MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Delaware Workers' Compensation

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Paul V. Tatlow

The Board grants the motion to dismiss the claimant's DACD petition seeking compensation for permanency on the basis that a prior Board decision had determined that, while the claimant sustained injuries to those body parts, they had resolved.

Rebecca Clark v. State of Delaware, (IAB Hearing No. 1393189-Decided July 30, 2020)

This case came before the Board on July 9, 2020, on the claimant's DACD petition, seeking compensation for alleged permanency of 31% to the cervical spine and 14% from a concussion. The employer filed a motion seeking dismissal of the claimant's petition based on a prior decision from the Board in the same case.

The previous hearing had taken place before the Board on October 27, 2017, when it was established that the claimant did sustain a compensable work injury, including "a concussion and left shoulder, arm and hand sprain/stain injuries." In that litigation, the claimant had alleged that she had additional injuries to the head, neck and left leg, as well as a traumatic brain injury. The evidence presented to the Board included two medical experts on behalf of the employer whose testimony indicated that, while the claimant may have sustained a strain and sprain injury to the neck in the work injury, it had since resolved. As far as the head injury and the alleged traumatic brain injury, the employer's medical evidence showed that the claimant had sustained only a mild concussion and contusion to the back of the head. The claimant had appealed the prior Board decision to the Superior Court, which affirmed, and then to the Supreme Court, which summarily affirmed on the basis of the Superior Court's decision.

In addressing the employer's motion to dismiss, the Board stated that certain findings were final based on the prior decision. Specifically, the Board had found as a factual matter that the claimant may have sustained a strain/sprain injury to the neck but that condition had resolved. The Board had further found that the claimant had only sustained a mild concussion in the work injury but that the mild concussion had, in fact, resolved.

The claimant argued that the litigation on the alleged permanencies should be permitted to go forward, relying on the recent decision in *Washington v. Delaware Transit Corp.*, 226 A.3d 202 (Del. 2020). In that case, the Supreme Court reversed the lower court and found that a permanency petition could proceed and was not precluded by a prior Board decision, which had found that the claimant's injury had resolved and there had been no recurrence of total disability. The reasoning by the court in that case was that work capacity is not the same issue as alleged permanency to a body part.

The Board in this case reasoned that the *Washington* case was distinguishable in that it would be completely inconsistent and contradictory for the Board to have found in one decision that the claimant had no ongoing compensable injury but then in a later decision to find that the claimant had a permanent impairment due to a no longer-existing injury.

The Board's well-written decision contained legal reasoning that there would hardly ever be an end to workers' compensation litigation if a claimant could first file a petition seeking to find a compensable injury and then, having lost that petition, being able to file a second petition alleging total disability and relying on the argument that total disability was not an issue in the prior decision. The Board emphasized a claimant could then file a third petition for permanent impairment and argue that benefit had not been part of the prior two petitions. Therefore, the Board held that the claimant's petition alleging permanencies to the cervical spine and to the head from a concussion must be dismissed. The Board found that once they make a finding that a compensable injury resulting from a work accident either does not exist or has subsequently resolved, there can simply be no further entitlement to benefits with respect to that injury.

Florida Workers' Compensation

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Linda W. Farrell

Judge rules that a prior final compensation order did not predict that permanent total disability benefits would flow from the award in that the claimant intended, but did not, undergo a surgery to alleviate the work-related injury.

PraXair, Inc. and Broadspire Services, Inc. v. Celentano, No. 1D20-927, First District Court of Appeal, Decision Date Nov. 16, 2020

The claimant filed a petition for benefits, seeking permanent total disability benefits. The employer/carrier voluntarily accepted but denied penalties, interest, costs and attorney's fees. The claimant later filed a verified petition for attorney's fees and costs, to which the employer/carrier objected. The judge ruled that no fees were due on the permanent total disability benefits. A prior final compensation order denied the employer/carrier's misrepresentation defense and awarded lumbar surgery, temporary partial disability benefits, impairment benefits, attorney's fees and costs. The claimant did not undergo the surgery.

In this case, the claimant argued that the permanent total disability benefits flowed from her attorney having successfully defeated the prior misrepresentation defense to temporary disability benefits. The First District Court of Appeal agreed with the judge and found that the prior final compensation order did not predict that permanent total disability benefits would flow from the award in that the claimant intended to undergo a surgery to alleviate the back condition.

