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What's Hot in Workers' Comp

TOP 10 DEVELOPMENTS IN DELAWARE WORKERS' COMPENSATION IN 2019

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

Paul V. Tatlow

1. The Superior Court disapproves the Board's decision that the employer must pay for any medical treatment the claimant receives in the hospital where he is treating following a work-related injury.

Barrett Business Services, Inc., D/B/A Enterprise Masonry v. Robert Edge, (C.A. No. N18A-05-005 CEB – Decided May 1, 2019)

The claimant was injured on a jobsite, sustaining injuries to his left hip and a laceration under his left eye. The claimant was not a healthy individual, having been a long-term smoker and having a lengthy history of high blood pressure. While receiving treatment for the work injury in the hospital emergency room, he suffered a mini-stroke from which he developed complications and eventually underwent surgery as a result of the stroke.

In his petition, the claimant sought compensability for treatment of the mini-stroke. The Board found that, but for the work injury, the claimant would not have been in the emergency room and receiving treatment for the mini-stroke. The Board, therefore, concluded the stroke was a work-related injury and awarded compensation for it.

The Superior Court reversed and remanded on appeal, taking the Board to task for side stepping the causation question on which both sides had presented testimony from medical experts. The court disapproved of the Board for simply finding that, in the broadest terms, the work injury caused the claimant to go to the hospital emergency room where he was treated for the mini-stroke, since by so doing, the Board effectively broadened the liability of the employer to that of a general insurer and ignored the basic question of what actually caused the mini-stroke.

This decision makes it clear that not all treatment a claimant receives when a work injury has occurred is compensable, only the care that is, in fact, causally related to the work injury. Especially in a hospital setting, treatment may need to be given at the same time for other medical problems the claimant has, but that does not thereby make it compensable.

2. It is now the law in Delaware that the employer is prohibited from asserting a workers' compensation lien 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 Jun. 14, 2019)

The employee died in an auto accident in New Jersey while driving a tractor-trailer that was owned and operated by the employer. The initial litigation before the Board determined that the decedent was an employee at the time of the accident and the claimant was, therefore, entitled to death benefits. The claimant later 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 limits of $300,000, the employer asserted a credit against the UIM recovery.

The Board issued a decision denying the employer's claim. On appeal, the Superior Court affirmed. In so doing, the court relied on recent case law establishing that a 1993 amendment to the subrogation statute eliminated any distinction between UIM coverage purchased by an employee versus that solely paid for by the employer, with the result that the employer could not assert a subrogation lien against any UIM policy.

3. Personnel changes at the Industrial Accident Board during the past year.

Jean Watkins was promoted to serve as Office Manager of Workers' Compensation and, in that role, supervises the administrative specialists. Michael Boone, Ph.D., is the new Director of Industrial Affairs, filling the vacancy that was created by the retirement of Julie Petroff. Brenda Sands has been serving as the acting Administrator for the Office of Workers' Compensation due to the departure of Stephanie Parker.

The current Board Members are Mark Murowany, who is the chair, Mary Dantzler, William Hare, Robert Mitchell, Patricia Maull, Peter Hartranft, Idel Wilson, Greg Fuller, Sr., Vince D'Anna and Angelique Rodriguez, who joined the Board in April 2019.

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4. The claimant does not have standing to bring a motion to assess a fine against the employer's medical expert on the basis that his expert fee exceeded the amount permitted under the practice guidelines.

Carol Streifthaul v. Bayhealth Medical Center, (IAB Hearing No. 1432002 – Decided Jul. 12, 2019)

The claimant had filed a legal motion to assess a fine against the employer's medical expert on the basis that he had violated the Act by charging an expert fee of $5,000, which is in excess of the amount permitted under the practice guidelines. Those guidelines specify that deposition testimony by a physician shall not exceed $2,000. The Board denied the motion, agreeing with the employer that the regulation in question capping expert medical fees was meant to limit the amount an employer can be required to pay for a claimant's medical expert fees but was not meant to limit the amount that an employer can choose to pay for its medical expert testimony. The latter fees are never chargeable to the claimant. On appeal by the claimant, the Superior Court remanded the case back to the Board to address the standing issue. The Board concluded that the claimant had not suffered an injury in fact related to the deposition fee charged by the employer's medical expert since she had prevailed on the underlying petition. Therefore, the Board held that the claimant did not even have standing to bring the motion seeking sanctions against the employer's medical expert.

