mileage being the only authorized and compensable reimbursement available. The court explained that Section 2322 (g) is unambiguous and cannot be reasonably interpreted in any other manner than its plain meaning. In other words, there are no reasonable doubts regarding the meaning of the term "mileage." The claimant had cited other sections of the Act that provide reimbursement for "travel expenses," but the court stated they were irrelevant as they would reasonably assume that the Legislature was and is aware of its choice of statutory language, and thus, they fully intended Section 2322 (g) to reflect only mileage as compensable. The court stated that the law demands that the court must assume that the Legislature amended Section 2322 (g) with the intent to use the specific term "mileage" despite the knowledge that other sections of the Act, including Section 2353, use the broader term "travel expenses." Therefore, the court held that since Section 2322 (g) is plainly unambiguous, the Board had correctly interpreted and applied the law to its decision. Since that decision was free from legal error, it was affirmed.

The impact of the Supreme Court's order is that the highest court in Delaware has now determined that the reimbursement to a claimant for attending medical appointments for a work injury includes only mileage, not tolls and parking expenses. Thus, employers and carriers should be careful to deny any requests for reimbursement of the latter items. ||

Florida Workers' Compensation

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Linda W. Farrell

Per curium affirmed with written concurring opinion, with recommendation by Judge Makar regarding costs charged to injured worker. Will costs be addressed by the Legislature?

Coto v. Univision/Sentry Casualty Co., No. 1D-19-0533, Appeal from JCC Havers, Decision date Sept. 25, 2019

The claimant, a tractor-trailer driver, fractured his right ankle while at work. After having corrective surgery, the claimant petitioned for additional surgery. However, after receiving authorization for PRP injections, he dismissed the petition for benefits to determine if the injections would eliminate the need for surgery. The employer was statutorily entitled to and sought costs because the claimant had dismissed the petition for surgery, even though it was later authorized.

Judge Makar opined that the claimant appeared to have acted in good faith throughout the process but was still assessed $1,074.34 in costs under section 440.34(3), Florida Statutes, which states: "If any party should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the non-prevailing party the reasonable costs of such proceedings, not to include attorney's fees."

Judge Makar wrote: "Imposition of costs makes little sense and operates as a deterrent to those seeking benefits in good faith in situations such as those confronting Coto…For this reason, it bears reiterating the recommendation of the panel…'that the Legislature consider whether an employee who files a petition for benefits in good faith should be subject to the imposition of costs.'" II

The nurse case manager did not meet the definition of a qualified rehabilitation provider; therefore, the motion for protective order was granted.

Debra Richardson v. Escambia County School District, OJCC Case Number 17-012599NSW, JCC Walker, Decision date Oct. 3, 2019

The claimant filed a motion for protective order, seeking to preclude the nurse case manager from engaging in *ex parte* conferences with the authorized treating physicians. The nurse testified that she is a registered nurse and a certified registered rehabilitation nurse. However, she had never provided rehabilitation services to the claimant nor had she been retained as a qualified rehabilitation provider. Further, she had never completed a vocational assessment of the claimant.

Originally, the claimant had executed a release, but claimant's counsel had revoked it. The judge of compensation claims noted that, while Fla. Stat. 440.13(4)(c) indicates that injured workers waive physician-patient privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation, the same is limited to the employer, the carrier, an authorized qualified rehabilitation provider or the attorney for the employer/carrier. The judge pointed to *City of Boynton Beach v. Joseph Price*, (1D-01-1633, Fla. 1st DCA 2001), where the appellate court upheld a judge of compensation claims' finding that the nurse could not engage in *ex parte* communications with the physicians. In this case, the judge held that the nurse case manager did not meet the definition of a qualified rehabilitation provider; therefore, the motion for protective order was granted. II

Communicable Diseases Are on the Rise

Mumps, measles and chicken pox are spreading through our workplaces. Whether you work in a school, a plant, a retail establishment, or anywhere with a high volume of people, you can expect to see an increase in these types of cases. We have an established team that can help you defend against these claims. We work with infectious disease experts and can help you to win these cases. II

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Pennsylvania Workers' Compensation

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Commonwealth Court Dismisses Action Brought by the AFL-CIO to Have the Act's New IRE Provision Declared Unconstitutional.