The First District Court of Appeal was not persuaded by the argument that listing the left knee as an accepted body part on the pre-trial stipulation constituted acceptance of the left knee condition.

Noland v. City of Deerfield Beach and Johns Eastern Co., No 1D19-1492, First District Court of Appeal, Decision Date Nov. 6, 2020

The claimant, a firefighter, suffered a work-related injury to his left knee in 1997. However, he treated on his own, including two surgeries on the left knee. The claimant returned to work full time, ran 2.5 miles per day and played competitive softball with no further treatment for the left knee after 2001. The claimant had other work-related accidents for other body parts and testified that he took pain medication prescribed for a neck injury to treat his knee pain. Then in 2018, his doctor recommended bilateral knee replacements due to osteoarthritis. The claimant chose to proceed under his private insurance, but he also filed a petition for benefits, seeking ongoing treatment for the left knee, along with attorney's fees and costs.

In the pre-trial stipulation, the employer/carrier agreed that the left knee was a condition related to a work accident and authorized a physician. The employer/carrier also asserted major contributing cause, and other defenses, and that "the treatment requested is no longer related to the work

place condition." The evidence at trial demonstrated the claimant had a lengthy history of knee problems long before the 1997 accident and, by that time, had extensive grade IV chondromalacia and osteoarthritis.

The judge rejected the claimant's 120-day-rule argument because the employer/carrier had never provided any benefits after the 1997 accident. The judge ruled that the date of accident was not the major contributing cause of the need for further left knee treatment.

The First District Court of Appeal affirmed the judge's ruling and was not persuaded by the claimant's argument that listing the left knee as an accepted body part on the pre-trial stipulation constituted acceptance of the claimant's left knee condition.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Appellate Division holds that, absent a sufficient basis for the Division of Workers' Compensation to assert jurisdiction over an injured worker's underlying workers' compensation claim, the Division cannot assert jurisdiction over an extraterritorial medical provider application derived from that claim.

Anesthesia Associates of Morristown v. Weinstein Supply Co. and Surgicare of Jersey City v. Waldbaums, Docket No. A-5033-18T4 and A-5718-18T4 (App. Div., Decided Oct. 7, 2020)

In these two appeals that were consolidated for the purposes of writing a single opinion, the Appellate Division determined that a New Jersey medical provider cannot file an independent claim under the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., to recover payment for medical services from their patients' employers where the patients lived and work outside of New Jersey, were injured outside of New Jersey and filed workers' compensation claims in their home states.

Anesthesia Associates of Morristown and Surgicare of Jersey City both appealed from orders issued by two Judges of Compensation dismissing their medical provider claims for lack of jurisdiction. In the Anesthesia Associates' matter, the employee suffered compensable work-related injuries in an accident in 1998. The accident took place in Pennsylvania, the injured worker was a Pennsylvania resident and the employer, Weinstein Supply Corporation, was based in Pennsylvania. The injured worker also filed a workers' compensation claim with the Pennsylvania Bureau of Workers' Compensation.

On March 22, 2018, Anesthesia Associates rendered services to the injured worker at a New Jersey hospital. It then submitted a claim to the Pennsylvania Department of Labor and Industry and received payment per that Department's fee schedule. Anesthesia Associates then initiated a medical provider application with the New Jersey Division of Workers' Compensation, even though there was no pending workers' compensation claim filed in New Jersey by the employee. The medical provider's application stated that Anesthesia Associates alleged that "the Employee sustained an injury by an accident arising out of an in the course of her employment with Respondent [that was] compensable under [the Act]."

Weinstein Supply Corporation file a motion to dismiss for lack of jurisdiction, which Anesthesia Associates opposed. In support of its motion, Weinstein filed a certification from its counsel setting forth facts that demonstrated there was no connection between New Jersey and either the injured employee, who had filed a claim in Pennsylvania, or his employer. Anesthesia Associates filed an opposition to Weinstein's motion, arguing that the New Jersey Division had jurisdiction over the claim as Pennsylvania's Act vested the New Jersey Division with "exclusive jurisdiction for any disputed medical charge, and because New Jersey had a substantial interest in the subject matter—i.e., the payment of New Jersey medical provider bills."

