MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Delaware Workers' Compensation

By Paul V. Tatlow, Esquire | 302.552.4035 | pvtatlow@mdwcg.com

Paul V. Tatlow

The Board denies the claimant's DACD petition by accepting the medical opinion of the employer's expert in concluding that the claimant's latest cervical spine surgery was not compensable.

Jaime Phipps v. Southern Wine & Spirits, (IAB Hearing No. 1432098-Decided Oct. 14, 2020)

This case presented an interesting medical causation issue on a spinal surgery involving the adjacent segment disease phenomenon in which the employer was represented by this writer. The claimant had a compensable work injury on August 12, 2015, which was initially accepted only as a cervical sprain with right arm radicular complaints. She later had a cervical spine surgery on March 20, 2018, involving a discectomy at the C3-C4 level with fusion, which was accepted as compensable. After a period of temporary total disability, the claimant returned to work for the employer as an outside sales consultant. Later, in April 2019, the claimant developed right-sided neck pain for which she again saw Dr. Eskander, who had done the initial surgery. Dr. Eskander performed a second cervical spine surgery on August 28, 2019, involving a discectomy with fusion at the C6-C7 level. This resulted in a closed period of temporary total disability. After the employer disputed the compensability of the 2019 surgery, the claimant filed a DACD petition that led to a hearing with the Board.

The issue before the Board was whether the claimant's C6-C7 surgery in August 2019 was causally related to the work injury and the initial surgery at the C3-C4 level. Dr. Eskander testified that the C6-C7 level on the cervical spine is the one that is most likely to herniate and this was more likely to occur here since the claimant had already undergone the initial surgery three levels away. Dr. Eskander referred to this as "noncontiguous adjacent segment disease" and explained that, because it happened just over a year after the initial cervical spine surgery, it was causally related to it.

The employer's medical expert, Dr. Fedder, testified that the disc problem and the surgery at the C6-C7 level were unrelated to the work injury and the prior surgery. Dr. Fedder explained that in his opinion the claimant had developed a C7 radiculopathy of a compressive nature in April of 2019, which was the reason for the August 2019 second surgery.

The Board's decision discusses in detail prior decisions it had issued on the spinal surgery issue of adjacent segment syndrome, some of which found for the claimant and some for the employer. However, the Board stated that this is not an issue to be decided based on legal precedent; rather, it depends on the facts in the particular case.

Importantly, the Board agreed with the employer that Dr. Eskander's causation theory was very questionable since, by using the term "noncontiguous adjacent segment disease," he was in essence treating the word "adjacent" as if it does not mean adjacent, which is a synonym for contiguous. Instead, the Board accepted the reasoning of Dr. Fedder, who testified that the medical literature discusses this issue and that none of the studies support the theory that adjacent segment disease can skip over a level to affect a disc further along the spine. Therefore, the Board concluded that the claimant had not shown that it was more likely than not that the C6-C7 level herniation was causally related to the prior cervical fusion at the C3-C4 level or the work injury. Quite simply, the Board stated that scientific literature does not establish that the adjacent segment disease phenomenon can skip over intervening levels, leaving them unaffected and yet affect a level even further away. This was at best a mere possibility and insufficient to establish the requisite legal causation. Accordingly, the claimant's petition was denied.

Florida Workers' Compensation

By Linda W. Farrell, Esquire | 904.358.4224 | lwfarrell@mdwcg.com

Linda W. Farrell

Claimant injured in car accident while on a morning "lunch break." Judge denies compensability as the lunch break was purely personal in nature and of no benefit to the employer. Judge also held that neither the special hazard nor dual purpose exceptions applied.

Virginia Rouse v. Escambia County School District and Self Insured, OJCC# 17-026263, Pensacola District, JCC Walker; Decision Date: Oct. 6, 2020

This case involves an employee who took her lunch break in the morning so that she could take her son to school. On the date of the accident, she was taking her child to school and was involved in a motor vehicle accident about a half of a mile from her place of employment. The employer denied compensability, contending that she was not in the course and scope of her employment. The judge ruled that the claimant's morning "lunch break" was purely personal in nature and that the employer did not receive any benefit from the trip. The judge further held that neither the special hazard nor dual purpose exceptions applied. Compensability denied.

