MARSHALL DENNEHEY

WHAT'S HOT IN WORKERS' COMP

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Delaware Workers' Compensation

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Paul V. Tatlow

The Board denies claimant's DCD petition, alleging bilateral carpal tunnel syndrome resulting from cumulative repetitive activities as a teacher, based primarily on literature cited by employer's medical expert that typing and keyboard work do not increase the likelihood of developing carpal tunnel syndrome.

James Lewis v. State of Delaware, (IAB Hearing No. 1481670-Decided Feb. 5, 2021)

This case involved a DCD petition in which the claimant alleged that he suffered bilateral carpal tunnel syndrome from his cumulative repetitive duties as a teacher for the State of Delaware. The employer denied the petition based on causation grounds.

The claimant's testimony showed that he is a 54-year-old high school science teacher who has been doing this work for 12 years. He estimated that, as part of his teaching duties, he spends between three to four hours per day consistently keyboarding. The claimant began developing symptoms of numbness and tingling in his hands in 2018. Following an EMG study, he was diagnosed with severe bilateral carpal tunnel syndrome in both wrists. He had right wrist carpal tunnel surgery on February 12, 2019, and a similar procedure on his left wrist on April 2, 2019. Thereafter, he made an excellent recovery and returned to work with only some residual complaints.

Dr. Shin, the claimant's expert, focuses solely on pathology involving the upper extremities and is Board Certified in orthopedic surgery with an added qualification in hand surgery. He testified that the claimant had tenosynovitis that led to the development of carpal tunnel syndrome. In his opinion, both conditions were causally related to the claimant's work activities involving significant amounts of typing and keyboarding as well as use of a computer mouse.

Dr. Spellman testified as the employer's expert and agreed that the claimant clearly had bilateral carpal tunnel syndrome. Dr. Spellman's practice includes treating patients from beef packing plants, which is tough, demanding work that involves vigorous activities. Dr. Spellman testified that based on his experience, as well as the medical literature, there is a correlation between vigorous work activities and tool use and carpal tunnel syndrome, but not keyboarding work. He further indicated that the peer reviewed medical literature for carpal tunnel syndrome shows that the most common cause is idiopathic. His key opinion was that a careful analysis shows that people doing keyboarding work do not have a higher incidence of carpal tunnel syndrome compared to the general population.

The Board analyzed the evidence and concluded that the claimant failed to meet the burden of proving that his bilateral carpal tunnel syndrome was causally related to his work activities as a teacher. In so doing, the Board accepted

the testimony of Dr. Spellman as convincing, which showed that a careful analysis has been done on typing and keyboarding work and does not establish an increased incidence or association with carpal tunnel syndrome. Dr. Spellman testified credibly that carpal tunnel syndrome is more pervasive in persons who perform jobs that are physically demanding on the wrist, specifically with repetitive activity involving force, which is why he has seen an increased incidence of carpal tunnel syndrome in the workers at the meat packing plants and those who use vibrating tools. Dr. Spellman noted that forcible use of the wrist against resistance is not characteristic of keyboard work. The Board concluded, based on the credible medical evidence, including the peer reviewed medical literature, that there is no higher instance of carpal tunnel syndrome from keyboarding work than in the general population. Therefore, the petition was denied as the claimant failed to meet his burden of proof.

Florida Workers' Compensation

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Linda W. Farrell

The language in the petition indicated a dispute was enough to justify the IME. The statute requires that there be a dispute before a party can obtain an IME.

Yves P. Charles v. Super Nice Sts, Inc. d/b/a Limousines of So. Fla., Transportation America, OJCC# 17-005608; Decision date: Feb. 23, 2021; Judge Havers

The employer/carrier filed a motion to compel the claimant's attendance at an independent medical examination (IME). The claimant contended there was no evidence of a dispute supporting the request for an IME. However, there was a pending petition that stated in part, "The claimant… has made a good faith effort to resolve the **dispute**."

The claimant further argued that the employer/carrier was not entitled to an IME because the surgery at issue was due by operation of law because the employer/carrier did not timely respond to the request for authorization in accordance with 440.13(3)(i). The judge ruled that this argument goes to the merits of the case, which would not be adjudicated until the final hearing had taken place and after discovery was completed. Furthermore, the employer/carrier did not wave its right to contest the major contributing cause if it did not timely respond to a request for authorization. The petition also asked for payment of a medical bill for services provided prior to the recommendation of the surgery, so the surgery was not the only issue pending.

