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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

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Francis X. Wickersham

A claimant who settles his claim by final and binding Compromise & Release Agreement cannot later petition to expand the nature of the work injury, arguing that the employer is precluded from denying causation by voluntarily making a medical bill payment.

Michael DePue v. WCAB (N. Paone Construction, Inc.); 1113 C.D. 2012; filed 1/30/13; Judge Leadbetter

The claimant settled his indemnity claim by Compromise and Release Agreement (C&R). The C&R that was approved by the Workers' Compensation Judge described the injuries as "[a]ny and all injuries . . . including but not limited to the accepted injuries of a severe closed head injury with seizure disorder and short term memory loss." The C&R also stated that the employer would pay for all reasonable and related medical bills. After a decision was issued by the judge approving the settlement, the claimant filed a penalty petition, alleging that the employer refused to pay for medical bills related to the work injury. The claimant additionally filed a petition to review, in which he alleged the description of his work injury was incorrect and sought to add a left shoulder injury.

The judge denied the claimant's petitions. She concluded that the review petition was barred by *res judicata* since the claimant was aware of the left shoulder injury at the time of the settlement and had agreed not to include it in the approved C&R. The Appeal Board affirmed.

On appeal to the Commonwealth Court, the claimant argued that the C&R should be corrected to add the left shoulder injury. He claimed the left shoulder injury was erroneously omitted in the final draft of the agreement and that, because the employer paid medical bills for the left shoulder injury, they were aware it was causally related to the work incident. The claimant further argued that under the Doctrines of Promissory and Equitable Estoppel, the employer should be precluded from refusing to pay the medical bills for the left shoulder.

The Commonwealth Court rejected the claimant's arguments and dismissed the appeal. The court pointed out that, before the C&R was signed, employer's counsel rejected a proposed addendum to the agreement prepared by claimant's counsel which included a left shoulder fracture as part of the work injury. The final version of the C&R omitted the injuries that the claimant sought to include in the proposed addendum to the C&R. The court further noted that the claimant did not expressly reserve his right to add a new injury in the C&R. The court additionally held that the Doctrines of Promissory Equitable Estoppel did not apply simply because the employer made a voluntary payment of medical bills for treatment of the left shoulder. The employer's payments did not constitute an admission of liability for an injury. II

Side Bar

An approved C&R is final and binding and is extremely difficult to rescind after it has been approved by a judge. But, surprises happen, and in order to address them, it is recommended that a C&R include language stating that the resolution includes any and all injuries sustained while working for the employer and that the C&R represents a full and final settlement of any claim, both past, present and future that the claimant may have against the employer.

New Jersey Workers' Compensation

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Dario J. Badalamenti

Appellate Division dismisses carrier's appeal to deny workers' compensation coverage based on a finding of invalid cancellation of policy.

Osorto v. FMF Construction, Docket No. A-3236-11T1, 2013 N.J. Super. Unpub. LEXIS 252 (App. Div., decided 1/25/13)

The petitioner was employed by the respondent, a subcontractor on a project for the General Contractor (GC). On November 29, 2007, the petitioner fell and injured himself at work. He filed a claim petition against the respondent as insured by Insurance Carrier A ("Carrier A"). Carrier A answered on behalf of itself only and asserted that the respondent's policy was cancelled prior to the petitioner's accident due to the respondent's refusal to permit Carrier A to conduct an audit. Carrier A filed a simultaneous motion to dismiss for lack of coverage. The petitioner subsequently filed a separate claim petition against the GC based on N.J.S.A. 34:15-79 which provides that:

> Any contractor placing work with a subcontractor shall, in the event of the subcontractor's failing to carry workers' compensation insurance as required by this article, become liable for any compensation which may be due an employee[.]

The petitioner also filed a motion to join the Uninsured Employers Fund ("UEF") as a necessary party to his claim against the respondent.