Judge denies claimant's petition as the statute of limitations had run and agrees that a doctor visit and prescribed medication were unauthorized.

Jose L. Cabeza v. Patnode Roofing, Inc. and Summit, OJCC# 17-013328, Ft. Myers District, JCC Clark; Decision Date: Oct. 1, 2020

The employer asserted that the statute of limitations had run on the claimant's 2011 work injury when the claimant filed a petition in 2020 for continued medical treatment in Mexico and temporary indemnity benefits. The claimant contended that a visit to a neurosurgeon and receipt of medication in 2019 tolled the statute of limitations. The employer asserted that neither the doctor visit nor medication was authorized. Coincidentally, the claimant had two dates of accident with two different employers but with the same carrier. The carrier had paid for a MRI related to the claimant's other work injury with another employer, but they paid for the wrong date of accident/claim. They argued that this payment was in error and did not toll the statute. The judge agreed and denied the claim.

The judge finds that the claimant made false representations and holds entire claim was barred.

Gustavo Porras v. Adonel Concrete Pumping and Finishing and Summit, OJCC# 18-003820, West Palm Beach District, JCC Stephenson; Decision Date: Sept. 18, 2020

The claimant filed a petition seeking compensability of a hip and ankle injury. The employer asserted misrepresentation and *Martin v. Carpenter* defenses. The claimant denied being involved in prior car accidents in his deposition, to the doctors and during his hiring process. The judge agreed that the claimant made false representations and held that the entire claim was barred.

New Jersey Workers' Compensation

By Dario J. Badalamenti, Esquire | 973.618.4122 | djbadalamenti@mdwcg.com

Dario J. Badalamenti

The Appellate Division affirms the dismissal of a third-party complaint filed by a general contractor seeking indemnification from its subcontractor for a tort action filed by the subcontractor's injured employee.

Mario Gonzalez v. Laumar Roofing v. Guiliano Environmental, Docket No. A-4067-18T1 (App. Div., Decided Aug. 10, 2020)

In this decision involving the exclusive remedy provision of the New Jersey Workers' Compensation Act, the Appellate Division found the third-party action filed by a general contractor against its subcontractor for indemnification from tort liability was barred by the exclusive remedy provision of the Act because the plaintiff was an employee of the subcontractor and had not asserted his employer committed any intentional wrongs against him. The Appellate Division found the Act did not authorize a third-party complaint against an employer in these circumstances.

The plaintiff was employed as a laborer with the third-party defendant, Guiliano Environmental. A school district awarded Laumar Roofing Company a contract to perform a roof tear down and replacement at an elementary school. Laumar subcontracted with Guiliano to perform a portion of the work. While working at the job site, the plaintiff fell from the school's roof and sustained significant bodily injury. At the time of the accident, the plaintiff was not using the safety harness provided by his employer. The plaintiff testified that his supervisor, a Guiliano employee, instructed him not to use the harness except when federal inspectors were present at the worksite. He further testified that his fall resulted from his climbing onto the roof from the edge of a dumpster and that he was instructed by his supervisor to access the roof in this fashion in order to save time, rather than taking a safer route via a ladder on the opposite side of the building. After the plaintiff's fall, OSHA cited Guiliano for "lack of fall protection and inadequate fall hazard training." It was noted that OSHA had cited Guiliano in the past for fall-related safety infractions.

The plaintiff filed a claim against Guiliano with the Division of Workers' Compensation for work-related injuries and received benefits pursuant to the Act, N.J.S.A. 34:15-1 et seq. He also filed a complaint in the Law Division against Laumar, alleging that as the general contractor, Laumar was negligent in failing to provide a reasonably safe place to work. The plaintiff did not name Guiliano as a defendant in his complaint, nor did he allege that his injuries were the result of an intentional wrong by Guiliano or its employees. Laumar subsequently filed a third-party complaint against Guiliano, alleging that any injuries which the plaintiff may have suffered were the result of the intentional wrongs of Guiliano or its employees. Laumar sought indemnity from Guiliano for damages it might owe the plaintiff under the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to 5, the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to 5.8, and common law indemnity.

