MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Top 10 Developments In Delaware Workers' Compensation In 2020

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

Paul V. Tatlow

1. Superior Court affirms the Board's decision denying DACD Petition seeking compensation for the out-of-pocket expenses the claimant paid for medical marijuana treatment.

John Nobles-Roark v. Back Burner, (C.A. No. N19A-11-001 ALR - Decided Jul. 28, 2020)

The claimant sustained a lumbar spine injury on May 22, 1998, resulting in surgery and ongoing total disability. The claimant began treating for chronic pain with Dr. Bandera, including epidural injections, physical therapy and narcotic medications. In 2014, the claimant began using marijuana and was given a certification by his treating physician allowing him to begin purchasing medical marijuana in August 2014. On the petition seeking reimbursement for the claimant's out-of-pocket medical expenses, the doctor testified that the medical marijuana treatment was reasonable and necessary and served as a replacement for the opioids treating the chronic pain. Dr. Brokaw testified for the employer that the claimant was not a good candidate for medical marijuana and the treatment was neither reasonable nor necessary based on the claimant having comorbidities, including chronic obstructive pulmonary disorder, bipolar disorder, depression and anxiety. The Board denied the petition, and the Superior Court affirmed the denial on appeal. The court disagreed with the claimant's argument that Dr. Brokaw's testimony regarding the efficacy of medical marijuana was contrary to Delaware law. The court stated that, the fact that the General Assembly had passed the Medical Marijuana Act, finding that it could effectively treat some patients, does not amount to a finding that medical marijuana is "reasonable and necessary" to treat all patients. In other words, the acknowledgement that medical marijuana has efficacy in treating some patients does not preclude the finding that marijuana is not reasonable or necessary for a particular patient as was the case here.

2. Board holds that it has the power to enforce a Commutation Agreement to settle the case but the claimant was killed prior to execution of the commutation documents and their submission to the Board.

Kari-Ann Jones v. Universal Health Services, Inc., (IAB Hearing No. 1412276 - Decided Aug. 24, 2020)

The claimant had a compensable work injury to her right upper extremity on April 6, 2014, resulting in several surgical procedures and a closed period of TTD. In 2020, the claimant was receiving ongoing partial disability benefits and the parties reached an agreement on May 26, 2020, to settle the case by way of a full and final commutation. The claimant and her husband were

tragically killed in a motor vehicle accident on June 1, 2020, prior to the commutation documents having been executed. The employer questioned the enforceability of the commutation under these circumstances.

On a Motion to Enforce Settlement filed by the claimant, the Board ruled that there had clearly been a meeting of the minds to settle the case and that it was in the best interests of the claimant to do so at that time. The Board cited prior case law and concluded that it had the power to enforce the agreement to settle the case for a full commutation with the funds to now go to the claimant's estate.

3. Board denies DACD Petition seeking payment for a second cervical spine surgery by rejecting the theory that this case involved noncontiguous adjacent segment disease.

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

The claimant had a compensable injury to the cervical spine resulting in surgery on March 20, 2018 with Dr. Eskander in the nature of a discectomy at the C3-C4 level with fusion. Approximately a year and a half later on August 28, 2019, Dr. Eskander performed a second cervical spine surgery involving a discectomy with fusion at the C6-C7 level. The employer disputed the compensability of that surgery, which led to claimant filing a DACD Petition.

Dr. Eskander testified that the second surgery was causally related to the work injury and the first surgery, even though it was three levels away from the initial surgery. He explained this as being the result of "noncontiguous adjacent segment disease" since the C6-C7 level is the one most likely to herniate on a compromised cervical spine. Dr. Fedder, the employer's expert, testified that the second surgery was unrelated to the work injury and the prior surgery and, instead, was due to a new problem of C7 radiculopathy of a compressive nature that developed in April of 2019. The Board denied the claimant's petition, concluding that the claimant had not shown it was more likely than not that the C6-C7 level herniation was causally related to the prior cervical fusion or the work injury. The Board stated that the 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.

4. Superior Court holds that a bad faith lawsuit can be filed against a third-party administrator based on its handling of a workers' compensation claim rejecting the argument that they are not a party to the contract.

