MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

VOLUME 17 | NO. 5 | MAY 2013

What's Hot in Workers' Comp

# PENNSYLVANIA WORKERS' COMPENSATION

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**A Workers' Compensation Judge's suspension of the claimant's benefits based on evidence of her voluntary removal from the work force was appropriate even where the employer did not specifically request a suspension of benefits.**

*Jean Fitchett v. WCAB (School District of Philadelphia)*; 1713 C.D. 2011; filed 4/8/13; by Judge Simpson

The claimant worked for the employer as an instructional aide and was injured as a result of a student attack. The injury was acknowledged by a Notice of Compensation Payable (NCP). Later, the employer filed a termination petition alleging that the claimant fully recovered from her work-related injuries.

During the litigation of that petition, the claimant testified that she began receiving pension benefits and Social Security Retirement benefits following the work injury. The claimant said that she accepted the benefits because she was impoverished by a lack of funds coming in from employment. The claimant also said she did not look for work after her injury, and when asked whether she considered herself retired, she responded, "Well, I'm collecting retirement." She also said that, if not for her injuries, she would have continued working.

The Workers' Compensation Judge issued an interlocutory order, ordering the employer to reinstate the claimant's benefits as of the date the claimant returned an LIBC-760, which she claimed she never received. The judge further ordered that the employer was entitled to a credit for pension and Social Security Retirement benefits the claimant received against weekly compensation benefits. Ultimately, the judge granted the termination petition in part, denying the termination petition as to a left shoulder injury. However, the judge also ordered a suspension of benefits, finding that the claimant was essentially retired and had voluntarily withdrawn from the work force.

The Workers' Compensation Appeal Board (Board) affirmed the suspension of the claimant's benefits, as did the Commonwealth Court. The court held that, although the employer did not specifically request a suspension of benefits by filing such a petition, the claimant was, nevertheless, put on notice that a suspension of benefits was in play when the judge issued the interlocutory order and that it was proper to suspend benefits. According to the court, the claimant was not prejudiced when put on notice that a suspension was possible as she was given the opportunity to defend against the petition. Although the claimant testified that she planned to resume working when she was physically able to do so, the judge did not believe her. The Commonwealth Court further held that the employer was entitled to an offset, even though a notification of workers' compensation offset form was not sent to the claimant, because the offset was taken pursuant to a judge's decision, not unilaterally. Thus, the employer was not required to provide the claimant with prior notice of the offset. II

## SIDE BAR

Although this is a case that deals with a voluntary removal from the work force issue, it is also a case that addresses the authority that a Workers' Compensation Judge has during litigation. Basically, if there is evidence to support a suspension or termination of benefits that a claimant has the opportunity to contest in litigation, the judge has the power to order a suspension or termination, even when the employer has not filed a petition seeking that relief. An example of this would be when a judge orders a termination of benefits within the context of a claim petition where there is evidence the judge accepts that the claimant is fully recovered from the work injuries.

### *A provider's fee review application cannot be barred by collateral estoppel where the hearing officer fails to conduct a hearing or address whether the insurer strictly complied with § 127.207 of the medical cost containment regulations.*

*Witkin v. Bureau of Workers' Compensation Fee Review Hearing Office (State Workers' Insurance Fund)*; 1313 C.D. 2012; filed 4/17/13; by Judge McCullough

In this case, the provider performed Therapeutic Magnetic Resonance (TMR) treatments on the claimant and billed them to the carrier at $3,298 per treatment. The carrier downcoded the procedure and paid the provider $26.24 per treatment. The provider then filed fee review applications with the Bureau disputing the amount that was paid. The Medical Fee Review Section of the Bureau held that proper reimbursement was made to the provider, who appealed by filing applications to a hearing officer. The hearing officer, without holding a hearing, dismissed the fee review applications, holding that the issue was identical to an issue that had already been fully adjudicated. The provider appealed to the Commonwealth Court.