The UEF filed opposition to Carrier A's motion to dismiss contending that Carrier A did not effectively cancel its policy. On June 7, 2011, the Judge of Compensation entered an order denying Carrier A's motion to dismiss for lack of coverage because Carrier A's cancellation notice did not specifically advise the respondent that it could reinstate its insurance policy by permitting Carrier A to conduct an audit, and because Carrier A used the wrong form to notify the insurance regulatory agency of the cancellation. Accordingly, the Judge of Compensation also denied the petitioner's motion to join the UEF and dismissed the petitioner's claim petition against the GC.

On January 24, 2012, Carrier A entered into a settlement of the petitioner's claim against the respondent. At the time of the settlement, the attorney handling the matter on behalf of Carrier A identified himself as counsel for the respondent and stated on the record that "[b]y virtue of Your Honor's previous order, [respondent] [was] insured by Carrier A at the time of the accident." There was no indication in either the record or settlement order that Carrier A was entering into the settlement on its own behalf rather than on behalf of the respondent, or that Carrier A was purporting to reserve any appeal rights.

On March 5, 2012, Carrier A filed an appeal of the January 24, 2012, order, asserting a denial of coverage. In dismissing Carrier A's appeal, the Appellate Division adopted the language used by the Judge of Compensation in his supplemental opinion issued following the filing of Carrier A's appeal.

> Carrier A is estopped from denying coverage because it undertook the settlement of the case on behalf of [the Respondent] without a reservation of rights. To allow Carrier A to assert the absence of insurance coverage after it settled the case, would put both [GC] and [Respondent] at risk of having to pay the settlement amount, and possibly sums for future medical treatment, when they had no opportunity to object to the settlement.

Having settled the claim without a reservation of rights, the Appellate Division concluded that Carrier A was barred from pursuing an appeal aimed at canceling coverage of its insured. **II**

Side Bar

As this decision demonstrates, the New Jersey Workers' Compensation Act, as well as the courts which enforce its laws, seeks to ensure that workers' compensation coverage of some sort will be afforded to all eligible injured workers. In the instant case, the Judge of Compensation was able to nullify Carrier A's purported cancellation of the respondent's policy based on its failure to adhere to strict procedural guidelines as set forth in the Act. Despite the fact that neither UEF involvement nor "general contractor liability" under N.J.S.A. 34:15-79 were triggered, the facts of this case do demonstrate their potential use in the true absence of workers' compensation coverage.

Delaware Workers' Compensation

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwcg.com)

Paul V. Tatlow

The employer is not excused from bringing its fact witnesses to a hearing for live testimony where the excuse offered is that they must travel from Pittsburg, PA to Delaware.

Michelle Dilley v. PNC Bank, (IAB #1372654 – Decided 1/31/13)

This case involved a motion presented by the employer to the Board seeking permission for two of its fact witnesses to testify telephonically at the upcoming Board hearing rather than appearing live. It appears that claimant's counsel was opposing this motion, although the reasons for that opposition are not specified. The Board held that the witnesses were required to appear live at the hearing, and the motion was, therefore, denied. The Board's reason was that the only basis offered by the employer for the request was the distance the witnesses must travel to appear at the hearing. There was no indication that the witnesses were physically unable to appear at the hearing, and the Board noted that credibility would be a significant factor in its determination of the case.

Section 2348 of the Act provides in Subsection (i) that medical testimony of an expert may be presented either by deposition, by live testimony at the hearing, by telephonic testimony at the hearing or by videotape. Further, Board Rule #14 provides that the rules of evidence applicable to the Superior Court shall apply to Board hearings, but that the Board in its discretion may disregard any customary rules of evidence and legal procedures so long as its doing so does not amount to an abusive discretion. In short, the Board has discretion to handle these types of motions as it sees fit. II

Side Bar

From a practical standpoint, it is often easier to have a witness who is at a significant distance from the hearing location testify telephonically. However, this case illustrates that such requests to the Board should be made in advance to approve the arrangement. Furthermore, if the credibility of the witness is likely to be critical to the outcome of the case, it is strongly suggested that the witness testify live at the hearing since the witness is much more likely to have a favorable impression on the Board when they are seen in person.