On June 19, 2019, the Judge of Compensation granted Weinstein's motion and dismissed Anesthesia Associates' claim for lack of jurisdiction. In her written decision, the judge reasoned:

> [I]t should go without saying that when the Legislature amended [the Act] to give the workers' compensation court exclusive jurisdiction for any disputed charges arising from any claim for a work-related injury or

> illness[,] that the claim had to be one compensable under New Jersey law. As our courts have held that a petitioner's New Jersey residence alone is an insufficient basis for jurisdiction, clearly one day of treatment in New Jersey is insufficient to grant New Jersey jurisdiction over this claim.

With regards to Surgicare's matter, the facts were similar. The injured employee, a resident of New York who had been hired in New York by his employer, Waldbaums, suffered a compensable injury as a result of a work-related accident in Brooklyn, New York, on February 20, 2010. The injured worker filed a workers' compensation claim in New York. On January 5, 2017, the employee's New York physician filed with the Workers' Compensation Board of New York (WCBNY) a request for authorization for the employee to undergo surgery, listing the injured worker's employer as Waldbaums in Brooklyn, New York. The WCBNY determined that surgery was necessary and that Waldbaums was liable for payment of these services in accord with New York law. The employee underwent surgery at Surgicare's facility in New Jersey, and Surgicare received payment in accord with the WCBNY fee schedule.

On July 17, 2018, Surgicare filed an medical provider application with the New Jersey Division of Workers' Compensation. The medical provider's application stated that Surgicare alleged that "the Employee sustained an injury by an accident arising out of and in the course of her employment with Respondent [that was] compensable under [the Act]." On August 2, 2018, Waldbaums filed a motion to dismiss for lack of jurisdiction. In support of its motion, it filed a certification from its counsel attesting to facts that established New Jersey had no relation to the employee's injury or claim. Surgicare filed an opposition to the motion to dismiss, arguing that as Waldbaums did business in New Jersey and as the employee was treated in New Jersey, the claim should not be dismissed.

On July 18, 2019, the Judge of Compensation dismissed Surgicare's medical provider application with prejudice for lack of jurisdiction. The judge stated that Surgicare:

> …provided medical treatment to a patient who lived in New York, who worked in New York for a New York Employer, who was injured in New York and who received medical treatment in New York, [and who] was directed by his New York doctor to a surgical center in New Jersey for a single, one-day visit. The patient's same-day surgery was performed by a New York doctor using equipment and devices ordered by the New York doctor. [Surgicare] filed an [medical provider application] in New Jersey's workers' compensation court seeking payment above and beyond that authorized by the workers' compensation law of the State of New York.

The Judge of Compensation concluded that one day of treatment in New Jersey "did not rise to the standard of sufficient purposeful minimal contacts requisite to vest this court with personal jurisdiction."

In affirming the dismissals with prejudice of Anesthesia Associates' and Surgicare's claims, the New Jersey Appellate Division acknowledged that the Division does have exclusive jurisdiction for any disputed medical charges arising from any claim for compensation for a work-related injury or illness. However, ascribing to the statute's plain language, its ordinary meaning and significance, the Appellate Division reasoned that:

> [C]ontrary to Anesthesia Associates' and Surgicare's arguments, by limiting its application to "claims for compensation," the statute did not apply to [medical provider applications] in matters where the Division did not have jurisdiction over an employee's related claim under the Act. That limitation was recognized by both Anesthesia Associates and Surgicare when they executed their medical provider applications that alleged the employees' claims were "compensable under the Act."

As such, the New Jersey Appellate Division concluded that, unless the Division has jurisdiction over the underlying claim for a compensable work-related injury, it does not have jurisdiction over a medical provider's application for payment.

This decision establishes that a medical provider's application is derivative of an injured worker's claim, and it demonstrates the importance of careful examination of any extraterritorial medical provider's application. Under New Jersey law, in order to make a determination as to jurisdiction, a court must consider the following six bases: [1] the place where the injury occurred; [2] the place of making the employment contract; [3] the place where the employer relation exists or is carried out; [4] the place where the industry is localized; [5] the place where the employee resides; and [6] the place whose statute the parties expressly adopted by contract. Absent sufficient basis for the Division to assert jurisdiction over an injured worker's underlying claim, the Division cannot assert jurisdiction over a medical provider's application derived from that claim.

Pennsylvania Workers' Compensation

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Francis X. Wickersham

An order compelling a claimant to attend an IRE is interlocutory and was, therefore, properly quashed by the Workers' Compensation Appeal Board.

