MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 23 | NO. 9 | SEPTEMBER 2019

What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

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); 1835 C.D. 2017; July 18, 2019; Judge Covey

The claimant worked for the employer as a uniform sales representative whose job involved travel from the employer's home branch and his own home. On the date of injury, after his last appointment, he drove to Allentown, Pennsylvania to attend a celebration with co-workers at a restaurant, and on the way, he passed the exit for his home. While driving home from the restaurant, he was involved in a motor vehicle accident and sustained multiple injuries.

The claimant filed a claim petition, which was denied and dismissed by a workers' compensation judge, who concluded that the claimant was not in the course and scope of his employment at the time of the accident. The claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

On appeal to the Commonwealth Court, the claimant argued that he was in the course and scope of his employment at the time of the accident because he was a travelling employee on his way home from a work-sponsored event. The court noted that a travelling employee is entitled to a presumption that he is in the course and scope of employment when travelling to or from work. The court further noted that in other workers' compensation cases involving motor vehicle accidents where compensability was found, the claimants were not in the vicinity of their homes when they stopped at the end of their work days and their homeward trips were a necessary part of their business excursions.

The court found this case to be distinguishable because the claimant left his work vicinity, passed his home, attended the celebration and was involved in an accident on the way home from that event. According to the court, the claimant's "homeward trip" ended before the claimant travelled to the restaurant. Therefore, the claimant's travel home from the restaurant could not be considered in the course and scope of his employment. The court further affirmed the workers' compensation judge's finding that the celebration was a social gathering and did not further the interests of the employer. II

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); 845 C.D. 2018; August 2, 2019; President Judge Levitt

The claimant, who worked as a police officer for the employer, was in a motor vehicle accident in September of 2014. Delaware Valley Workers Compensation Trust (Trust) acknowledged the work injury via a notice of compensation payable. The employer paid the claimant his full wages pursuant to the Heart and Lung Act, and the claimant's workers' compensation checks were signed over by the claimant to the employer. Later, the claimant filed an action against the driver of the vehicle in his accident, and the Trust asserted a lien.

Prior to the third party case settling, the employer filed a petition to review to protect its lien rights. Afterwards, they filed a second petition to review, requesting a determination as to whether benefits were properly paid under the Workers' Compensation Act. The claimant maintained that benefits should have been paid pursuant to the Heart and Lung Act and that the employer could not subrogate against Heart and Lung benefits.

The workers' compensation judge agreed with the claimant and denied the employer's first review petition. The judge noted that the employer was not a self-insured entity but, rather, a member of a self insurance group fund. Nevertheless, the judge found that this did not permit the employer or the Trust to subrogate against the claimant's tort recovery.

The Appeal Board reversed the workers' compensation judge's decision that benefits were not subrogable. The Board found that the Trust, acting in the same manner as an insurance carrier, paid workers' compensation benefits completely separate from the employer's payment of Heart and Lung benefits.

The Commonwealth Court reversed the Board. In doing so, it found that the Trust, while perhaps indistinguishable from an insurance company, nevertheless remitted workers' compensation indemnity payments to the claimant that were then signed over to the employer. The claimant did not actually collect any workers' compensation benefits, only Heart and Lung benefits. The court also found that it was irrelevant that the Trust paid workers' compensation benefits to the employer, noting that the critical question in determining whether a right of subrogation exists is the nature of the benefits for which subrogation is sought, not who is paying the benefits or whether benefits are being paid from a separate account. **II**

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); 1619 C.D. 2018; August 7, 2019; President Judge Levitt

The claimant filed a claim petition in which he alleged that he suffered multiple injuries while moving a cabinet with a hand truck. Medical bills from the pharmacy were received by the employer, which they denied on the basis that the claimant did not sustain a work injury. The pharmacy responded by filing three fee review applications. Two applications were denied on the basis that they were premature since the employer contested liability. One was granted. The employer requested *de novo* hearings, arguing that the Medical Fee Review Section lacked jurisdiction because the employer had no liability for the claimant's injuries.