5. New workers' compensation rates.

The Delaware Department of Labor announced that the new workers' compensation rates effective July 1, 2019, establish an average weekly wage of $1,088.84. Accordingly, the maximum weekly compensation rate is now $725.89, and the minimum weekly compensation rate is $241.96.

6. The Supreme Court affirms the lower court ruling, thereby establishing that an employer is only required to reimburse the claimant for mileage, not tolls and parking expenses, incurred for attending medical appointments in treatment for a work injury.

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

This case involved a motion filed by the claimant seeking reimbursement for attendance at medical appointments, including not only mileage but also tolls and parking fees. The Board denied the motion, agreeing with the employer's contention that pursuant to Section 2322 (g) of the Act, the claimant could only be reimbursed for mileage related to travel for medical treatment. The Superior Court affirmed, and now the Supreme Court, as the highest court in the state of Delaware, has agreed that reimbursement to a claimant for attending medical appointments for a work injury is limited to mileage. Employers and carriers should be careful to screen any such reimbursement requests to deny any claims for parking and tolls.

7. Interesting statistics from the Department of Labor.

The Department of Labor's *21st Annual Report on the Status of Workers' Compensation Case Management* shows that the number of certified health care providers has continued to increase. Specifically, in 2017 there were 2,755 certified providers, and in 2018, that number increased to 2,792. The report further shows that during 2018, a total of 7,708 petitions were filed, a very slight decrease from the prior year. As far as Utilization Review, in 2018 the Office of Workers' Compensation received 358 requests for Utilization Review, an increase of 11.5% from the prior year. They also received 203 petitions appealing Utilization Review Determinations, which is 56% of the cases where Utilization Review had been requested. As to those petitions, the great majority of them were later withdrawn prior to actually going to a hearing before the Industrial Accident Board. As in past years, chronic pain treatment and, in particular, pain medication continued in 2018 to be the treatment most challenged through the Utilization Review process.

8. The Board denies petition seeking approval for medical marijuana treatment, finding that the evidence did not establish that it was necessary and reasonable treatment for the work injury.

John Nobles-Roark v. Back Burner, (IAB No.1144068 – Decided Oct. 30, 2019)

The claimant filed a DACD Petition, seeking compensation for medical marijuana treatment that had started back in 2015. The claimant was receiving chronic pain treatment for failed back surgery that he had received after a work-related accident in May 1998. Dr. Bandera testified as the claimant's expert that the medical marijuana treatment was necessary and reasonable, and was helping to wean the claimant off the high-dose opiates that he had been taking. Dr. Brokaw testified as the employer's expert that the medical marijuana was not necessary and reasonable treatment and was, in fact, dangerous to the claimant, given that he had several comorbidities including chronic obstructive pulmonary disease and bipolarism. The Board denied the claimant's petition, finding that Dr. Bandera was not credible for many reasons, including the fact that he was unaware of the claimant's significant comorbidities and did not address them in his testimony. Further, the evidence showed that there were unexplained and significant gaps in the claimant's medical marijuana treatment, as well as his treatment with Dr. Bandera. In contrast, Dr. Brokaw provided credible testimony that, given the claimant's COPD and psychiatric condition, he was not a good candidate for medical marijuana.

9. The Board determines that the claimant's ongoing use of opioid medications is not reasonable and necessary treatment for his chronic pain condition.

Lynne Wilfong v. Ministry of Caring, Inc., (IAB Hearing No. 1328436 – Decided Jun. 28, 2019)

The claimant had sustained an injury to her lumbar spine and right lower extremity in a work injury. The litigation involved the claimant's appeal from a UR Determination that had ruled that her pain management treatment, including several opioid medications, was not guideline compliant. The Board ruled against the claimant, finding that the ongoing use of Fentanyl patches and Oxycodone was not necessary and reasonable treatment. In so doing, the Board agreed with Dr. Schwartz, the employer's expert, that long-term, chronic use of opioids is not effective for pain control and over a prolonged period of time causes other serious health issues. The claimant had other comorbidities, and under the care of Dr. Swamy, the treating physician, her condition actually deteriorated, rather than improve or even remain stable. The evidence showed there was no proper documentation that the opioid drug use had provided any positive patient response.