Guiliano moved for summary judgment, arguing that Laumar's third-party complaint was barred by the Act because the plaintiff received workers' compensation benefits for his injuries and did not allege that either Guiliano or its employees committed intentional wrongs against him. Laumar opposed Guiliano's motion, arguing that Guiliano and its employees harmed the plaintiff with intentional wrongs within the meaning of N.J.S.A. 34:15-8, constituting an exception to the Act's bar against an employee bringing a tort action against his employer.

The trial court granted Guiliano's motion and dismissed Laumar's third-party complaint. The court concluded that the claims of a third-party tortfeasor against an employer do not fall within the exception created by N.J.S.A. 34:15-8 when an employee has not alleged an intentional wrong by the employer. Laumar appealed.

In affirming the trial court's dismissal of Laumar's third-party claim, the Appellate Division found that N.J.S.A. 34:15-8 precludes a third-party tortfeasor from seeking statutory or common law indemnification from an employer with respect to a judgment obtained by an employee who received workers' compensation benefits. The Appellate Division explained:

> In *Ramos v. Browning Ferris Industries, Inc.*, 103 N.J. 177 (1986), the Supreme Court held that N.J.S.A. 34:15-8 precludes a third-party tortfeasor from seeking statutory or common law indemnification from an employer with respect to a judgment obtained by an employee who received workers' compensation benefits. [The Act] removes the employer from the operation of the Joint Tortfeasors Contribution Law. Because the employer cannot be a joint tortfeasor, it is not subject to the provisions of the Joint Tortfeasors Contribution law, and a third-party tortfeasor may not obtain contribution from an employer, no matter what the comparative negligence of the third party and the employer.

The Appellate Division rejected Laumar's argument that the exception to the Act's recovery bar not only allows an employee to file suit against his employer for intentional wrongs, but also permits a third-party tortfeasor who is sued by an employee to file a common law claim for contribution against the employer for intentional wrongs that harmed the employee. As the Appellate Division concluded:

> [T]he overall context of the Act makes apparent that the legislative intent reflected in the exemption is to provide an election of remedies only for the injured employee. [Here,] Gonzalez has accepted workers' compensation benefits as his sole remedy against Guiliano. He and his representatives as defined by the statute are bound by that election. In the absence of a claim by him that Guiliano or its employee committed an intentional wrong, the exception to recovery bar established in N.J.S.A. 34:15-8 is not triggered.

This decision demonstrates the strong judicial proclivity to protect the immunity provided employers under the exclusive remedy provision of the Act. As the Appellate Division discussed in its opinion, the Act accomplishes a trade-off whereby employees relinquish their right to pursue common-law remedies in exchange for entitlement to certain, but reduced, benefits whenever they suffer injuries by accidents arising out of and in the course of their employment. In turn, employers are immune from liability to injured workers under laws other than the Act. Such protections eliminate the unpredictable nature of tort actions and allow employers to effectively manage their risk-related costs.

Unemployment Compensation

It has become increasingly apparent that there is a cross-over between workers' compensation and unemployment cases. While the two areas of law are mutually exclusive by way of collateral estoppel, it is clear the same issues are simultaneously being litigated in both forums. By using the unemployment and workers' compensation forums to bolster defenses in both claims, we achieve successful results for our clients. Our unemployment practice is full service, with our attorneys handling claims at all levels of the courts. We welcome the opportunity to work with you in defending your unemployment compensation matters.

For more information, please contact:

Delaware:
Linda L. Wilson, Esquire
(302) 552-4327 | llwilson@mdwcg.com

Florida:
Heather Byrer Carbone, Esquire
(904) 358-4225 | hbcarbone@mdwcg.com

New Jersey:
Robert J. Fitzgerald, Esquire
(856) 414-6009 | rjfitzgerald@mdwcg.com

Pennsylvania:
Anthony Natale III, Esquire
(215) 575-2745 | apnatale@mdwcg.com

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire | 610.354.8263 | fxwickersham@mdwcg.com

Francis X. Wickersham

The claimant failed to provide adequate notice that his stomach cancer was caused by his firefighting duties under § 311 of the Act and, therefore, his claim petition was properly dismissed.