Subsequently, the employer and the claimant presented a C&R Agreement to the workers' compensation judge, which stated that the employer was not admitting liability. It also specified there were pending fee reviews that were not being resolved by the C&R and that the claimant would not be responsible for any payments to the pharmacy pursuant to the fee review litigation. Upon questioning by the employer's counsel, the claimant indicated that he understood he would not be responsible for payment of the pharmacy bills that were subject to the pending fee review litigation.

After the C&R was approved, the Hearing Office vacated the three determinations of the Medical Fee Review Section, holding that, because the employer had not been adjudicated liable for the work injury, the Hearing Office lacked jurisdiction over the fee review contest. The pharmacy appealed to the Commonwealth Court.

The court vacated the decision of the Hearing Office, finding that the employer accepted full liability for the debt to the pharmacy, even though they did not admit liability in the C&R Agreement. The court noted that the employer, in both the Agreement and in questioning the claimant at the C&R hearing, promised the claimant that he would not be liable for the pharmacy's bills, regardless of the outcome of the fee review litigation. In other words, the employer accepted responsibility for the debt to the pharmacy when it released the claimant from any obligation to pay the pharmacy in the C&R Agreement. **II**

Florida Workers' Compensation

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

Linda W. Farrell

First District Court of Appeal addresses whether termination from employment prevents an employer from arguing voluntary limitation of income with regard to temporary partial disability benefits.

MJM Electric, Inc./OCIP and Sedgwick CMS v. William Spencer, DCA #18-4064 Panel Judges: Ray, Bilbrey and Jay; D/A 8/1/17; Decision date July 29, 2019

The employer appealed Judge Lorenzen's decision based on seven issues, but the 1st District Court of Appeal only addressed the issue of temporary partial disability.

This case involves a journeyman electrician, William Spencer, who was hired by the employer through a union hall. The claimant reported an injury on August 1, 2017, and then went home. He stayed home for the next two days. When he returned to work on the third day, he was taken to see the authorized physician.

The claimant's supervisor spoke with the claimant on August 2nd. After not hearing from him the next day, the supervisor and the on-site safety employee tried calling the claimant three times that day without success. On August 8th, the claimant called to say that he was not coming in to work. The employer tried calling the claimant on August 10th and August 14th, leaving messages that light-duty work was available. The employer called the union hall on August 14th and was told that they had not heard from the claimant. The employer testified that they would have been able to accommodate whatever restrictions were assigned, short of a no-work status, until the claimant was released to full duty.

The 1st District Court of Appeal reversed the Judge of Compensation Claims' rejection of the employer's affirmative defense that the claimant voluntarily limited his income by refusing suitable employment after the date the employer terminated his employment and remanded the case for further proceedings. Temporary partial disability benefits are payable to an injured employee if he has not reached overall maximum medical improvement and the medical condition creates restrictions on his ability to work. Here, the employer did not dispute the Judge of Compensation Claims' finding that the claimant met his *prima facie* burden of proving entitlement to temporary partial disability benefits; however, they argued that the judge erred as a matter of law when she rejected the affirmative defense of a voluntary limitation of income after the claimant's termination date.

The employer relied on Section 440.15(6), which states that an employee who refuses suitable employment is not entitled to indemnity benefits, such as temporary partial disability benefits, "at any time during the continuance of such refusal unless at any time in the opinion of the Judge of Compensation Claims such refusal is justifiable." In her order, the Judge of Compensation Claims found that the claimant voluntarily limited his income by refusing suitable employment up until the date his employment was terminated for job abandonment (August 16th), but that after that date, the defense no longer applied because the employer stopped offering suitable employment. The DCA found that the Judge of Compensation Claims erred in this regard.

The claimant testified that he did not believe he was able to safely work after the accident and that he "can't work" because "there's no such thing as light duty on a job like he was working on." The Judge of Compensation Claims held that the employer did not meet its burden of showing available suitable employment *after* his termination date.

Based on its previous holding in *Moore v. Servicemaster Commercial Servs.*, 19 So. 3d 1147 (Fla. 1st DCA 2009), the court held that an employer is not required to "continually re-offer a job to avail itself of this statutory defense." But at the same time, the court emphasized that the employer must, nonetheless, "establish the continued availability of the job for each applicable period to obtain the continued benefits of the defense."