Andrew Ferrari v. Helmsman Management Services, LLC, (C.A. No. N17C-04-270 MMJ - Decided Jun. 23, 2020)

This case involved a lawsuit filed by the claimant against Helmsman, asserting claims for bad faith delay, denial of timely payment of workers' compensation benefits and intentional infliction of emotional distress. Helmsman filed a motion for summary judgment, arguing as a matter of law that they were not a party to the contract since they only served as the third-party administrator for the employer and its workers' compensation carrier. The court referred to a prior decision that defined the relationship between an insurer and TPA as one between principal and agent. If a principal appoints an agent to perform a duty, the duty of the agent acting under the contract is the same as the duty of the principal. The prior case had held that a TPA could be sued directly for its bad faith handling of a workers' compensation claim because the TPA's duty is coextensive with the insurer. The court found that the prior case, *Thomas v. Harford Mutual Insurance Company*, was controlling on the narrow issue of whether a plaintiff may sue a TPA for breach of the duty of good faith and fair dealing arising from a workers' compensation contract. Therefore, the court held that the bad faith claim against Helmsman does not fail as a matter of law on the basis that a TPA is not a party to the insurance contract.

5. Board grants a termination petition, finding that the claimant voluntarily removed himself from the labor market and adopted a retirement lifestyle.

Michael Garfinkel v. Frank Diver, (IAB Hearing No. 1273542 - Decided Aug. 17, 2020)

This case involve the employer's petition seeking to terminate the claimant's partial disability benefits. The evidence showed that claimant was 65 years old and receiving Social Security benefits. Importantly, the evidence further showed that the claimant had not made a good faith job search and had commented to the employer's medical expert at the IME that he had no plans to return to work and was "content" with his lifestyle. The court granted the petition, finding that the claimant had voluntarily removed himself from the labor market by adopting a retirement lifestyle and, therefore, forfeited any entitlement to ongoing partial disability benefits.

6. New workers' compensation rates.

The Delaware Department of Labor announced that the new workers' compensation rates effective July 1, 2020, establish an average weekly wage of $1,121.49. Accordingly, the maximum weekly compensation rate is now $747.66, and the minimum weekly compensation rate is $249.22.

7. The COVID-19 pandemic in 2020 has necessitated the Board suspending all live in-person hearings.

On March 16, 2020, in response to the COVID-19 outbreak, the Board ordered that all workers' compensation hearings be suspended immediately. The Board issued another Order effective April 13, 2020 directing hearings to take place using WebEx meeting technology before a Hearing Officer, only if stipulated to by the parties. The Board issued a subsequent Order effective May 18, 2020, providing that the video hearings through WebEx could now take place before two Board Members or, alternatively, if the parties stipulated before a solo Hearing Officer. As of this writing, the Board has just recently begun doing limited live in-person hearings in Wilmington, but on a very selective basis, as to which cases qualify for a live hearing.

8. Interesting statistics from the Department of Labor.

The Department of Labor's 22nd Annual Report on the Status of Workers' Compensation Case Management revealed that in 2019, the Office of Workers' Compensation gave attorneys' and parties the ability to file petitions electronically through the online portal. But the report commented that less than 50% of local attorneys were filing electronically, and the goal was to increase online filings and email submissions.

The number of certified health care providers has continued to increase. In 2018 there were 2,792 certified providers, and in 2019 that had increased to 2,992 providers. The report further revealed that in 2019, there were a total of 7,717 petitions filed, a slight increase from the 2018 figure of 7,708. As far as Utilization Review requests, in 2019 the OWC received 296 such requests, which was actually a decrease of 17.3% from the 2018 figure of 358 requests for Utilization Review. In 2019, the OWC received 165 petitions to appeal a Utilization Review Determination. That was the same percentage rate of appeal as the prior year. As in the prior year, the great majority of those petitions appealing the determinations were later withdrawn before actually going to a hearing before the Board. Once again, chronic pain treatment and, in particular, pain medication continued to represent the treatment most challenged through Utilization Review. Specifically, there were 248 UR requests involving chronic pain treatment, with the next most challenged treatment being low back, with 22 UR requests.

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

Brenda Sands had been serving as the Interim Administrator of the Office of Workers' Compensation. However, in May 2020, Ms. Sands left that position in order to join the Office of Anti-Discrimination. In July 2020, Allison Stein was promoted to the position of Administrator, having formerly been the Division's Fiscal Officer. Deborah Massaro retired from her position as a Hearing Officer on July 1, 2020. In September 2020, Angela Fowler, who had previously served as a Hearing Officer, returned to fill the Hearing Officer vacancy. Kevin Slattery, Esquire, with the Office of the Attorney General, began in May 2020 representing the Workers' Compensation Fund, replacing Oliver Cleary. On November 5, 2020, Governor Carney nominated Department of Labor Secretary Cerron Kade to lead the Delaware Office of Management and Budget, which manages the annual financial plan and state of Delaware facilities. The governor intends to nominate Karryl Hubbard, who is the Deputy Labor Secretary, to serve as the next Secretary of the Department of Labor.