Thomas Cantanese v. WCAB (RTA Services Co., Inc.); No. 1739 C.D. 2019; by Judge Covey; filed Jul. 21, 2020

The claimant sustained a work injury on December 11, 2013, and began receiving benefits pursuant to a Notice of Compensation Payable. In January of 2019, the employer filed a petition seeking to compel the claimant's attendance at an Impairment Rating Evaluation (IRE), alleging that the claimant failed to attend an IRE that was scheduled to occur earlier that month. The Workers' Compensation Judge granted the petition, which the claimant appealed to the Appeal Board, arguing that the judge erred by ordering him to appear at an IRE because Act 111 was unconstitutional. The Board quashed the claimant's appeal as interlocutory, and the claimant appealed to the Commonwealth Court.

The court, citing *Groller v. WCAB (Alstrom Energy Sys.)*, 873 A.2d 787, 789 (Pa. Cmwlth. 2005), affirmed the Board. According to the court, because the order merely stated that the claimant was required to participate in the IRE, and neither affected the claimant's benefits nor affected the employer's obligation to pay benefits, the IRE order was a non-appealable, interlocutory order.

Side Bar

In a footnote, the Commonwealth Court said that the claimant presented two issues for its review: (1) whether the claimant's failure to attend an IRE was reasonable because Act 111 violates the remedies clause of the Pennsylvania Constitution and deprived him of a vested right in paid benefits; and (2) whether Act 111 violates the Pennsylvania Constitution's non-delegation rule. However, these issues were not considered by the court since the issue of whether the Workers' Compensation Judge's order was interlocutory was dispositive.

News

We are pleased to announce that **Ryan A. Hauck**, Esquire, has been elevated to shareholder in the Workers' Compensation Department. Ryan joined our Pittsburgh office in 2016 and has significant experience litigating cases before judges throughout the Commonwealth of Pennsylvania and before the Workers' Compensation Appeal Board. He works closely with clients to develop a creative risk management strategy focused on reducing workers' compensation exposure in the most cost-effective manner possible. Please join us in congratulating Ryan!

Linda Wagner Farrell (Jacksonville, FL) was quoted in the AM Best *BestWire* article, "Florida OIR Orders Larger Workers' Comp Rate Cut of 6.6%." The article discusses how Florida Insurance Commissioner, David Altmaier, has ordered a larger decrease in workers' compensation rates than recommended for 2021.

Mike Duffy's (King of Prussia, PA) article "Is There a Doctor in the House? Telemedicine Has Its Benefits, But Not for Contested Workers' Compensation Claims" was published in the November 2020 issue of *CLM Magazine*. You can read Mike's article here: https://online.pubhtml5.com/adfn/wngy/#p=16.

Michele Punturi (Philadelphia, PA), **Bob Fitzgerald** (Mount Laurel, NJ), **John Gonzales** (Philadelphia, PA), **Keri Morris-Johnston** (Wilmington, DE) and **Rachel Ramsay-Lowe** (Roseland, NJ) presented a webinar "Workers' Compensation Winter Roundup." The discussion focused on hot topics at the intersection of workers' compensation and employment law, including the impact of terminating an employee while on workers' compensation, dealing with credits against workers' compensation benefits, unemployment issues, and navigating the interplay between FMLA, ADA and workers' compensation.

Outcomes

Andrea Rock (Philadelphia, PA) successfully defended against a claim petition. The Workers' Compensation Judge denied the claim petition, finding that the claimant was less credible than the two fact witnesses presented by Andrea regarding notice. In addition, the judge found that the claimant quit his employment for reasons not related to the alleged work injury. The judge also reasoned that our medical expert was much more qualified to testify regarding the alleged injuries than the claimant's treating chiropractor, especially based on the inconsistencies between the medical records and history provided by the claimant.

Paul Tatlow (Wilmington, DE) successfully defended a termination petition after the claimant received temporary total disability for many years. The Board accepted the strong testimony of our medical expert over that of the treating physician and found that the claimant could perform sedentary work. The Board also found that Paul had established inconsistences in the claimant's testimony and that she was not credible.

Mike Duffy (King of Prussia, PA) received a favorable decision in a case involving claim and penalty petitions. The claimant alleged cervical injuries requiring surgery. Our medical expert agreed that surgery was required but did not agree to a work injury based on the records obtained following the claimant's deposition. Although the claimant testified he had never had prior injuries or treated for his neck prior to the injuries, Mike was able to obtain medical records showing treatment for the same complaints two weeks prior to the work injury. The judge denied the claim and penalty petitions.