The nurse can have ex parte communications with the doctor because the claimant acknowledged that she was an agent of the carrier.

Michael Antonacci v. Hi-Tec Concrete, Inc., OJCC# 20-002220; Decision date: Feb. 23, 2021; Judge Weiss

This matter was before Judge Weiss on an evidentiary hearing after the claimant filed a motion for protective order regarding the nurse case manager having *ex parte* contact with the healthcare providers. Because the claimant testified that he understood the nurse was an agent of the carrier, he did not need to reach the issue of whether the nurse case manager was an authorized qualified rehabilitation provider under 440.13(4)(c). He was able to refer to the portion of the statute that allows an agent of the employer to discuss the medical condition of the injured employee with the healthcare provider.

The plain language of 440.15(e)(1) allows the employer to obtain a vocational assessment, and the change in attendant care after the PTD acceptance was a sufficient basis to trigger the employer/carrier's right to a vocational assessment.

Michael Boland v. University of Florida Board of Trustees, OJCC# 03-006772; PCA Decision date: Feb. 24, 2021; Lower Court Judge: Stanton

In this case before Judge Stanton in Gainesville, the employer/carrier filed a motion to compel a vocational assessment, arguing it had the right to require the claimant

to undergo same as it is paying the claimant permanent total disability benefits. The employer/carrier argued that it had an absolute right to obtain the assessment, but the claimant argued that the employer/carrier must present evidence that there has been a change in medical condition, the treating doctor recommends the assessment or the claimant has made appropriate medical progress.

The claimant began receiving permanent total disability benefits in 2004 prior to a reduction in attendant care in 2016. Therefore, the judge found that the plain language of 440.15(e)(1) allowed the employer/carrier to obtain an assessment and that the change in attendant care after the permanent total disability acceptance was a sufficient basis to trigger the employer/carrier's right to a vocational assessment.

The claimant appealed, and the First District Court of Appeal affirmed the judge's decision without a written opinion.

New Jersey Workers' Compensation

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Dario J. Badalamenti

The Supreme Court reverses Appellate Division's decision (injury was not compensable as it occurred at an employer-sponsored social/recreational event), finding petitioner entitled to compensation as her role at the event was neither social nor recreational.

Goulding v. NJ Friendship House, Inc., Nos. A-48 September Term 2019, 083726 (Supreme Court of New Jersey, Decided Feb. 8, 2021)

In this unanimous opinion, the New Jersey Supreme Court reversed an Appellate Division's decision—that the petitioner's injury was not compensable because it occurred at a social/recreational event sponsored by her employer—finding that the petitioner's role at the event was neither social nor recreational as required under the New Jersey workers' compensation statute. The Supreme Court held that because the petitioner's role at the event was the same as her normal job duties and she would not have been asked to volunteer for the event but for her employment, the petitioner satisfied the two-part statutory exception under N.J.S.A. 34:15-7. The court further noted that the employer received a benefit from the event in the form of community outreach and goodwill.

The petitioner was employed as a cook with the respondent, a non-profit organization that provides vocational training and clinical services to individuals with developmental issues. The petitioner prepared and cooked meals for the respondent's members during lunchtime and for afterschool programs from Monday to Friday. On Saturday, September 23, 2017, the respondent hosted a "Family Fun Day" event in the rear parking lot of its premises. The event was planned to provide recreational and social services to the respondent's members and their families, and included food, music, games, prizes and other recreational activities. The respondent sought volunteers from its pool of employees to service the event. Volunteers were not compensated for their time. Some employees agreed to volunteer their time, and others declined. The petitioner chose to volunteer as a cook for the event, and while returning from a bathroom break, she stepped into a pothole, injuring her right foot and ankle.