The current Board Members are Mark Murowany, Chair, and Mary Dantzler, William Hare, Robert Mitchell, Patricia Maull, Peter Hartranft, Idel Wilson, Greg Fuller, Sr., Vince D'Anna and Angelique Rodriguez.

10. Statistics 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 2015 through 2019, the Board rendered 1,863 decisions on the merits. From that number, only 200 were appealed which is 10.73%. Furthermore, from that number of appeals taken 177 of them were resolved. Only 22 decisions were issued by the appellate courts either reversing and/or remanding the Board's decisions in whole or in part. This represents an extremely low reversal rate of only 1.18% of all Board decisions rendered in that five year time span. Therefore, it continues to be extremely difficult to overturn Board decisions on appeal so the lesson is to give full effort to winning your case at the Board level.

Top 10 Developments In Florida Workers' Compensation In 2020

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

Linda W. Farrell

1. Alleged workplace exposure to toxins requires a clear and convincing standard of proof to prove occupational exposure.

School District of Indian River County/Ascension Benefits v. Edward Cruce, deceased; District Court of Appeal # 17-3342; Decision date: Nov. 27, 2019

The employer/carrier appealed a final order of Judge Dietz which found that the deceased employee's death resulted from a workplace exposure to Cryptococcus Neoformans fungus that led to meningitis. Because the judge improperly applied the statutory provisions, the First District Court of Appeal reversed, holding that the claimant failed to meet the clear and convincing standard of proof.

2. Claimant must establish, by clear and convincing evidence, that exposure was work-related and must provide quantifiable proof of level of exposure.

City of Titusville and Johns Eastern Company v. Robert Taylor; District Court of Appeal # 17-3814; Decision date: Nov. 27, 2019

This is a second exposure case involving Judge Dietz and the required burden of proof. While the employer/carrier did not dispute in its appeal that the claimant was exposed to Cryptococcus Gattii, resulting in fungal meningitis, they argued that the judge again erred in excusing the claimant from establishing, by clear and convincing evidence, that the exposure was work-related and from providing quantifiable proof of the level of exposure. The First District Court of Appeal again reversed the judge, finding that the claimant failed to satisfy the burden of proof regarding occupational causation.

3. Since the claimant established an occupational causation of his heart disease, the burden is on the employer to present evidence that the heart disease had wholly non-occupational causes.

Eugene McDonald v. City of Jacksonville; District Court of Appeal # 19-0573; Decision date: Dec. 20, 2019

The claimant, a law enforcement officer, appealed an order of the Judge of Compensation denying compensability of his coronary artery disease pursuant to the presumption of occupational causation created by section 112.18, Florida Statutes. The First District Court of Appeal held that, because the claimant established the occupational causation of his heart disease, the burden was then on the employer/carrier to put forth evidence that the heart disease had wholly non-occupational causes. The case was remanded to the judge to determine whether the employer/carrier has overcome this statutory presumption.

4. Last-minute motions to admit surveillance or continue final hearing denied as claimant was prejudiced by the surprise, the prejudice was incurable and another continuance would have prevented efficiency.

2K South Beach Hotel, LLC and Continental Indemnity Co. v. Marlene Mustelier; District Court of Appeal # 19-0713; Decision date: Jan. 15, 2020

On the eve of the final hearing, the employer/carrier moved to admit evidence, amended the pre-trial stipulation to add a misrepresentation defense and "clarified" their witness and exhibit lists to include the surveillance evidence. The judge denied the employer/carrier's motions, finding prejudice to the claimant and no good cause for the employer/carrier's delay. The judge awarded the claimant the requested benefits. On appeal, the First District Court of Appeal held that the claimant was prejudiced by the surprise, that the prejudice was incurable and another continuance would have prevented efficiency. The court also held that the judge did not abuse his discretion in denying the employer/carrier's motion to amend the pre-trial stipulation, finding that the motion was not a mere "clarification" of the witness list and the lateness of the motion to add a misrepresentation defense was not excusable. The court went on to hold that there was no error on the part of the judge in the denial of testimonies from surveillance witnesses.

5. Under the occupational disease statutory provision, it is the disability, not the disease, that determines compensability.