10. Statistic on appeals from Board decisions show the reversal rates continue to be extremely low.

The Annual Report from the Department of Labor gives the five-year cumulative summary of appeals from Board decisions. For the five-year period from 2014 through 2018, the Board rendered 1,875 decisions on the merits. From that number, only 194 were appealed, which is approximately 10.3%. Furthermore, from that number of appeals taken, 167 were resolved and only 13 decisions were reversed and/or remanded in whole or in part. This represents an extremely low reversal rate of only 0.69% of the decisions rendered in that five-year span. Therefore, it continues to be extremely difficult to overturn Board decisions on appeal. The lesson is to give full effort to winning your cases at the Board hearings. ||

TOP 10 DEVELOPMENTS IN FLORIDA WORKERS' COMPENSATION IN 2019

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

Linda W. Farrell

1. The First DCA reversed ruling on the basis that the judge of compensation claims 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 First District Court of Appeals 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).

2. Evidentiary order again limits parties' ex parte doctor conferences, finding discussions cannot suggest, direct or instruct provider as to what treatment or care to recommend.

Lyne Bien-Aime v. Correct Care Recovery Solutions/ESIS, Inc., OJCC 17-022305DAL, Ft. Lauderdale District, Order Jan. 2, 2019

The judge of compensation claims held that, although the attorney for the employer may discuss the claimant's medical condition with the claimant's provider on an ex parte basis, the employer or its representative shall not suggest to or instruct the doctor as to what treatment he or she may provide or recommend. The judge held that if the employer wishes to challenge a doctor's treatment or recommendations, it must do so at a conference where the claimant or his legal representative has the opportunity to be present, otherwise, a deliberate undermining of the doctor-patient relationship would occur.

3. Second opinion referral granted even though workers' compensation law does not provide for same.

Sylvestre v. Coca Cola and Travelers Ins, Sedgwick, OJCC# 16-003534, Ft. Lauderdale District, JCC Lewis

The claimant made a claim for authorization for a second opinion with a plastic surgeon. The employer argued that there is no second opinion provision in the statute (440.13(2)(f)) and that the claimant could use his one time change. The judge of compensation claims held that case law demonstrates that a claimant may obtain a second opinion but has the burden of proof to show that same is reasonable and medically necessary.

4. The work-from-home arrangement does not mean that the employer imports the work environment into a claimant's home and the claimant's home into the work environment.

Sedgwick v. Valcourt-Williams, No. 1D17-96, 1st DCA, April 5, 2019

On the date of the accident, the claimant had been working remotely for three hours when she got up to get a cup of coffee. As she reached for a cup in her kitchen, she fell over one of her two dogs. The judge of compensation's findings deemed the injury compensable, concluding the work-from-home arrangement meant the employer "imported the work environment into the claimant's home and the claimant's home into the work environment." The First District Court of Appeals stated that the question is not whether a claimant's home environment becomes her work environment, rather, the question is whether the employment—wherever it is—"necessarily exposes a claimant to conditions which substantially contribute to the risk of injury." The First DCA held that risks exist whether the claimant is at home working or she is at home not working. The majority opinion went on to say that it existed before she took her job and it will exist after her employment ends. Because the risk did not arise out of the employment, the First DCA reversed the judge's ruling.

5. The employer's ability to have an ex parte conference with the treating physician does not violate the claimant's right to privacy.

Varricchio v. St. Lucie County Clerks of Courts and Ascension Insurance, No. 1D17-3229 (1st DCA Fla, Apr. 29, 2019)

The attorney for the employer had a conference with the treating physician shortly before the doctor completed a questionnaire specifying a retroactive date for maximum medical improvement (which was relevant to the claim for temporary disability). The First District Court of Appeals held that the claimant had no legitimate expectation of privacy and that it is well established that this section does not violate the right to privacy. The court noted that workers' compensation cases are substantially different from a medical malpractice action (where conferences are a violation of privacy) and that the only medical professional to be interviewed was explicitly hired for the purpose of the workers' compensation case, to evaluate the causal connection between the work performed and the injury.