Kenneth Stahl v. WCAB (East Henfield Township); No. 1575 C.D. 2019; filed Aug. 14, 2020; Judge Brobson

The claimant began working as a volunteer firefighter for the employer in 2002. He was diagnosed with stomach cancer in 2006. Six weeks following treatment, he returned to work and later retired in October 2008. In November of 2014, he filed a claim petition in which he alleged his stomach cancer was caused by his exposure to carcinogens while he worked as a firefighter.

In connection with the petition, he testified that as early as 2006 or 2007, he suspected a connection between his duties and his stomach cancer. He also said that in July of 2011 he read an article about Pennsylvania's passage of a law regarding cancer in firefighters and how it may affect their rights under the Act. He again suspected a connection after reading this article. He hired an attorney on August 5, 2012, and on September 16, 2014, a doctor confirmed the relationship between his cancer and service as a firefighter.

The Workers' Compensation Judge granted the claim petition, which the employer appealed to the Appeal Board. The Board found that the judge applied an inapplicable presumption and remanded the matter to the judge, who again granted the claim petition, holding that the claimant's obligation to provide notice started with the receipt of a medical opinion confirming the injury and its relationship to the job. The employer appealed to the Board, arguing that the judge erred in concluding that the claimant provided timely notice under § 311 of the Act. The Board affirmed, noting that in occupational disease matters, it is generally recognized that the notice period does not begin to run until the claimant is advised by a physician that he has an occupational disease and it is related to his work. The employer appealed to the Commonwealth Court, which held the Board failed to properly analyze the issue of whether the claimant provided timely notice under § 311 and remanded the case back to the judge.

On remand, the judge gave the parties the opportunity to present additional testimony on the issue of whether, through the exercise of reasonable diligence, the claimant should have known of the work-relatedness of his stomach cancer, but this was declined. This time, the judge denied the claim petition on the basis of lack of notice, finding that after the claimant read the article about the cancer presumption law and retained a workers' compensation attorney in August of 2012, he failed to receive medical confirmation of his stomach cancer being caused by his firefighting duties until September of 2014 and failed to file his claim petition until November of 2014. The claimant appealed, and the Board affirmed.

The Commonwealth Court affirmed as well. In doing so, they rejected the claimant's argument that he provided timely notice under § 311 of the Act as he did not know or have reason to know that his cancer was potentially related to his work as a volunteer firefighter until receiving a copy of his medical expert's report in September of 2014. According to the court, the claimant failed to exercise reasonable diligence as required by § 311. The court noted that the claimant did nothing between August of 2012 and April of 2014 to determine whether there was a connection between his stomach cancer and his firefighting activities. Moreover, on remand, the claimant declined to present any additional evidence to the judge regarding efforts to determine the cause of his cancer.

News

Thank you to everyone who attended our first ever "virtual" Teach 'n' Treat webinar series! The support for the event was overwhelming, and all of the speakers did an excellent job presenting engaging and relevant content on important issues in workers' compensation.

For our **Florida clients**, we are hosting a **free one-hour webinar** on **pre-existing conditions**, **major contributing cause** and **apportionment** on Thursday, November 12, from 10:00 – 11:00 a.m. The course is approved for one hour of CEU credit. You can find more details and register here.

Everyone is also invited to join us for the **complimentary one-hour webinar: Navigate the Medicare Maze: A Practical Guide to Understanding Medicare Set-Asides**. **Ross Carrozza** and **Anthony Natale**, co-chairs of our Medicare Set-Aside Practice Group, will offer practical advice to simplify the Medicare Set-Aside process. You can find more details and register here.

On October 13, 2020, *The Philadelphia Legal Intelligencer* published **Michele Punturi**'s (Philadelphia, PA) article "Keep Your Eyes on the Road—Distracted Driving and Workers' Compensation Claims." Read the article here.

On September 15, 2020, **Jessica Julian** (Wilmington, DE) spoke at the Workers' Compensation Annual Seminar sponsored by the Delaware State Bar Association and Industrial Accident Board. Jessica's topic was "In the Beginning: Initiating the Employer's Defense." **Jessica** also presented "Overview of Delaware Workers' Compensation" to the City of Dover on October 14th.