Andrew Wilkes v. Palm Beach County Fire Rescue and

Preferred Government Claims Solutions; OJCC # 19-019645, West Palm Beach District, Judge Stephenson; Decision Date: Apr. 23, 2020

The claimant, a firefighter, was called to assist with the drowning death of a child in 2015. He believed that the victim looked like his son. Later, in May 2019, he woke up in a sweat with his heart racing after dreaming that he was the diver pulling his own son out of the water on the same call. Also, the claimant went diving with friends in April or May 2019, which brought back the drowning call. He then sought care on his own for what he thought might be ADHD as he was having difficulty focusing. He underwent a PTSD assessment on May 30, 2019, and was formally diagnosed with PTSD and reported same to the employer in June 2019. Judge Stephenson found that the claimant met the clear and convincing burden of proof that he suffered PTSD by a qualifying event with a disability date of May 30, 2019, and that notice was timely. Compensability was granted.

6. Because of its unreasonable delay, the employer failed to provide an alternate physician, and competent substantial evidence existed to support this factual finding.

City of Bartow and Commercial Risk Management v. Isidro Flores; District Court of Appeal # 18-1927; Decision date: May 29, 2020

The claimant requested a one-time change of physician. On appeal, the First District Court of Appeal indicated that the issue was "what satisfies the employer/carrier's obligation under section 440.13 (2) (f) to 'provide' an alternate physician or forfeit its right of selection." The court affirmed the judge's finding that, as a result of its unreasonable delay, the employer/carrier failed to provide the alternate physician and that competent substantial evidence existed to support this factual finding. However, the court certified the following as a question of great public importance:

> Whether an employer/carrier's duty to timely furnished medical treatment under section 440.13(2)(f), which includes a claimant's right to a one time change of physician during the course of such treatment pursuant to section (2)(f), is fulfilled solely by timely authorizing an alternate physician to treat the claimant or whether – in order to retain its right of selection after timely authorizing the alternate physician to treat the claimant – the employer/carrier must actually provide the claimant an appointment date with the authorized alternate physician?

7. Judge finds that it is reasonable and medically necessary for the claimant to be evaluated by a board-certified neurologist.

David Rivera v. The Berkley Group, Inc. d/b/a Vacation Village at Parkway and Zurich American Insurance Company; OJCC # 19-005730; Lakeland District, Judge Arthur; Decision Date: Jun. 30, 2020

The employer/carrier authorized a neurologist per the referral of the authorized treating provider. The claimant petitioned for a board certified neurologist and refused to treat with the doctor selected by the employer/carrier. The employer/carrier asserted that board certification was not required by the statute. The claimant presented the only medical evidence, which was the testimony of the authorized treating physician. That doctor opined that it was reasonable and medically necessary for the claimant to be evaluated by a board certified neurologist. The judge granted the petition seeking a board certified neurologist.

8. Judge's findings were supported by competent, substantial evidence and, therefore, court affirmed the judge's order denying the employer's misrepresentation defense.

LSG Sky Chefs, Inc./Liberty Mutual Ins. Co. v. Gertrudis Santaella; District Court of Appeal # 1D19-4073; Decision date: Jul. 20, 2020

The employer/carrier appealed judge's order denying its misrepresentation defense. The employer/carrier presented two Employee Earnings Reports (DWC-19s) in which the claimant denied any earnings, but explained, "Claimant does not receive income from any other source. Any checks issued to Claimant's name are for work done and performed by Claimant's husband." At the final hearing, the claimant testified that she did not knowingly or intentionally provide false statements when completing the DWC-19s. The First District Court of Appeal affirmed, finding competent and substantial evidence supported the judge's findings that the claimant was noted to be credible with no intention of misrepresentation with regard to her husband's earnings and her physical abilities.

9. Court finds that failure to object on specificity grounds, where specificity would show ripeness, waives challenge to ripeness. IME opinions are admissible and can support a claim for specific medical benefits.

Mary Thompson v. Escambia County School Board/ Escambia County School District; District Court of Appeal # 1D19-4063; Decision date: Aug. 17, 2020

The claimant appealed an order from Judge Winn denying right knee surgery. After suffering a hard fall, she was diagnosed with right knee chondromalacia and meniscal tear. The authorized treating provider opined that she was not a surgical candidate and said that her condition was pre-existing. The claimant then obtained an independent medical examination (IME). The IME physician opined that her work accident was the major contributing cause of her condition and that it required surgery. The judge accepted the IME physician's opinion. However, ruled that the claim for surgery was premature because no authorized treating provider had recommended surgery. The First District Court of Appeal held that the judge erred in two ways. First, the employer/carrier waived objections on grounds of ripeness and specificity by not asserting that defense or moving to dismiss the claim, but also because IME opinions are admissible and can support claims for specific medical benefits.