Pennsylvania AFL-CIO v. Commonwealth of Pennsylvania, Governor Tom Wolf and W. Girard Oleksiak, Secretary of the Department of Labor and Industry; 62 M.D. 2019; Filed Oct. 11, 2019; by Judge Cohn Jubelirer

This case involves an action brought by the AFL-CIO, seeking to have § 306(a.3) of the Pennsylvania Workers' Compensation Act declared unconstitutional. The provision provides for Impairment Rating Evaluations (IRE) and was signed into law following the Pennsylvania Supreme Court's decision in the case of *Protz v. WCAB (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), finding § 306(a.2) unconstitutional. In the *Protz* case, the Supreme Court found that § 306(a.2) of the Act violated Article 2, §1 of the Pennsylvania Constitution because it was an unlawful delegation of the General Assembly's legislative authority. The AFL-CIO argued that the new IRE law is also unconstitutional.

The court noted that § 306(a.3) changed the IRE process from the pre-*Protz* process in two ways. First, it reduced the threshold impairment rating from 50% to 35%. Second, IRE determinations were to be made pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition (AMA Guide), rather than pursuant to the most recent edition of the AMA Guide.

The court rejected the argument made by the AFL-CIO that the new IRE provision once again delegates the General Assembly's legislative function to the AMA, a private entity. According to the court, the General Assembly did not delegate its legislative authority when it enacted § 306(a.3), but adopted existing standards as its own in the exercise of its power to legislate. As the Supreme Court noted in *Protz*, the non-delegation doctrine did not prohibit the General Assembly from adopting as its own a particular set of standards which were already in existence at the time of adoption. The General Assembly did that by designating the Sixth Edition of the AMA Guides to be used for IREs, which was in existence when § 306(a.3) of the Act was enacted. The court further denied the AFL-CIO's request for an injunction to enjoin the new IRE section of the Act. ||

Medicare Update

By James E. Pocius, Esq. & Ross A. Carrozza, Esquire (570.496.4617 or racarrozza@mdwcg.com)

James E. Pocius

Ross A. Carrozza

Recently, the 9th Circuit Court of Appeals decided the case of *California Insurance Guarantee Association v. Azar*. In this case, Medicare brought an action against the California Insurance Guarantee Association seeking declaratory relief and demanding reimbursement for conditional payments. Initially, the federal court indicated that Medicare should be reimbursed because it was a secondary payer. However, the 9th Circuit Court of Appeals indicated that the California Insurance Guarantee Association (CIGA) only provides funding when one of its member insurers becomes insolvent and unable to pay its insured claims.

California state law prohibited CIGA from reimbursing state and federal government agencies, including Medicare. While the District Court concluded that federal law preempted California law to the extent that it prohibited CIGA from reimbursing Medicare, the 9th Circuit Court of Appeals reversed, holding that CIGA was not a primary plan and was specifically not a workers' compensation law or plan. Instead, the court held that CIGA was an insolvency insurer of last resort. The panel then indicated that insurance regulation is a field traditionally occupied by the states, and the panel presumed that the Medicare Secondary Payer provisions did not preempt state insurance laws unless Congress clearly manifested its intent to do so. The court then held that nothing in the Medicare statute or its implementing regulations suggests that Congress meant to interfere with state schemes to protect against insurer insolvencies. The panel reversed and remanded for further proceedings.

This is an interesting decision since CIGA actually guarantees workers' compensation payments. Thus, while it is an insolvency insurer, it makes payments just as a primary workers' compensation insurer would. This decision, if upheld (we do not know if it will be appealed to the Supreme Court), could be used to allow all of the states' guarantee funds to avoid payments to Medicare. Further, if Medicare's conditional payments are not reimbursable by these funds, it stands to reason that a set-aside would not be necessary since Medicare could not collect any payments from these insurers. It will be interesting to see if other states bring the same type of action.

It is still too early to tell if this would ever apply to a primary insurer. ||

Verdicts

Heather Byrer Carbone (Jacksonville, FL) successfully defended a motion for summary judgment filed by another carrier in a disputed employer/employee issue. The issue involved whether the injured employee was the statutory employee of our client or of the subcontractor/PEO who actually hired him. The injured worker was hired by a subcontractor during the aftermath of the Category 5 storm, Hurricane Michael, that hit near Panama City, Florida on October 10, 2018. The subcontractor's company could not provide hiring paperwork that would have confirmed workers' compensation coverage by the employee leasing company due to lack of electricity, internet connections and cellular service. Therefore, the parties agreed that the hiring paperwork would be hand delivered to the risk manager for the employee leasing company. The worker was injured the day before the hiring paperwork was hand delivered, but after the parties had agreed on hand delivery of the paperwork. The court found this to be enough evidence of detrimental reliance and of a disputed issue of material fact that the motion for summary judgment was denied.