6. First DCA affirms the claimant as an independent contractor.

Norman Platt, Jr. v. Four Fountains, Inc. and PMA Companies, No. 1D18-2570, Decision Date Apr. 26, 2019, On appeal from Judge Clark (Ft. Myers)

This case was bifurcated on the issue of compensability, specifically to determine whether the claimant was working as an independent contractor or as an employee of the condominium association at the time of his accident. The judge of compensation claims found that the claimant was essentially a sole proprietor, as he was able to perform work for any entity in addition to or besides the employer and received compensation for work or services rendered at completion of a task. The judge also held that, because the claimant worked for an hourly wage, his testimony supported that he "[received] compensation for work or services performed ... on a per job basis." He was assigned specific tasks, completed them one at a time, and had the option (exercised on several occasions) to receive his pay upon the completion of each task. Therefore, the claimant was deemed an independent contractor on the date of his accident and not entitled to workers' compensation benefits. The First District Court of Appeal *per curiam* affirmed.

7. The claimant's mention of an expert medical advisor during opening and closing arguments did not constitute a timely request.

Frances Wilcox v. Publix and Publix Risk Management, No. 1D19-0076, Decision Date Jul. 3, 2019, Claimant appealed ruling of Judge Walker (Panama City)

The judge of compensation claims held that the claimant's mention of an expert medical advisor during opening and closing arguments did not constitute a timely request. On appeal, the First District Court of Appeals *per curiam* affirmed.

8. 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

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 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 carrier appealed, and the First District Court of Appeal held that no competent substantial evidence supported the judge's finding concerning the claimant's eligibility for Social Security disability benefits. 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.

9. 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

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 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."

10. 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 # 17-012599NSW, JCC Walker, 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 but 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. 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. **II**

TOP 10 DEVELOPMENTS IN NEW JERSEY WORKERS' COMPENSATION IN 2019

By Dario J. Badalamenti, Esquire (973.618.4122 or djbadalamenti@mdwcg.com)

Dario J. Badalamenti

1. The petitioner found to be the respondent's employee as the respondent exercised considerable control over the petitioner, who was economically dependent on his work relationship with the respondent, and there was a functional integration between the petitioner's work and the nature of the respondent's business.

Pendola v. Milenio Express, Inc. d/b/a/ Classic, Docket No. A-0225-17T2, 2018 N.J. Super. Unpub. LEXIS 2374 (App. Div., Decided Oct. 26, 2018)

The Appellate Division found that it was undisputed that the petitioner was economically dependent on the respondent as he had been driving for the respondent for eleven years as his sole source of income. As to the control factor, the Appellate Division found that cab drivers were subject to the respondent's rules: drivers would receive a dispatched fare; drivers were not free to pick up passengers based on how long the driver had waited since his last fare; and customer complaints about the condition of a vehicle immediately triggered suspension, which could be lifted only by inspection of the vehicle by one of the respondent's supervisors. Of greatest significance, the Appellate Division found that the petitioner's work was an integral part of the respondent's business.

2. Medical provider applications filed with the New Jersey Division of Workers' Compensation are governed by the six-year statute of limitations requiring that actions at law for recovery upon a contractual claim shall be commenced within six years after the cause of action has accrued.

The Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc., Docket Nos. A-5597-16T1, A-5603-16T1, A-5604-16T1, A-0151-17T1, A-0152-17T1, 2019 N.J. Super. Unpub. LEXIS 8 (App. Div., Decided Jan. 17, 2019)

The Appellate Division found that the timeliness of the medical provider's claims was governed by the general six-year statute of limitations—i.e., N.J.S.A. 2A:14-1—requiring that every action at law for recovery upon a contractual claim shall be commenced within six years after the cause of action shall have accrued.

3. The Appellate Division affirms dismissal of the plaintiff's tort action against the defendant based on a finding that the plaintiff was a "special employee" at the time of her injuries, limiting her remedies under the New Jersey Workers' Compensation Act.