10. Claimant injured in car accident while on a morning "lunch break." Compensability denied as the lunch break was purely personal in nature and of no benefit to the employer. Neither the special hazard nor dual purpose exceptions apply.

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

The claimant was allowed to take her lunch break in the morning so that she could take her son to school. On the date of injury, she was taking her child to school and got into a motor vehicle accident about a half of a mile from her place of employment. The employer/carrier denied compensability and contended 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 the dual purpose exceptions applied. Compensability was denied.

Top 10 Developments In New Jersey Workers' Compensation In 2020

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

Dario J. Badalamenti

1. Appellate Division affirms the Judge of Compensation's dismissal of petitioner's claim for a work-related injury as injuries occurred during a recreational activity not within the scope of petitioner's employment.

Goulding v. NJ Friendship House, Inc., 2019 N.J. Super. Unpub. LEXIS 2285 (App. Div., decided Nov. 7, 2019)

In affirming the Judge of Compensation's dismissal of the petitioner's claim, the Appellate Division relied on *Lozano v. Frank DeLuca Construction*, 178 N.J. 513 (2004). In *Lozano*, the Supreme Court held that if an employer requires or compels participation in a recreational or social activity, that activity should be viewed as would any other compensable work-related assignment. However, if an employer merely sponsors or encourages a recreational or social activity, such activities are excluded from compensability under the Act.

2. Appellate Division affirms the Judge of Compensation's order requiring an employer to reimburse its employee for his purchase of medical marijuana despite the employer's objection that complying with the order would be in violation of the Federal Controlled Substances Act.

Hager v. M&K Construction, Docket No. A-0102-18T3 (App. Div., decided Jan. 13, 2020)

In affirming the Judge of Compensation's order, the Appellate Division found that the employer's reimbursement of a registered patient's use of medical marijuana under New Jersey's Compassionate Use Medical Marijuana Act (CUMMA) does not require the employer to "possess, manufacture or distribute" marijuana—the actions proscribed by the United States Controlled Substances Act (CSA). Also, the Appellate Division concluded that, under the circumstances presented here, the employer could not be found to have aided and abetted the petitioner if it simply reimbursed him for medical marijuana as ordered by the Judge of Compensation. Further, the Appellate Division found the employer's argument specious as compliance with the Judge of Compensation's order would expose it to the threat of federal prosecution. Rather, the Appellate

Division noted that there is ample evidence of tolerance from the federal government of state-legislated medical marijuana use.

3. Appellate Division affirms the denial of a motion to change venue of a workers' compensation coverage dispute to New York as New Jersey's workers' compensation law embodies a strong public policy preference to litigate workers' compensation coverage disputes in this jurisdiction.

The Travelers v. HES Trans, Inc., 2019 N.J. Super. Unpub. LEXIS 2621 (App. Div., decided Dec. 23, 2019)

In affirming the Superior Court's ruling, the Appellate Division found that the key issue before it was whether the forum selection clause required the case to be litigated in New York or whether such action would be contrary to New Jersey's public policy. The Appellate Division reasoned that the New Jersey workers' compensation statute, N.J.S.A. 34:15-1 et seq., requires an employer to insure all of its workers' compensation liabilities and invalidates any insurance policies that fail to do so. A failure to provide workers' compensation protections under the statutory scheme, or a deliberate misrepresentation of employees as independent contractors to avoid providing coverage, can subject an employer to criminal liability under N.J.S.A. 34:15-79(a). As such, the Appellate Division concluded that New Jersey's workers' compensation laws embody a strong public policy preference to litigate disputes over workers' compensation coverage and premiums in this jurisdiction.

4. The New Jersey Supreme Court affirms an Appellate Division's decision requiring an employer to reasonably accommodate an employee's use of medical marijuana prescribed pursuant to New Jersey's Compassionate Use Medical Marijuana Act.

Wild v. Carriage Funeral Holdings, 2020 N.J. LEXIS 299 (Supreme Court, decided Mar. 10, 2020)

In this case of first impression, the New Jersey Supreme Court affirmed the Appellate Division's ruling that under the New Jersey Law Against Discrimination (NJLAD) an employer is required to accommodate its employee's use of medical marijuana as part of his cancer treatment as allowed under the state's Compassionate Use Medical Marijuana Act (CUMMA). In affirming the Appellate Division's ruling, the Supreme Court largely reiterated the Appellate Division's reasoning that just because CUMMA does not itself require an employer to accommodate the medical use of marijuana in the workplace, it does not mean that the NJLAD may not impose such an obligation, particularly when the refusal of an accommodation to such a user relates only to medical marijuana use during off-duty hours.