The Commonwealth Court reversed the hearing officer's decision. The court held that the hearing officer improperly concluded that the provider's fee review application was barred by collateral estoppel because the hearing officer did not conduct a hearing or address whether the insurance carrier strictly complied with §127.207 of the regulations. II

#### Side Bar

As pointed out by the Commonwealth Court, when an insurer downcodes a procedure, §127.207 of the Medical Cost Containment Regulations require the insurer to: (1) supply the provider written notice of the proposed changes and the reasons in support of the changes; (2) give the provider the opportunity to discuss the proposed changes and to support the original coding decision; (3) have sufficient information to make the proposed changes; and (4) make changes that are consistent with the Medicare Guidelines and the Act. The insurer must also give the provider ten days to respond to the notice of the proposed downcode and state the reasons why the provider's codes were changed in the explanation of benefits. If an insurer changes a provider's code without strictly complying with these requirements, the Bureau must resolve an application for fee review in favor of the provider.

### *Despite the existence of earlier decisions concluding that the downcoding of provider's bills for TMR treatment was appropriate, it is still necessary for the insurer to demonstrate compliance with the procedural requirements set forth in §127.207 of the medical cost containment regulations.*

*B. Walsh, D.O. (c/o East Coast TMR), et al v. Bureau of Workers' Compensation Fee Review Hearing Office (Travelers Insurance Company)*, 839-841 and 844-851 C.D. 2012; filed 4/22/13; by Judge Brobson

This is a case involving multiple fee review applications that were dismissed by a hearing officer on the basis of prior decisions from another hearing officer who upheld identical downcoding by the insurer in previous challenges from East Coast TMR. The hearing officer concluded that, because the downcoding issue had already been decided in the insurer's favor, the providers were collaterally estopped from challenging future downcoding for TMR services.

On appeal to the Commonwealth Court, the providers argued that a non-waivable prerequisite to downcoding is that the insurer strictly comply with the procedural requirements set forth in the regulations. According to the providers, the hearing officer erred because he did not conduct a hearing on the question of whether there was compliance with the regulations. In the provider's view, the issue of the insurer's compliance with the regulations is one that will vary factually in every case. The insurer responded by arguing that, because earlier decisions concluded that the downcoding of provider's bills for TMR treatment was appropriate, the insurer does not need to demonstrate compliance with the procedural requirements set forth in the regulations.

The Commonwealth Court reluctantly agreed with the provider's position and reversed the hearing officer's decision. According to the court, the language of the regulations is very clear. Before downcoding, an insurer must comply with the regulations. Otherwise, an application for fee review will be found in favor of the provider. II

#### Side Bar

The Commonwealth Court's opinion recognized that the providers may be using the regulation as a hammer to unjustifiably "upcode" TMR treatment. The court said that they did not think the drafters of the regulation intended to encourage repetitious challenges that waste resources. But, the court said they were "hamstrung" and had no choice but to reverse the hearing officer's dismissal of the fee review applications on the basis of collateral estoppel.

# New Jersey Workers' Compensation

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## The Appellate Division addresses the issue of compensability in the context of off-site employment.

*Benvenutti v. Scholastic Bus Company,* Docket No. A-3732-11T1, 2013 N.J. Super. Unpub. LEXIS 739 (App. Div., decided 4/4/13)

The petitioner was employed as a school bus driver by the respondent. Her responsibilities included driving children to school in the morning and then driving them home from school in the afternoon. The petitioner was also required to clean the bus interior and inspect all seatbelts after each run. On June 9, 2010, the petitioner parked her bus in front of her house after her morning run. Before leaving the bus, the petitioner swept the bus and inspected the seat belts as required. While exiting the bus, the petitioner tripped and fell over a rubber mat, sustaining an injury to her ankle.

The petitioner filed a petition with the Division of Workers' Compensation. The respondent asserted that the petitioner's injuries did not arise in the course of her employment because she was injured when she exited the school bus, which was in front of her home, and was not working for the respondent at the time. Accordingly, the respondent denied the petitioner's claim. A trial as to the issue of compensability ensued.