The Board denies the employer's request for a credit against the claimant's future medical benefits based on its having paid a lien for child support arrears against the claimant.

Grayson Williams v. Evraz Oregon Steel Mills, (IAB #1329960 – Decided 1/29/13)

This case came before the Board on a rule to show cause filed by the employer who asserted a credit against the claimant's future medical benefits. The claimant was pro se and was actually not present at the legal hearing. The employer sought a credit based on its having paid a Domestic Relations Office in Pennsylvania in the amount of $5,279.79 to satisfy a lien for child support arrears against the claimant.

The non-disbursement order from the court concerning the child support arrears was dated May 7, 2008. However, according to the evidence, it was not faxed to the claims adjuster until October 9, 2012. The employer argued that it had made the payment for the child support arrears under a feeling of obligation rather than voluntarily. Curiously, the employer asserted that they were not on notice of the child support lien until after having made the actual payment. The evidence also showed that the employer had previously paid various compensation benefits to the claimant, including total disability, partial disability, permanent impairment, disfigurement and medical benefits.

The Board held that the employer's request for a credit against future medical expenses was denied. The Board noted that they generally only award a credit against future benefits in two circumstances: (1) where there has been an overpayment of benefits owing to the claimant; and (2) where there has been a third-party recovery and the employer has asserted a subrogation lien pursuant to §2363 of the Act. Neither of those circumstances applied here. II

Side Bar

The employer in this case appears to have made the mistake of paying the lien for the child support arrears after having already paid the various compensation benefits to the claimant. The better way to handle this situation would have been to pay the child support arrears lien and then assert a credit against any additional compensation benefits owing to the claimant. The Board seem troubled by the employer's assertion that they had paid the child support lien prior to being put on notice of the order, and they suggest that the various lump sum payments to the claimant should have been held up pending resolution of the child support lien issue.

News from Marshall Dennehey

On April 9, 2013, **Robin Romano** (Philadelphia, PA) will be a speaker for the Pennsylvania Bar Institute's presentation *Tough Problems in Workers' Compensation 2013*. This seminar will provide attendees with the necessary tools to manage tough problems in workers' compensation. The distinguished faculty will address how to master the ins and outs of compensation for medical treatment, provide the keys to establishing liability and coverage for injuries in today's mobile workforce, review the most effective ways to handle dual jurisdiction and employees who live far away, and offer a judge's perspective including how-to's, do's and don'ts, tips and insights. Robin Romano will discuss fee reviews—what they are and why you should care. To register, visit the Institute at http://www.legalspan.com/pbi/calendar.asp?UGUID=&ItemID=20120831-229194-94950#ItemDescription.

Bill Walls (Pittsburgh, PA) will be a speaker at NBI's *Handling the Workers' Compensation Case From Start to Finish* seminar on Wednesday, April 24, 2013, in Pittsburgh. This course will guide attendees through the step-by-step practicalities of handling a workers' compensation case, from initial intake through the hearing process. Bill Walls and Glenn Sinko, a partner with Sinko Zimmerman, will present on the topic of *Medical Issues During the Claim*. They will address issues relating to:

- Medical discovery issues
- Choice of doctor
- Second medical opinions
- Medical evaluation issues and IMEs
- Vocational rehabilitation and functional capacity evaluations

To register, visit NBI at www.nbi-sems.com.

Jeff Watson (Harrisburg, PA) was successful in securing a voluntary withdrawal of a claim petition by counsel. The claim petition alleged that the claimant, a driver for the insured, sustained substantial injuries in a work-related motor vehicle accident. Jeff performed a site visit and utilized documentation from the New York and Pennsylvania Departments of State to demonstrate that the insured was actually an out-of-state entity who did not employ the claimant. After thoroughly cross-examining the claimant regarding her lack of relationship with the insured, an order was secured dismissing the claim petition against our insured and its carrier. **II**