5. The New Jersey Supreme Court holds that an employer's subrogation reimbursement rights under the New Jersey Workers' Compensation Act are not barred by the Automobile Insurance Cost Reduction Act.

New Jersey Transit Corp. v. Sandra Sanchez, A-68-18/082292 (decided May 12, 2020)

The New Jersey Supreme Court affirmed an Appellate Division ruling that found that the state's no-fault auto insurance scheme under the Automobile Insurance Cost Reduction Action, N.J.S.A. 39:6A-1.1 et seq. (AICRA), did not bar an employer from bringing a third-party action under Section 40 of the New Jersey Workers' Compensation Act., 34:15-1 et seq. in order to recoup workers' compensation costs it incurred for a worker's injuries resulting from a motor vehicle accident.

6. Appellate Division Affirms a Judge of Compensation's granting of petitioner's motion for reconsideration vacating a prior order approving settlement in order to reconstruct petitioner's average weekly wage.

Esperanza Calero v. Target Corp., Docket No. A-2650-18T3 (App. Div., Decided Jun. 10, 2020)

In affirming the Judge of Compensation's order, the Appellate Division revisited the holding in *Katsoris*, 131 N.J. at 543, where the Supreme Court established a two-step process for determining if reconstruction of wages is appropriate. First, the judge must determine if a petitioner, at the time her injuries were sustained, "worked fewer than the customary number of days constituting an ordinary week in the character of the work involved." The judge must then consider whether the petitioner's disability "represents a loss of earning capacity, or has an impact on probable future earnings." Thus, the Appellate Division reasoned, the critical inquiry is whether the petitioner demonstrated that her injuries have disabled her with respect to her earning capacity in contemporary or future full-time employment. Applying the guiding principles of *Katsoris*, the Appellate Division concluded that it could not "think of a more fitting scenario, given the facts of this case that calls out for wage reconstruction."

7. Appellate Division finds that a Judge of Compensation has the statutory authority to enter an order requiring petitioner and petitioner's counsel to repay a workers' compensation award that was subsequently overturned by the Appellate Division.

Malone v. Pennsauken Board of Education, Docket No. A-3404-18T3 (App. Div., Decided Jul. 28, 2020)

In reversing and remanding the Judge of Compensation's dismissal of the respondent's motion, the Appellate Division noted that as a general rule, once an appeal is perfected, the trial court is divested of jurisdiction to act. That notwithstanding, the Appellate Division found that under N.J.S.A. 34:15-57, a Judge of Compensation does have the statutory authority to "modify any award of compensation, determination and rule for judgment" it has issued. This provision vests in the Division of Workers' Compensation and its judges the "discretionary power over its own judgments as is inherent in other courts." Accordingly, the Appellate Division reasoned, the Judge of Compensation had the statutory authority to enter a judgment against the petitioner and his counsel for the amounts paid by the respondent under the order which was later reversed.

8. The Appellate Division affirms the trial court's dismissal of an employee's tort action against his employer based on the exclusive remedy provision of the New Jersey Workers' Compensation Act.

Hocutt v. Minda Supply Company, Docket No. A-4711-18T1 (App. Div., Decided Aug. 7, 2020)

The Appellate Division affirmed a grant of summary judgment in favor of an employer based on the "exclusive remedy" provision of the New Jersey Workers' Compensation Act. Under the Act's exclusive remedy provision, the filing of a tort action against one's employer is prohibited except where the employer has committed an "intentional wrong." Here, the Appellate Division found that, despite numerous OSHA violations calling the employer's safety practices into question, the employer's conduct did not to rise to the level of "intentional wrong" necessary to trigger an exception to the Act's "exclusive remedy" provision.

9. 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 affirming the trial court's dismissal of Laumar's third-party claim, the Appellate Division found that N.J.S.A. 34:15-8, the so-called exclusive remedy provision of the Act, 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 concluded that the Act removes the employer from the operation of the state's Joint Tortfeasors Contribution Law. As such, 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. Accordingly, the Appellate Division found that, because the plaintiff was an employee of the subcontractor and had not asserted that his employer committed any intentional wrongs against him, the third-party action filed by the general contractor against its subcontractor for indemnification from tort liability was barred by the exclusive remedy provision of the Act.