Theezan v. Allendale Cmty. for Senior Living, Docket No. A-1650-17T2, 2019 N.J. Super. Unpub. LEXIS 890 (App. Div., Decided Apr. 16, 2019)

In affirming the lower court's granting of summary judgment, the Appellate Division relied on *Kelly v. Geriatric & Med. Servs., Inc*., 287 N.J. Super 567 (App. Div. 1996), where the court established a five-part test to be used in assessing whether a special employment relationship exists: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done by the employee is essentially that of the special employer; (3) the special employer has the right to control the details of the work; (4) the special employer pays the employee's wages; and (5) the special employer has the power to hire, discharge or recall the employee. Although no single factor is dispositive, the *Kelly* court held that the most significant factor is the element of control.

4. The Appellate Division affirms denial of the petitioner's application for reconstruction of wages based on the holding in Katsoris.

Lawson v. N.J. Sports and Exposition Auth., Docket No. A-4058-17T1, 2019 N.J. Super. Unpub. LEXIS 1462 (App. Div., Decided Jun. 16, 2019)

In *Katsoris v. South Jersey Publishing Co*., 131 N.J. 535 (1993), the New Jersey Supreme Court instructed that reconstruction of wages is appropriate when the "petitioner has demonstrated that her injuries, which disable her from engaging in part-time employment, have disabled or will disable her with respect to her earnings capacity in contemporary or future full-time employment." At the conclusion of trial, the judge of compensation found the petitioner to be "a very sturdy woman with a high level of physical strength and endurance and energy," and accordingly concluded that she had failed to prove that she lacked the potential for full-time employment under *Katsoris*.

5. The Appellate Division revisits Connolly 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 Jul. 22, 2019)

In *Connolly v. Port Authority of New York & New Jersey*, 317 N.J. Super. 315 (App. Div. 1998), 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 the judge's 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.

6. The Appellate Division affirms denial of the petitioner's motion for medical and temporary benefits based on the petitioner's failure to sustain her burden of proof as to the compensability of her injury.

Robinson v. United Airlines, 2019 N.J. Super. Unpub. LEXIS 1920 (App. Div., Decided Sep. 18, 2019)

Under the Workers' Compensation Act, an injury is compensable if it is caused by an accident arising out of and in the course of her employment. The burden of proving that an accident is compensable "rests upon a workers' compensation claimant." *Drake v. Essex Cty*., 192 N.J. Super. 177 (App. Div. 1983). Here, the judge of compensation found that the petitioner failed to prove that her rotator cuff tear was caused or exacerbated by her work conditioning therapy. The judge noted that at no time during the petitioner's work conditioning sessions did she complain of having suffered an injury to her left shoulder, nor did she report to her own physician that her rotator cuff tear resulted from trauma sustained during her work conditioning.

7. Appellate Division affirms denial of motion for medical and temporary benefits based on petitioner's failure to prove that continued treatment with opioid medication would reduce his pain or allow him to better function.

Martin v. Newark Public Schools, Docket No. A-0338-18T4 (App. Div. decided, October 4, 2019).

Under *Hanrahan v. Twp. of Sparta*, 284 N.J. Super. 327 (App. Div. 1995), whether characterized as curative or palliative, treatment is compensable if competent medical testimony shows that it is "reasonably necessary to cure or relieve the effects of the injury" and thereby improves a petitioner's "ability to function." Here the judge of compensation found credible the medical testimony of the petitioner's treating physician, who opined that continued use of opioid medication would not heal the petitioner or relieve his condition, and that the petitioner should consider weaning himself from opioid medication in favor of other palliative care or surgery.

8. The Appellate Division reverses and remands granting of the petitioner's motion for medical and temporary benefits as the petitioner failed to sustain his burden of establishing medical and legal causation under the statute.

Riley v. Thomas Co., 2019 N.J. Super. Unpub. LEXIS 2249 (App. Div., decided Nov. 1, 2019)

As the Appellate Division reasoned, "It was Riley's burden to establish causation by producing live testimony. Nonetheless, the judge of compensation required that Thomas first produce its witness, and after failing to present evidence demonstrating a lack of causation, ruled in favor of Riley. By doing so, the judge of compensation incorrectly relieved Riley of his burden of presenting testimony establishing an essential element of his claim—i.e., medical and legal causation. Moreover, although the judge of compensation made no express findings on the issue of causation, by directing that Thomas authorize and pay for Riley's surgery, the judge of compensation implicitly determined that Riley established causation even though the hearing record lacks any competent evidence provided by Riley supporting that finding."