The court went on to say that when an injured employee's employment is terminated, a three-part inquiry applies: (1) did the employer establish the continued availability of suitable employment after termination; (2) did the injured employee continue to refuse suitable employment after termination; and (3) was the refusal justified?

The DCA said that the Judge of Compensation Claims' finding that the employer was not likely to offer light-duty work after his release to full duty on August 21st was speculative based on the record and, even if supported by the evidence, would not explain an award beginning August 17th.

The DCA reversed and remanded for reconsideration with findings addressing the: (1) continued availability of suitable employment; (2) claimant's continued refusal of such suitable employment; and (3) justification for continued refusal. ||

News from Marshall Dennehey

Niki Ingram (Philadelphia, PA) is a recipient of the *Philadelphia Business Journal*'s "Minority Business Leader Awards." The award is given in recognition of the Philadelphia region's top minority business leaders, based on professional accomplishments, community leadership, philanthropy, and awards and milestones. Niki was featured in the *Philadelphia Business Journal*, along with the other recipients, in a special supplement published on August 16, 2019, and she was recognized at an awards dinner on August 15. Congratulations, Niki!

We are proud to announce that **Daniel Deitrick**, shareholder in our Pittsburgh office, has been selected to the 2020 Edition of the Best Lawyers in America®. Dan was selected a Best Lawyer for the first time in the practice area of Workers' Compensation Litigation. ||

Verdicts

Ashley Talley (Philadelphia, PA) secured a defense verdict on appeal of a decision that assessed liability against another insurance carrier. Claim petitions were filed against an uninsured employer (who our client briefly insured, but was no longer on the risk at the time of injury), the Uninsured Employers Guaranty Fund, our client and a separate insurance carrier. Litigation presented complex legal issues, although ultimately, the claimant was able to prove an entitlement to workers' compensation benefits. The primary issue was identifying the liable defendant. Ashley was successful in proving that it was not our client. The liable carrier appealed, seeking to impute liability onto the uninsured employer, our client and the Uninsured Employers Guaranty Fund. However, the Appeal Board was not persuaded and upheld the determination against the liable employer.

Michele Punturi (Philadelphia, PA) successfully defended an international car manufacturer in a case involving nine fee reviews filed by the claimant's chiropractor, who was billing separately for procedures performed on the same day as the office visit under code 992130-25. The hearing officer issued a decision that the employer and its TPA were liable for payment of all office visits billed under the code, plus statutory interest. The employer and its TPA filed an appeal, and the Pennsylvania Commonwealth Court remanded the case to determine what constitutes "a significant and separately identifiable service performed in addition to another procedure, pursuant to 34 Pa. Code Section 127.105e." The court determined that a treatment performed on the same date does not constitute "a significant and separately identifiable service" for which a chiropractor may be paid. The workers' compensation judge found the defense met its burden of proving that it properly denied payment for the office visits billed by the provider under code 99213-25. Therefore, Supersedeas Fund reimbursement will enable the defendant/employer to secure monies back that were paid during the pendency of the litigation.

Tony Natale (Philadelphia, PA) successfully defended a Bucks County apparel manufacturing company in the litigation of claim and penalty petitions. The claim petition alleged disc herniation injuries in the neck, upper back and lumbar spine as a result of job duties. The penalty petition alleged that the insurer committed fraud in lulling the claimant to believe his claim was accepted as compensable by paying medical bills and then denying liability for the injuries. Tony was able to establish that the claimant presented a false medical history as to his pre-existing conditions, and the claimant's expert was found to have relied on the false history. As such, the claimant's allegations of work-related disc herniations and disability were dismissed. The workers' compensation judge also found that no evidence of record supported the claimant's penalty petition as payment of medical expenses is not a violation of the Act and the insurer is well within its rights to deny a claim as not compensable.

Tony also successfully defended a Pennsylvania- and New Jersey-based employment agency in the litigation of a claim petition on the bifurcated issue of jurisdiction. Tony convinced the workers' compensation judge that a claimant injured while loading materials on a barge in the Delaware River lacked jurisdiction under the Pennsylvania Workers' Compensation Act and was relegated to the Longshore Act. The employer in this case had coverage and indemnity through a borrowing employers Longshore policy; thus, our client was able to escape all liability even in the Longshore action. ||