The petitioner filed a claim with the Division of Workers' Compensation, along with a simultaneous motion for medical and temporary total disability benefits. The respondent denied the claim based on its assertion that the petitioner was not in the course and scope of her employment at the time of the accident. The Judge of Compensation determined that the petitioner's injury did not arise out of and in the course of her employment. In her analysis, the judge noted the two-prong test established for determining compensability for an injury sustained during recreational or social activity. Under N.J.S.A. 34:15-7, an employer must compensate an employee for accidental injuries arising out of and in the course of employment. However, the statute excludes any injuries that arise from "recreational or social activities," unless those "recreational or social activities are a regular incident of employment and produce a benefit to the employer beyond improvement in employee health and morale." The judge found that the Family Fun Day in which the petitioner participated was a recreational activity, not a regular incident of her

employment, and that the respondent derived no benefit from it beyond the health and morale of its members. Accordingly, the judge dismissed the petitioner's claim. The petitioner appealed.

In affirming the Judge of Compensation's dismissal of the petitioner's claim, the Appellate Division relied on *Lozano v. Frank DeLuca Constr.*, 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. Based on the *Lozano* holding, the Appellate Division reasoned:

> [Petitioner] contends . . . that she was not engaged in a recreational or social activity at the time of her injury because the activity she was participating in was cooking—her job. We disagree. [Petitioner] volunteered her time to participate at an event designed by her employer to celebrate its members. The Family Fun Day included food, games, music and other recreational activities. Respondent's employees were not compelled to attend or help. Many declined to volunteer without ramification. We are satisfied that the Family Fun Day, held on a Saturday for which employees chose whether to offer their time, was a recreational or social activity.

Accordingly, the Appellate Division found that the petitioner's accident did not arise out of and in the course of her employment, and as such, her injuries were not compensable. The petitioner again appealed.

In reversing the Appellate Division's ruling and remanding the matter to the Division of Workers' Compensation for further findings, the New Jersey Supreme Court considered whether the specific non-compulsory activity in which the petitioner participated was a recreational or social activity within the meaning of N.J.S.A. 34:15-7.

The Supreme Court expressed disagreement with the Appellate Division's view that the petitioner's volunteering at Family Fun Day was a social or recreational activity because she was not compelled to volunteer and because the event celebrated clients, had food, music and games, and was held outside of working hours. The Supreme Court found that the Appellate Division's opinion failed to consider the employee's role in the activity. As the Supreme Court reasoned:

> It is undisputed that Goulding, unlike the employee in *Lozano*, was not compelled to volunteer for Family Fun Day. However, compulsion is not the only instance in which an activity can be removed from the social or recreational activity label. Goulding was not playing softball on her lunch break; she was volunteering to cook (her regular job) for an event her employer was hosting, and which it planned to hold annually. [A]lthough Family Fun Day as a whole may have been a social or recreational event, Goulding did not participate in a social or recreational role because she was there to facilitate it. The statute applies to 'recreational or social activities' – not 'recreational or social events.'

The Supreme Court further found that the petitioner would have been entitled to compensation under N.J.S.A. 34:15-7 even if her volunteer work at Family Fun Day could be deemed a recreational or social activity. As the Supreme Court opined:

> N.J.S.A. 34:15-7 contains an exception to the general rule of no recovery for injuries sustained during a recreational or social activity that is (1) a 'regular incident of employment,' and that (2) 'produces a benefit to the employer beyond improvement in employee health and morale.' Family Fun Day was designed to be a recurring annual event. It is difficult to imagine that the Legislature intended to preclude compensation for injuries sustained by an employee who was volunteering at the employer's behest to assist in facilitating an employer-sponsored event designed to celebrate the employer's clients. [As to the second prong,] Friendship House received the 'intangible benefits' from Family Fun Day of promoting itself and fostering good will in the community.

The Supreme Court's ruling illustrates that the determination as to whether an activity is social or recreational should turn not on the event itself but, rather, on the employee's role in the activity. The appropriate inquiry is whether the employee is participating as a guest or providing services for her employer at the event. If the employee is helping to facilitate the event in the manner that occurred in this case, the event cannot be deemed a social or recreational activity as to that employee, and any injuries sustained by the employee while acting in that capacity will be found to be compensable.

Pennsylvania Workers' Compensation

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Francis X. Wickersham

Commonwealth Court addresses the retroactivity of the Supreme Court's decision in *Whitmoyer*, holding an employer is required to reimburse medical payments as of the date *Whitmoyer* was decided and not as of the date of a signed third-party settlement agreement.