9. The Appellate Division affirms granting of the petitioner's motion for medical and temporary benefits as unopposed as the certifications provided by the respondent failed to include the verification required for certifications in lieu of oath.

Capel v. Township of Randolph, 2019 N.J. Super. Unpub. LEXIS 2094 (App. Div., decided Oct. 10, 2019)

The judge of compensation noted that the respondent's initial opposing papers did not include a certification of the respondent's attorney. Instead, counsel "submitted a two-page letter rampant with uncorroborated, factual speculation and argument predicated on matters outside the personal knowledge of the submitter." Further, the respondent submitted "certifications" that were both unsigned and failed to include the verification required under R. 1:4-4(b)—i.e., "I certify that the foregoing statement made by me are true. I am aware that if any of the foregoing statement made by me are willfully false, I am subject to punishment." The judge explained that the required language is intended to secure personal responsibility for sanctions if a false certification is submitted. *See Sroczynski v. Milet*, 197 N.J. 36 (2008). The judge found that the respondent's opposing papers were not in compliance with the rules, despite respondent's counsel having been previously warned, on several occasions, about such deficiencies. Accordingly, the judge declined to consider the submissions as opposition, considered the petitioner's motion to be unopposed and granted the petitioner's motion.

10. The Appellate Division affirms the finding that the petitioner's injuries did not arise out of and in the course of employment as she was injured on a public street not within the control of her employer while exiting an employee parking garage.

Manuel v. RWJ Barnabas Health, 2019 N.J. Super. Unpub. LEXIS 2120 (App. Div., decided Oct. 16, 2019)

The judge of compensation found that the employer rented only a small portion of the spots in the parking garage; did not own or maintain the garage; derived no direct business interest from arranging for its employees to park in the garage; did not control the public street the injury occurred on; did not add any special or additional hazards to the employee's ingress or egress to work; and did not control the employee's ingress or egress route. As the judge reasoned, the petitioner "was not directed to cross" where she was injured, and in fact, the employer "provided an alternate means to and from the garage, this being a shuttle bus, but [petitioner] chose not to use it, but to walk across [the public street]." II

TOP 10 DEVELOPMENTS IN PENNSYLVANIA WORKERS' COMPENSATION IN 2019

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

Francis X. Wickersham

1. The Supreme Court holds that the insured may not enforce its statutory right to subrogation by filing a direct action against the tortfeasor, absent definitive action taken by the injured employee.

The Hartford Insurance Group on Behalf of Chunli Chen v. Kafumba Kamara, Thrifty Car Rental and Rental Car Finance Group., 199 A.3d 841 (Pa. 2018)

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

2. 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.), 199 A.3d 482 (Pa. Cmwlth 2018)

There was not substantial evidence to support a conclusion that the visual disability of the decedent's daughter made it impossible for her to earn an income; therefore, she was not entitled to dependent death benefits under the Pennsylvania Workers' Compensation Act.

3. Because the claimant's employment was exclusively in Delaware at the time of the work injury, the dismissal of his claim for lack of jurisdiction under § 305.2 (a)(1) of the Act was proper.

James McDermott v. WCAB (Brand Industrial Services), Inc., 204 A.3d 549 (Pa. Cmwlth. 2019)

Although the claimant spent 90% of his work time in Pennsylvania, his employment was not continuous. The record clearly indicated that, at the time of injury, the claimant worked exclusively in Delaware. Therefore, Pennsylvania lacked jurisdiction under the Act.

4. The joint compact between Pennsylvania and New Jersey that established the Delaware River Port Authority did not confer jurisdiction to Pennsylvania authorities under the Act for injuries occurring in New Jersey.

Zachary Kreschollek v. WCAB (Commodore Maintenance Corp), 201 A.3d 916 (Pa. Cmwlth. 2019)

Where Pennsylvania and New Jersey are joint owners of a bridge and the claimant sustained his injuries while standing on the ground in New Jersey, the claim fell outside the jurisdiction of the Act.