Benjamin Durstein (Wilmington, DE) successfully handled a case before the Delaware Supreme Court. In its order, the Supreme Court affirmed a decision of the Superior Court that, in turn, had affirmed a Board decision regarding the compensability of travel expenses for trips to and from medical appointments. Specifically, the court agreed with the employer's arguments that the plain language of 19 Del. C. § 2322(g) only provides that mileage expenses are to be reimbursed by the employer when it comes to travel to and from compensable medical appointments. The claimant had petitioned for parking and toll expenses incurred during her trips to visit a doctor in Philadelphia, Pennsylvaia from her residence in Dover, Delaware. Although the amounts in question were very low, it matters because it potentially applies to every Delaware workers' compensation case. (*For more info on this case, see the case summary by Paul Tatlow on page 2.*)

Tony Natale (Philadelphia, PA) successfully dismissed a claimant's penalty petition in which he alleged that the employer utilized the transit authority's collective bargaining agreement to violate the Pennsylvania Workers' Compensation Act by failing to pay benefits that were adjudicated to be due and owing to the claimant in an underlying decision. The claimant was injured in the course and scope of employment during a fist fight on a bus. During the litigation of the underlying action, the claimant testified that he was using his "personal sick time," which paid him near full salary while out of work. Upon receiving a decision from the workers' compensation judge, finding a work injury, the employer utilized its collective bargaining agreement to set off the amount of benefits due and owing by the sick time received. In so doing, the employer restored the claimant's used sick time back into his sick time bank. The claimant filed a penalty petition, arguing he was entitled to collect his personal sick time and then get paid again for that same period with workers' compensation benefits. The judge ruled that the Act has always allowed the use of collective bargaining agreement policies as long as the claimant is not put in a worse position in terms of payment for lost time. The judge found that since the claimant's sick time was restored and the sick time paid more than the compensation benefits for the period at issue, there was no violation of the Act, regulations or Constitution.

Michele Punturi (Philadelphia, PA) successfully prosecuted a termination petition on behalf of a national water company. After securing all prior medical records, which showed a significant medical history, and a thorough and detailed cross examination of the claimant, Michele uncovered a past medical history of similar complaints and treatment and a later fall that was not disclosed by the claimant. After being specifically questioned by defense counsel, the claimant admitted to the nature and extent of his prior treatment, including office visits, prescription medication and MRIs, supporting Michele's contention that his prior complaints were basically identical. Further, the defense medical expert not only had the opportunity to perform a comprehensive medical examination, but he also reviewed all of the claimant's prior and post-incident records and diagnostic films. Of significance to the workers' compensation judge was the defense medical expert's extensive review of medical records, his comparison of diagnostic films, and his explanations to support his opinions. The judge found that the claimant was not credible because his testimony contradicted the defense medical expert. Additionally, based upon a review of the evidentiary record as a whole, which included expert deposition testimony and reports, the judge found the defense medical expert to be competent, credible and persuasive to support that the claimant was fully recovered from his work injuries, the resulting three surgeries, and all residuals. As such, the termination petition was granted.

Joseph Vender (Scranton, PA) successfully handled two recent cases. In the first case, the claimant sustained injuries to his left shoulder, arm, and carpal tunnel syndrome due to 24 years of repetitive use of his upper extremities. The claimant underwent surgery to his left wrist, elbow and shoulder in July 2018. The employer obtained an IME in October of 2018, which indicated full recovery, and a termination petition was filed. The workers' compensation judge granted the termination petition after accepting the expert medical testimony of the employer's doctor and finding that the claimant had fully recovered from his work injuries. In the second matter, the claimant had filed a claim petition, alleging disabling injuries to her low back, mid back, upper back, buttocks, neck, and head as a result of a slip and fall in the employer's restroom. The claimant reported the alleged event to the employer, who immediately advised that they would provide sedentary work to accommodate the claimant. The claimant refused, went out of work, and filed her petition. We presented testimony of two employer witnesses to establish that work was at all times available to the claimant. We also presented the testimony of the IME doctor, who found nothing wrong with the claimant. The workers' compen-sation judge found the testimony of the employer's witnesses to be credible. He also found our medical evidence to be credible and accepted our argument that the claimant's medical evidence did not establish the required causal connection between the alleged disability and the work injury. The claim and penalty petitions were dismissed. II