Beaver Valley Slag Inc. v. Jason Marchionda (WCAB) and Jamie Young, Guardian v. Beaver Valley Slag, Inc. (WCAB); 867 C.D. 2020; 901 C.D. 2020; filed Mar. 10, 2021; Judge Covey

In this case, the claimant sustained a severe injury while using a stone crusher that malfunctioned. The employer accepted liability for the injury through a notice of compensation payable (NCP). Eventually, the claimant was adjudicated an incapacitated person, and a Guardian was appointed. The Guardian filed a product liability lawsuit in 2014, resulting in a substantial settlement. After distribution of the settlement proceeds was ordered by the trial court, a Special Needs Trust (Trust) was established, and the parties signed a Third-Party Settlement Agreement (TPSA). The TPSA said the employer was responsible for 33.7% of the claimant's future weekly wage loss and medical benefits.

In June of 2018, the Pennsylvania Supreme Court decided *Whitmoyer v. WCAB (Mountain Country Meats)*, 186 A.3d 947 (Pa. 2018), holding that § 319 of the Act precludes employers from subrogating future medical benefits after a TPSA is executed. Two months after *Whitmoyer*, the Guardian filed a petition to review, seeking to recover all the medical benefits paid from the Trust after the TPSA was executed and relief from the Trust's obligation to pay any future medical benefits. The Workers' Compensation Judge granted the petition and concluded that the employer was obligated to reimburse the Trust for any medical expenses the Trust paid as of the date of the *Whitmoyer* decision and not as of the date of the TPSA. The parties filed appeals with the Workers' Compensation Appeal Board, which affirmed. The parties then filed appeals with the Commonwealth Court.

The court affirmed the judge and the Board, concluding *Whitmoyer* was retroactive to the date it was decided and not as of the date of the TPSA. In doing so, the court rejected the employer's arguments—that the judge erred by applying *Whitmoyer* since *Whitmoyer* was before the Board at the time the TPSA was signed and that the judge erred in applying *Whitmoyer* retroactively. According to the court, it was proper for *Whitmoyer* to be applied since the TPSA was not a final resolution of the claim, thereby permitting the judge to review, modify or set it aside under § 413 (a) of the Act. The court also held that the status of the TPSA's terms for future medical expense subrogation was not "pending on direct appeal" at the time *Whitmoyer* was decided; therefore, the court declined to apply *Whitmoyer* retroactively to the date of the TPSA's origination. Because § 319 of the Act is an existing statute which the Pennsylvania Supreme Court had not yet interpreted, *Whitmoyer* did not establish a new rule of law. The court noted that the TPSA was not a final resolution of the claim and was, therefore, subject to review under § 413 of the Act. The court further noted that the Guardian preserved the issue of *Whitmoyer*'s application to the TPSA by raising it at the earliest point and was, thus, entitled to the benefit of the *Whitmoyer* ruling as of the date it was decided.

Medical Marijuana and Workers' Compensation

There has been a wave of medical marijuana legalization throughout the country in recent years. It is now legal in more than 35 states, including ones where we defend clients in workers' compensation matters: Delaware, Florida, New Jersey, New York, and Pennsylvania. Our attorneys are knowledgeable about the medical marijuana laws in these specific states and can provide sound advice on the many issues that arise in the workers' compensation context. Some of these issues include insurance coverage, payment, the reasonableness and necessity of medical cannabis treatment for work injuries, work injuries that qualify as conditions treatable with medical cannabis, and workplace safety concerns. We are also committed to tracking important trends in medical marijuana law nationally to keep our clients well informed of significant developments and the impact they may have on the practice of workers' compensation.

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News

Niki Ingram (Philadelphia) was a panelist at a recent webinar hosted by the Philadelphia Association of Defense Counsel. "How Women Judges and Lawyers Succeed During Challenging Times" featured an esteemed panel of women in the legal profession offering advice and sharing real life experiences on how to move forward while overcoming obstacles, juggling work life with personal life, and maintaining civility.

Kacey Wiedt (Harrisburg) was a featured speaker at the "Controlling Workers' Compensation Costs" webinar hosted by the County Commissioners Association of Pennsylvania. During his presentation, "The Impact of COVID-19 on Workers' Compensation in Pennsylvania," Kacey discussed the importance of working together with clients during the pre-litigation phase to properly manage COVID-19 claims and mitigate risk. He also discussed the compensability of such claims and the importance of choosing the right medical expert.