10. New Jersey creates a presumption of workers' compensation liability for essential workers diagnosed with COVID-19.

On September 14, 2020, New Jersey Governor Phil Murphy signed new legislation lowering the burden of proof for certain workers' compensation petitioners alleging they contracted COVID-19 at work. The legislation makes it easier for "essential employees," including health care and public safety workers, who contract COVID-19 by creating a legal presumption that the virus was contracted from a work-related exposure. That notwithstanding, this presumption is rebuttable by the employer if they can show by a preponderance of the evidence that the employee was not exposed to COVID-19 at work. Much of the legislation is devoted to defining those petitioners who are considered "essential employees." This definition includes: [a] employees considered essential in support of gubernatorial or federally declared statewide emergency response and recovery operations; and [b] employees in the public or private sector with duties and responsibilities, the performance of which is essential to the public's health, safety, and welfare. This new legislation is retroactive to March 9, 2020.

Top 10 Developments In Pennsylvania Workers' Compensation In 2020

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


Francis X. Wickersham

1. A flight attendant's injury while riding an airport shuttle bus to an employee parking lot after her shift ended was compensable; the injury occurred on the employer's premises, even though the employer did not own the shuttle bus or the employee parking lot.

US Airways Inc. and Sedgwick Claims Management Services, Inc. v. WCAB (Bockelman), 221 A.3d 171 (Pa. 2019)

The employee, a flight attendant, fell and crushed her foot while storing luggage on a shuttle bus that carried employees from the employer's airport to the employee parking lot. For purposes of the Act, she was injured on the employer's premises, even though the employer did not own or control the shuttle service, because employees used the shuttle as a customary means to enter and exit the workplace, and under the collective bargaining agreement, the employer would have been obligated to reimburse flight attendants for the cost of airport parking.

2. Court holds that for future Utilization Review procedures where a Utilization Review request is made, a provider that is not a "health care provider," as defined in the Act, must be afforded notice and an opportunity to establish a right to intervene.

Keystone Rx, LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (CompServices Inc./AmeriHealthCasualty Services), 223 A.3d 295 (Pa. Cmwlth. 2019)

Due process required that providers that were not "health care providers" as defined in the Act, such as pharmacies, medical testing facilities and suppliers of medical supplies, be afforded notice and an opportunity to establish a right to intervene in UR proceedings requested by an employer, insurer or employee. Precluding providers from participating in the UR process, but treating UR determinations as binding on subsequent fee review determinations, would threaten providers' due process right to payment, in contravention of the requirement that the Act be construed in accordance with due process of law.

3. An insurer/employer who challenges a medical provider's bill because the treatment was allegedly not causally-related to the accepted work injury must do so through the Utilization Review process, not through the Fee Review process.

Workers' First Pharmacy LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (Gallagher Bassett Services), 225 A.3d 613 (Pa. Cmwlth. 2020)

The employer, whose employee was issued a prescription due to a work injury, was obligated to seek Utilization Review upon receipt of the pharmacy's invoice before refusing to reimburse the pharmacy; therefore, the pharmacy's Fee Review petition under the Act was not premature. An employer whose employee has been awarded workers' compensation benefits may question liability for a particular medical treatment by filing a petition to modify the description of the employee's work injury in the Notice of Compensation Payable (NCP) or by seeking a Utilization Review of the reasonableness or necessity of a treatment offered for an accepted work-related injury.

4. A mechanism does not exist under the Act to provide reimbursement to an employer for erroneously awarded litigation costs.

Crocker v. WCAB (Georgia Pacific LLC), 225 A.3d 1201, (Pa. Cmwlth. 2020)

No statutory mechanism exists within the Act to permit an employer, after requesting and being denied Supersedeas, to disgorge litigation costs that it paid to a claimant's counsel for an unreasonable contest when an appellate tribunal subsequently determines that the award of costs was made in error; overruling *Barrett v. Workers' Compensation Appeal Board (Sunoco, Inc.)*, 987 A.2d 1280.

5. Commonwealth Court holds that Act 111, which implemented the new IRE provisions under § 306(a.3) of the Act, was not a substantive change of the law and could not

be applied retroactively, absent a clear legislative intent to do so.

Rose Corporation v. WCAB (Espada), 238 A.3d 551 (Pa. Cmwlth. 2020)

Amendment to section 306(a.2) of Workers' Compensation Act governing impairment rating evaluations (IRE) was substantive, rather than procedural, and thus did not apply retroactively to the claimant whose IRE was performed prior to effective date of amendment. Retroactive application of the amendment would have direct, negative impact on the claimant's disability status by giving effect to an IRE performed under a process that the Supreme Court had found constitutionally invalid.