Outcomes

Lori Strauss (Philadelphia, PA) successfully defended against a claim petition filed against a group home facility. The claimant alleged that he suffered a significant, disabling knee injury while carrying an air conditioner at work during the early hours of his shift. The claimant worked his entire shift, performing his full work duties for the remainder of his day. The claimant testified that he reported the work injury to a representative of the human resources department upon his completion of the shift. We offered testimony from three members of the human resources department who all disagreed with the claimant's testimony. Additionally, we offered video from three cameras located in the facility which showed the claimant moving freely and that the claimant did not enter the human resources office suite on the day of the alleged incident. The judge found the claimant and his doctor not credible and further found all of employer's witnesses and evidence to be more credible and convincing. The claim petition was denied and dismissed.

Michele Punturi (Philadelphia, PA) successfully defended against a claimant's appeal that granted a termination of all benefits in relation to the work injury, including medical. The claimant asserted the judge erred with the facts and the law and the decision was not based upon substantial competent evidence of record as the claimant continues to suffer from his work injury and disability. Contrary to the claimant's assertion and as accepted by the Appeal Board, the defense presented very cogent evidence, based upon the comprehensive evaluations by two Board Certified physicians with upper extremity specialties, supporting no objective findings and no findings supportive of any subjective complaints as they relate to the upper extremity injury. Further, a detailed cross-examination of the claimant's medical expert further established the expert could not and did not offer an explanation to support that the claimant was not fully recovered, and he was challenged on the exact mechanism of injury, nature and extent of medical treatment, and a lack of causation, which he could not counter with any substantial competent evidence.

Michele also successfully defended against the claimant's appeal. The court denied the claimant's petition to review compensation benefits, seeking an entitlement to a reinstatement of benefits based on an unconstitutional IRE. The court relied upon *Whitfield v. WCAB (Tenet Health Systems, LLC.)*, 188 A.2d 599 (Pa. Cmwlth. 2018), in finding the claimant failed to meet his burden of proof by not presenting testimony to support his legal argument. While the defense did not agree with the judge's reasoning, the defense adamantly argued it was the claimant's position that

Outcomes (cont.)

the issues were purely legal such that no testimony of the claimant was warranted. Despite repeated requests, claimant's counsel chose a legal strategy to not present the claimant's testimony. The claimant further argued for nunc pro tunc relief as the interests of justice required that the matter be remanded to the judge for the claimant to testify as to ongoing disability. The defense presented a strong argument that the claimant's position was misguided, unfounded and without any merit, and the Appeal Board agreed. Failure to take the claimant's testimony was waived and attempts to re-litigate the matter on a remand were clearly prejudicial and contrary to the defendant.

Michele successfully defended against the claimant's appeal denying the claimant's claim petition and granting a termination petition. The injury was accepted as a medical only lumbar strain, but the claimant asserted the injury should be expanded to include bilateral lower extremity radiculopathy resulting in total disability. It was the claimant's position that the judge erred in granting the claim and the termination petitions, and the Appeal Board disagreed with this position on the basis of detailed cross-examination of the claimant and substantial medical evidence supported by the defense medical expert. The defense emphasized that the claimant's medical expert, who attempted to expand the nature of the injury, could not substantiate the opinion because the diagnostic study films were contrary to that opinion and were evident of a chronic, age-related degenerative condition absent of any post-traumatic indications.

Tony Natale (Philadelphia, PA) successfully prosecuted a de novo request for hearing to challenge the Pennsylvania Bureau of Workers' Compensation Fee Review Section's final determination holding that an injured worker's shoulder surgery expenses must be paid by the insurance carrier and employer. Tony argued that the work-relatedness of the shoulder surgery is currently in dispute, thus barring the Bureau's attempt to force payment. Tony also proffered the argument that due process of the provider remained intact since the challenge to work-relatedness must be adjudicated before a provider has standing to challenge the amount or timeliness of payment. The court's decision quashed the Bureau's determination and held that no surgical expenses are payable.