At trial, the petitioner testified that the respondent did not specify an exact time or place where her bus was to be cleaned, only that it was to be cleaned following each run. The respondent conceded that the petitioner was permitted to clean the bus off premises and that she received additional money to do so. The respondent further acknowledged that the petitioner was permitted to take her bus home after her morning run and then leave from her home to complete her afternoon run. At the conclusion of trial, the Judge of Compensation found that the petitioner was in the scope of her employment at the time of her injury and, accordingly, was entitled to workers' compensation benefits. The respondent appealed.

In affirming the Judge of Compensation's ruling, the Appellate Division relied on *Jumpp v. City of Ventnor*, 177 N.J. 470 (2003), in which the court noted that, "[w]hen an employee is assigned to work at locations away from the employer's place of employment, eligibility for workers' compensation benefits generally should be based on a finding that the employee is performing his or her prescribed job duties at the time of the injury."

The Appellate Division found significance in the fact that, cleaning the bus interior between runs was not only an integral part of her job, but that she received additional compensation from the respondent for this work. Moreover, the respondent had knowledge of and expressly permitted the petitioner to take the bus home between runs and clean it off premises. As such, the Appellate Division concluded that the petitioner was, indeed, acting in the scope and course of her employment at the time of her injury and was, therefore, entitled to benefits under the New Jersey Workers Compensation Act. **II**

### Side Bar

The New Jersey Supreme Court decision on which the Appellate Division relied in this case—*i.e.*, *Jumpp v City of Ventnor*, 177 N.J. 470 (2003)—also contained a discussion of the so-called "minor deviation doctrine." The Court in *Jumpp* held that for an injury to be compensable, there must generally be a finding that the off-premises employee was performing his or her work responsibilities at the time of injury. However, an employee may not need to be actually performing the work of the employer to be protected under the Act. The Court in *Jumpp* also ruled that injuries sustained while employees are engaged in personally motivated, but customary or reasonably expected activities, such as smoking, eating or using the bathroom, are also compensable. These activities are considered only "minor deviations" and are not significant enough to be considered an abandonment of employment.

# Delaware Workers' Compensation

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***There is no lien recovery against a UIM policy purchased by the employer.***

*Kingsley Simendinger v. Natl. Union Fire Ins. Co. and Philadelphia Indemnity Insurance*, No. 553, 2011, DE Supreme (3/19/13)

Two employees were killed in a motor vehicle accident while in the course and scope of their employment. The employer provided workers' compensation coverage for the decedents' estates. The vehicle in which they were killed was owned by the employer, who also had an underinsured motorist policy [UIM] in effect at the time of the accident. The limits of the UIM policy were $1 million.

The decedents' estates filed suit against the UIM insurer, seeking benefits under the employer-purchased UIM policy. The employer's workers' compensation carrier intervened in the litigation, attempting to enforce their lien in the amount of the workers' compensation benefits paid. The UIM insurer's policy contained an exclusion stating that the [UIM] policy does not apply to benefits obtained through a workers' compensation insurer. The Superior Court held that the UIM exclusion was unenforceable as a matter of law. The Superior Court noted that "[employers] should not be penalized for their efforts to protect their employees." The Supreme Court disagreed and held that 19 *Del C.* §2363(e) does not permit reimbursement from a UIM carrier, **even if the policy was paid for by the employer**.

Under 19 *Del C.* §2363(e), workers' compensation carriers may enforce their liens against **third party liability** insurers. The same holds true in cases where the plaintiff pursues additional damages against the UIM insurer. In the past, the courts made a distinction that a workers' compensation lien recovery depended upon whether the employer or the employee purchased the coverage. However, that distinction ended in 1993 when the General Assembly changed §2363(e) to reflect, "[r]eimbursement shall be had only from the third party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage."

In 1995, the Supreme Court in *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10 (Del. 1995), held that §2363 did not apply to the employer's uninsured motorist coverage. The Supreme Court adopts the same interpretation of §2363 in this case. Workers' compensation insurers are not able to enforce their liens against a UIM policy, regardless who purchased the policy.

Once again, the court strictly adheres to the collateral source doctrine. ||

## Side Bar

Delaware is an opt-out state with regard to UIM coverage. A specific form needs to be completed in order to opt out of UIM coverage. 18 *Del C.* § 3902 (a)(1).