Raphael Duran (Philadelphia) was a guest speaker on WPHT Talk Radio along with JB Dilsheimer of Stampone O'Brien & Dilsheimer and Geoff Dlin of Krasno Krasno & Onwudinjo. Raph and his fellow panelists discussed litigation styles (such as when to be a bulldog and when to be cooperative) and how it impacts workers' compensation cases. Various claims were discussed involving subrogation, catastrophic and minor claims. The effectiveness of various litigation styles, in the speakers' respective specialties, was also debated.

Ashley Eldridge (Philadelphia) is speaking at the "Personal Injury Potpourri" webinar on April 20, hosted by The Dispute Resolution Institute. The daylong event will feature discussion on various topics, including recent case analyses, COVID-19 and workers' compensation, new disciplinary rule regarding referral fees, Common Pleas update and much more. For more information, click here.

News (cont.)

Michele Punturi (Philadelphia) is speaking at the 2021 CLM Worker's Compensation and Retail, Restaurant & Hospitality Conference to be held virtually on May 12-14. In "Changing the Employee Safety and Wellness Mindset to Reduce Workers' Compensation Costs and Avoid Liability," Michele is part of a panel discussion that will focus on changing the claims management mindset surrounding employee safety and wellness to drive down workers' compensation costs and avoid liability exposure. Today's litigious environment, particularly considering COVID-19, calls for an innovative approach that might include self-reporting programs and dedicated medical case management teams to help employers spot issues before they become costly claims. For more information, click here.

Outcomes

Ashley Eldridge (Philadelphia) successfully defended a claim petition on behalf of a national communications carrier. The claimant was employed as a customer services representative who transitioned to a work-from-home position during the pandemic. While carrying computers into his house, the claimant fell, sustaining a patellar tendon tear, PCL tear, meniscus tears and bone contusions. Arguing that the injuries were work-related, the claimant presented evidence from several orthopedic surgeons. Ashley was able to demonstrate that the injuries were neither work-related nor sustained in the course and scope of his employment. The judge accepted the defense evidence as credible and denied the claim petition in its entirety.

Bob Fitzgerald and **Jeremy Zacharias** (Mount Laurel) were successful before Judge *Bradley W. Henson, Sr., J.W.C.*, who rendered a decision in favor of Zurich North America. *Maria Burgos v. 20 Horse Tavern* involved a 2010 claim petition resulting from a knee injury sustained in a March 20, 2010, workplace accident. This claim was denied by Zurich as it did not provide workers' compensation insurance coverage on the date of loss. Prior to the date of loss, 20 Horse Tavern retained a restaurant management company to handle all business-related issues for the restaurant, including obtaining workers' compensation insurance coverage. However, based on certain representations made by 20 Horse Tavern regarding its business closure, the restaurant was not listed for coverage under the existing PMA Insurance's workers' compensation policy. When the restaurant management company obtained a renewal policy through Zurich, this policy did not include 20 Horse Tavern or its business address as a covered entity. Bob and Jeremy successfully argued that 20 Horse Tavern was never insured by Zurich since 20 Horse Tavern was taken off the workers' compensation policy prior to Zurich ever taking over coverage.

Judd Woytek (Allentown) received a favorable decision denying and dismissing the claimant's claim petition and granting our termination petition. The claim was accepted as medical-only for a low back strain. The claimant filed a claim petition seeking wage loss benefits after refusing a modified-duty job offer by the employer. Judd obtained an opinion of full recovery from our IME physician and filed a termination petition. The judge denied the claim petition and granted our termination petition, finding that the employer had made a good faith offer of employment within the claimant's restrictions, which she refused to accept. Therefore, the claimant was not entitled to any wage loss benefits. The judge also found that the claimant fully recovered as of the date of our IME and terminated benefits completely as of that date.

Judd also received a favorable decision by the Department of Labor (DOL) denying a coal miner's claim for benefits when the only evidence submitted by his widow was the death certificate listing severe chronic obstructive pulmonary disease (COPD) as the primary cause of death. The DOL claims examiner agreed with Judd's position that the death certificate alone was insufficient evidence to sustain the claimant's burden of proving that her husband had totally disabling coal workers' pneumoconiosis during his lifetime. Benefits were denied.