5. A claimant's duties as a caretaker for a woman suffering from mild dementia come within the domestic service exception to the Workers' Compensation Act; therefore, claimant's injuries are not compensable.

Pamela Joan Van Leer v. WCAB (Hudson), 204 A.3d 558 (Pa. Cmwlth. 2019)

A petitioner's claim was properly denied because her duties as a caretaker for a woman suffering from mild dementia were within the domestic service exception to the Act, as her main responsibility was to get the woman ready for bed and make sure she stayed in bed throughout the evening.

6. A claimant's motor vehicle accident while traveling home from a company celebration with co-workers was not in the course and scope of employment.

Jonathan Peters v. WCAB (Cintas Corporation), 214 A.3d 738 (Pa. Cmwlth. 2019)

A claim petition was properly dismissed because the employee was not in the course of his employment when he received his injuries, since he had left his work vicinity, passed his home, attended happy hour at a bar, and was involved in an accident on his way home from happy hour.

7. Medical and indemnity benefits paid to a claimant under the Heart & Lung Act are not subrogable from the claimant's third party recovery.

James Kenney v. WCAB (Lower Pottsgrove Township and Delaware Valley Workers Compensation Trust), 2019 Pa. Commw. LEXIS 723

A workers' compensation trust, while perhaps indistinguishable from an insurance company, was not entitled to subrogation against a police officer's third-party recovery because the police officer did not actually collect any workers' compensation benefits, only Heart & Lung benefits.

8. An employer cannot use a "no liability" C&R Agreement to challenge jurisdiction in a fee review matter when it accepted responsibility in the C&R for payment of the provider's bills that were subject to the pending fee review..

Workers' First Pharmacy Services, LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (Cincinnati Insurance Company), 216 A.3d 554 (Pa. Cmwlth. 2019)

The claimant was not responsible for the cost of treatment of work-related injuries since the employer promised in a settlement agreement that the claimant would not be liable for the pharmacy's bills, regardless of the outcome of the litigation on the fee determinations.

9. Court dismisses insurance company's fraud case against physicians who own pharmacies that dispense costly compound pain prescriptions written by those physicians for their injured patients.

Liberty Mutual Group, Inc. et.al. v. 700 Pharmacy, LLC, et. al.

A Philadelphia County court granted a motion to dismiss a lawsuit filed by an insurance company against multiple pharmacies and doctors alleging workers' compensation fraud. In the complaint, the insurance company claimed the defendants created a fraudulent scheme that allowed them to bypass workers' compensation law, resulting in the insurance company paying thousands of dollars to the defendants for unwarranted compounding pain cream prescriptions written for patients that suffered a work injury or an automobile accident injury.

10. 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

An action was brought by the AFL-CIO, seeking to have § 306 (a.3) of the Act declared unconstitutional. The provision provides for Impairment Rating Evaluations (IRE) and was signed into law following the Supreme Court's decision in the case of *Protz v. WCAB (Derry Area School District)*, 161 A.3d 827 (Pa. 2017), which found § 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 Commonwealth Court rejected the AFL-CIO's argument that the new IRE law was similarly unconstitutional. ||

2020 RECOVERY THRESHOLDS REGARDING CONDITIONAL PAYMENTS

By Ross A. Carrozza, Esquire (570.496.4617 or racarrozza@mdwcg.com)

Ross A. Carrozza

Each year, as required by Section 1862(b) of the Social Security Act, Medicare must review their costs related to collecting conditional payments. If the cost of recovery is over the amount of the conditional payment, Medicare does not seek recovery. The threshold with regard to workers' compensation cases, physical trauma-based liability insurance cases, and no-fault insurance cases will remain at $750.00 where the no-fault insurer or workers' compensation entity does not otherwise have ongoing responsibility for medical payments.

Essentially, this means that carriers and self-insureds are not required to report and CMS will not seek recovery on settlements under $750.00. An entity does not have to do a conditional payment search, nor does an entity have to report the settlement to Medicare. The threshold will again be reviewed for 2021.

If you have any questions, please contact Ross Carrozza at 570.496.4617 or racarrozza@mdwcg.com. ||