Tony also defended a national car insurance underwriter/carrier in an appeal before the Workers' Compensation Appeal Board. In the underlying action, the claimant alleged that her job activities caused her to succumb to carpal tunnel syndrome that needed surgical repair. The judge found the claimant's conditions not to be work-related. On appeal, the claimant argued that the judge's conclusions of law were not reasoned and not supported by the record. Tony convinced the Board that there was substantial evidence to support the judge's findings and conclusions and that the Board, therefore, does not have standing to overturn on review.

Tony also successfully prosecuted a termination petition and Petition to Review a Utilization Review Determination on behalf of a Philadelphia-based transportation authority. The case has direct impact on the workers' compensation system since the termination petition dealt with the issue of a "piece-meal" full recovery—a petition seemingly banned by recent case law. The UR Review petition dealt with the systemic flaws in the UR process that resulted in a collateral attack on a previous judge's decision regarding reasonableness and necessity of medical treatment. The judge opined that the claimant fully recovered from a work-related knee injury and post-injury surgery despite part of the meniscus in the knee now missing. Tony successfully argued that the missing piece of meniscus did not functionally impair the injured worker. Moreover, Tony convinced the court that a partial termination of benefits is proper in this scenario because the original petition was filed only to the claimant's knee injury and extricated itself from any additional compensable injuries. The judge also agreed that the UR Determination issued in the matter collaterally attacked a previous judge's decision on the issue of reasonableness of chiropractic treatment. The decision exposed the problem of final decisions of a judge on reasonableness of medical treatment being attacked by the UR process when an injured worker switches treating providers or files new prospective reviews.

Tony successfully prosecuted suspension and termination petitions and defended a claim petition for a Berks County mushroom distribution company. The claimant sustained a work injury to his upper extremity when he slipped and fell during the course and scope of his employment. He returned to work in a light-duty capacity and then abandoned the job

Outcomes (cont.)

shortly thereafter. He filed a claim petition to add concussion, neck, and low back injuries. Testimony of fact witnesses proved that the claimant abandoned his job in bad faith while medical testimony proved the claimant to be fully recovered from his accepted injuries. Cross examination of the claimant's medical expert demonstrated the expert's lack of knowledge as to the facts of the claim and mechanics of the injury. It was further established through the cross examination of the claimant that he lacked any credibility regarding allegations of head, neck, or low back injuries. The suspension and termination petitions were granted by the court and the allegations of head/concussion, neck and back injuries were dismissed.

John Swartz (Harrisburg, PA) was successful defending against a claim petition for a left foot injury, allegedly to be traumatic plantar fascitis and aggravation of pre-existing plantar fascitis and tendonitis. John was successful in defending the claim by showing that the claimant had longstanding left foot complaints, as well as a previous surgery. In addition, the claimant's testimony was rejected by the judge for his misrepresentation that he did not have a CDL license when he initially testified. After further discovery, John was able to obtain information that the claimant did have an active CDL license at the time he testified, having a physical examination for his CDL and obtaining his license a month before he testified initially. The claimant's credibility was also impeached in other parts of his testimony. He alleged a lack of funds for medical treatment when he had medical insurance through his spouse and had just received a $10,000 stimulus unemployment check. The judge rejected his testimony in its entirety for these reasons. The judge further rejected the medical evidence the claimant submitted from a podiatrist versus a board-certified orthopedic surgeon. The judge found the claimant had suffered no traumatic injury and his complaints were due to his pre-existing plantar fascitis condition in his left foot.

John was also successful in defending another claim petition which was completely denied by the judge. The claimant had alleged he suffered low back and knee injuries from a specific work incident. He did not report any knee injury until six weeks post injury. The employer had accommodated the claimant's work restrictions. Eventually, he was discharged for making threats to the employer's representatives. He then filed a claim alleging his knee injury and the surgery he had for his knee within six months were related to the initial injury. This was rejected by the judge. It had been established he initially did not report any type of knee injury from the work incident to his employer. In addition, medical evidence established his previous knee complaints and symptoms. He was also actively involved in coaching his son's wrestling and baseball teams. Medical evidence from the defendant showed that the right-knee condition was not related to the initial work injury. Therefore, the claimant's claim petition was completely denied even though he had an accepted low-back injury. ▸