6. Commonwealth Court holds that § 406.1 of the Act does not sanction conversion of a Notice of Temporary Compensation Payable to a Notice of Compensation Payable for failure to file a Notice Stopping Temporary Compensation within five days of stopping payment of temporary compensation.

Communication Test Design v. WCAB (Simpson), 229 A.3d 994 (Pa. Cmwlth. 2020)

According to the court, no such remedy is included in § 406.1(d)(5) of the Act. It pointed out that § 406.1(d)(5) states that if an employer does not file a Notice Stopping Temporary Compensation Payable (NSTC) within the 90-day period during which temporary compensation is paid or payable, the employer shall be deemed to have admitted liability and the Notice Temporary Compensation Payable (NTCP) converts to an Notice of Compensation Payable (NCP). The court noted that the employer filed its NTSC within 90 days from the date of its NTCP; therefore, the NTCP could not convert by operation of law.

7. Supreme Court did not intend Protz II to be given full retroactive effect or to nullify the Statute of Repose in § 413(a) of the Act.

Patricia Weidenhammer v. WCAB (Albright College), 232 A.3d 986 (Pa. Cmwlth. 2020)

The claimant argued that *Protz II* rendered the IRE provisions as void *ab initio* and that she was thus entitled to a reinstatement of benefits, even though her 500 weeks of partial disability had exhausted in 2013 under a prior IRE and almost four years before *Protz II*. The court, though, found that the claimant's statutory right to total disability compensation had been extinguished at the point in time when she filed her reinstatement petition. According to the court, allowing the claimant to resuscitate her right to disability compensation violated § 413(a).

8. A fee agreement between a claimant and an attorney that says claimant's counsel is entitled to a 20% fee from any benefits awarded includes an award of medical expenses.

Robert Neves v. WCAB (American Airlines), 232 A.3d 936 (Pa. Cmwlth. 2020)

When a contingent fee agreement is presented to a workers' compensation judge for approval under the Act governing the award and approval of attorney's fees for workers' compensation services, the counsel fee should be calculated against the entire award, without regard for whether the award is for medical or indemnity compensation.

9. Pennsylvania Supreme Court holds that its decision in *Protz II* is retroactive to the IRE date for cases on appeal where a constitutional challenge to the IRE was raised.

Dana Holding Corporation v. WCAB (Smuck), 232 A.3d 639 (Pa. 2020)

The general rule is that, at least where prior judicial precedent is not overruled, a holding of the Pennsylvania Supreme Court that a statute is unconstitutional will generally be applied to cases pending on direct appeal in which the constitutional challenge has been raised and preserved.

10. A claimant who raises a Protz challenge to a pre-Protz IRE on the basis that the IRE was unconstitutional is entitled to a reinstatement of temporary total disability benefits as of the date the reinstatement petition is filed, not the date of the IRE.

Yolanda White v. WCAB (City of Philadelphia); 237 A.3d 1225 (Pa. Cmwlth. 2020)

Reinstatement to total disability of a workers' compensation claimant, who broke her right foot in three places during course of employment, was to begin as of the date she filed her reinstatement petition rather than the date of her conversion from total to partial disability, where the claimant's modification from total to partial disability was effective in a prior year and had not been appealed.

Pennsylvania Heart and Lung Act Claims

In addition to handling traditional workers' compensation claims, our attorneys also advise local municipalities and counties throughout Pennsylvania on heart and lung claims. The Heart and Lung Act provides full wage loss benefits to certain eligible municipal, county and state workers who are injured in the performance of their job duties. With a depth of experience in this area, we are well versed in the associated law and adept at defending clients facing these types of claims. Our attorneys understand the complex interplay between the Heart and Lung Act and the Workers' Compensation Act and will provide the necessary guidance in pre-litigation settings, address all issues to challenge entitlement to Heart and Lung benefits, and explain its impact on a workers' compensation claim. Our approach focuses on mitigating future exposure and providing practical advice to avoid pitfalls in handling Heart and Lung Act claims. We work with our clients to evaluate and achieve reasonable resolution of both the heart and lung and worker's compensation claims, as well as address any subrogation issues.

For more information, please contact: Kacey C. Wiedt, Esquire
Assistant Director, Workers' Compensation Department
717.651.3511 | kcwiedt@mdwcg.com